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Autonomy and Authority: The Image of the Roman Jurists in Schulz and Wieacker

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Introduction

The idea of a common European legal past can be traced back to two sets of scholars working between the 1930s and the 1960s in the field of Roman law and its reception. The first set of these scholars was exiled from Germany at the advent of the Second World War, necessitating a formulation of their theories to a new audience that lacked the Roman legal tradition that had been present in Germany. Among this group, Fritz Pringsheim (Honoré 2004: 206–32) and Fritz Schulz (Ernst 2004: 106–204) (along with, for example, Hermann Kantorowicz, David Daube and Ernst Levy) continued their scientific endeavours in the Anglophone academic world. The second set of scholars working on the notion of a common European legal past had remained in Germany during this period. Of this set of scholars, Paul Koschaker was effectively ousted from his office in Berlin,² Helmut Coing was, in 1940, established as a professor of Roman law in Frankfurt am Main (Luig 2002: 663) and Franz Wieacker, a pupil of Pringsheim, may have been a Nazi sympathizer (Behrends 1995: XXV–XXXIX; Winkel 2010: 213–21). These five professors of Roman law from both sets of scholars contributed profoundly to the development of the idea of a common European past as it is still employed, for example, in modern discussions on the legislation of a European private law.³ Elements of this common European past, then, should be understood to be the result of an accumulative process of reception of Roman law from the eleventh century on, as discussed by Koschaker (Koschaker 1947: 124–64; Van Caenegem 2002: 22–37, 89–90), Wieacker (see, for example, Wieacker 1967, 1995) and Coing (see, for example, Coing 1985), and the notion of classical Roman jurisprudence as a legal science functioning independently from and even in antithesis to the political sphere. The latter notion is central to the works of Schulz and Pringsheim.⁴

This chapter aims to problematize the wartime and post-war manufacturing of a common European legal history around a single subject: that of the historical image of the Roman jurists. That is to say, the major works of these creators of a common European legal history are somehow linked together fundamentally by the creators' appreciation for the texts of the Roman jurists, be those in their classical,

Byzantine or otherwise received form. To investigate this relationship, I shall first determine the defining characteristics of Roman jurisprudence as understood by some or all of these scholars. For this, the works of Fritz Schulz are paramount, as they deal almost exclusively with Roman law in its Classical period.⁵ Secondly, I shall compare the defining characteristics of Roman jurisprudence as understood by these scholars with their own study of the reception of Roman law, primarily Wieacker's *Privatrechtsgeschichte der Neuzeit* (1952). Even though similar ideas can certainly be found in the works of Pringsheim (Pringsheim 1921: 391–449; Pringsheim 1961) and Koschaker (Koschaker 1947: 166–7, 191–2), there are various reasons to single out Wieacker in this respect, primarily because he composed major works on both Roman law in Antiquity and its reception in the Middle Ages. In tracing the defining characteristics of the Roman legal science according to Schulz and Wieacker, I shall focus primarily on similarities between and direct citations in and among these scholars as well as the political context of Roman jurisprudence as an autonomous legal science – that is, as functioning independently from or even in antithesis to the political sphere.

The image of the Roman jurists in Schulz

The Roman jurists as a concept

For the sake of clarity, by *the Roman jurists*, I am referring specifically to the jurists that were active during the Roman Republic and subsequently the Roman Empire, from around the first century BCE up to the early third century CE. Already in many ancient legal and non-legal sources, these jurists are referred to as a relatively closed group of legal practitioners.⁶ Some individuals belonging to this group can be identified primarily from the inclusion of their names in our main source for Roman legal texts, the sixth century CE compilation by Emperor Justinian known as the *Corpus iuris civilis*.

As a notion, *the Roman jurists* were rediscovered during the sixteenth century,⁷ mainly with the goal of summarizing the works of the jurists in the late Republic and early Empire from the texts referred to in the *Corpus juris civilis*. It was also in the sixteenth century that the timeframe in which this group of jurists lived was given the title of the 'classical period', on the one hand to distinguish it from the later period of 'vulgarized law' (Wieacker and Wolf 2006: 207–18. Compare Levy 1956: 1–5 and Kop 1980), on the other to connect the work of the jurists to that of other classical sources, primarily Cicero.⁸ In many ways, following the legal humanists, this distinction has echoed through the ages, for example, when, in the nineteenth century, the Historical School and their successors the Pandect scientists made it one of their goals to strive for a 'pure Roman law', one in any case made by individual jurists or legal scientists, not by the legislator (Stein 2004: 120–1). In the early twentieth century, the categorization of classical Roman jurists resulted in a large-scale hunt for so-called interpolations – that is, elements introduced to classical Roman legal texts by Justinian in his sixth century compilation (Stein 2004: 128–9).

As was the case in the sixteenth century (Stein 2004: 128), an emphasis on the content of Roman law in the Classical period arguably created the need for closer examination of the biographical details of the Roman jurists of the Classical period. The most important and influential work in this respect is Wolfgang Kunkel's *Herkunft und soziale Stellung der römischen Juristen*, first published in 1952, by which time the hunt for interpolation had already fallen out of fashion.⁹ There were also several earlier incarnations of this endeavour, most notably the references to sources for individual jurists in Otto Lenel's *Palingenesia iuris civilis*, a nineteenth-century reconstruction of the works of the jurists of the Classical period, as well as Schulz's 'trilogy' (Ernst 2004: 185) on classical Roman law: the *Principles of Roman Law* (1934, 1936), *History of Roman Legal Science* (1946)¹⁰ and *Classical Roman Law* (1951). Some years before publishing these, Schulz had already co-edited with Hermann Kantorowicz a sixteenth-century volume on the individual Roman jurists originally composed by a Byzantine scholar working in Italy.¹¹ However, Schulz had first set out his own views on the Roman jurists in what he presented as a series of lectures held at the University of Berlin, published in 1934 under the title *Prinzipien des römischen Rechts* (hereafter: 'the *Prinzipien*'), a noteworthy and peculiar work that discusses in each of its chapters a single 'principle' of predominantly classical Roman law.¹² While the content may be historical, it is interesting to note that recent scholarship has questioned whether or not a political agenda motivated the work, namely to employ principles derived from the ancient texts as a political attack against Nazi law and ideology.¹³

The Roman jurists according to Schulz

Since the work as a whole may have had a political character, it would stand to reason that the image of the Roman jurists detailed in the *Prinzipien* has perhaps also been informed by contemporary circumstances. To test this hypothesis, the hallmarks of the image of the Roman jurists as a category need first to be discussed. Famously, and perhaps apparently somewhat contrary to what one would expect, Schulz concurs with Savigny in his assessment of Roman jurists as 'fungible Personen' ('interchangeable people').¹⁴ Not only is it impossible to divide the history of Roman legal science into various distinctive periods, it even appears difficult to attribute specific legal scientific peculiarities to individual Roman jurists.¹⁵ According to Schulz, no jurist had taught one thing fundamentally different from his predecessors or successors, nor had there been any fundamental changes in method or jurisprudence (Schulz 1934: 73). Even in his own time, this was something of a minority view,¹⁶ and he has been roundly criticized for this assumption by later Roman legal scholars.¹⁷ Moreover, the assumption appears to be somewhat at odds with the fundamental emphasis on classical Roman law, the relatively minimal usage of interpolations as arguments¹⁸ and various other aspects of his work.¹⁹ Two 'external' political motives could have been at play here: for one, the criticism the Nazis levelled at Roman law, evidenced by the infamous Article 19 of the party programme of the *Nationalsozialistische Deutsche Arbeiterpartei* (NSDAP) - that is, its perceived 'individualism' over against the collectivism championed in Germanic law.²⁰ Not without purpose, Schulz refutes this individualism extensively throughout the *Prinzipien*.²¹ Similarly, regarding the Roman jurists as 'fungible Personen',

Schulz refers to the tendencies towards the individual in nineteenth-century Roman legal scholarship.²²

The second possibly politically inspired theme in Schulz relates to the first in that the lack of fundamental changes in the legal method of the Romans, according to Schulz, may have been partly due to the isolated position of Roman legal science, particularly from Greek law and philosophy. Schulz suggests this somewhat implicitly by referring to the two schools of jurists in the early Empire known as the *Sabiniani* and *Proculiani* without noting any distinctive features in method,²³ whereas there now exists some scholarly consensus that the use of Greek philosophy may have divided these two schools.²⁴ The political undertones of Roman law as a legal order free from ‘foreign’ influences are made explicit in the discussion on the principles of isolation and ‘nation,’ especially in the latter discussion.²⁵ Yet, interestingly, the isolated development of Roman legal science did not, according to Schulz, give way to political independence.

From his discussion of the principle of ‘authority,’ we perhaps get the clearest vision of Schulz’s image of the Roman jurists as a group. In Schulz, ‘authority’ is both a fundamental feature of the jurists externally speaking (i.e. with regard to non-jurists) and among the jurists themselves.²⁶ However, this authority is in a sense curtailed following the collapse of the Republic and the subsequent rise of the Empire. The impact affected Roman jurists to the extent that both the ancient legal and historical sources indicate that Augustus allowed several jurists to ‘respond based on his authority’ (Schulz 1934: 127, n. 112; *Dig.* 1.2.2.49) – granted, the exact meaning of this notion is unclear and still heavily debated in modern literature.²⁷ Given the potential political motivations behind the book, however, it is worth noting that, in Schulz’s earlier writings, he had already referred to Augustus as a ‘Führer’²⁸ who founded the ‘third Reich,’²⁹ possessed with a Weberian ‘charismatic authority’ (Schulz 1934: 123) and enacted racial legislation.³⁰

The social background of the Roman jurists was also important in Schulz’s assessment of the image of the Roman jurists. Based on the available sources, jurists seem to have been drawn from the upper echelons of Roman society – for example, *nobiles*, *honestiores* and *equites*.³¹ As such, they are generally referred to as belonging to the aristocracy, not only in Schulz³² but also, for instance, in Pringsheim³³ and Kunkel.³⁴ The hallmark of the image of the Roman jurists as necessarily aristocratic in background is further elaborated on in Schulz’s *History of Roman Legal Science*. In this regard, it should first be noted that Schulz divides Roman legal science in the whole of its development into four distinct periods,³⁵ a division only implied in the *Prinzipien*.³⁶ There are perhaps two reasons why Schulz outlines these time periods in his *History*: firstly, the chapter on the Hellenistic period contains a large section on the influence of Greek dialectic on Roman law,³⁷ whereas in the Classical period juristic interest in dialectic according to Schulz had declined severely.³⁸ If Greek influences can be detected in the Classical period, they would be (p. 137) ‘of some interest to the sociologist, ... of no value to the jurist’ and generally to be found in the works of ‘academic jurists,’ such as Pomponius and Gaius (Schulz 1946: 137). The second reason for Schulz distinguishing between a Hellenistic and a Classical period in Roman legal science is the lack of individual traits and differences in method among the jurists of the Classical period (Schulz 1946: 125). Here, the lack of individual traits is placed in a

similar historical and social framework as in the *Prinzipien*,³⁹ placing it in the context of aristocracy,⁴⁰ tradition and authority and defining it as an (essentially still republican) ‘esprit de corps’.⁴¹ In my view, there can be little doubt that the differences between the Hellenistic and Classical periods in Schulz are closely linked to the idealization of several Republican jurists as the ‘founding fathers’ of legal science, Quintus Mucius Scaevola *pontifex* in particular.⁴²

The ideal type of jurist in Wieacker

The Roman jurist in Wieacker’s works on Roman law and two letters to Carl Schmitt

Schulz’s observations are largely founded on ancient sources and earlier research, a research practice closely followed by other well-regarded Roman legal scholars – chief among them Franz Wieacker (1908–94),⁴³ one of the most famous legal historians of the twentieth century. Unlike Koschaker and Coing, Wieacker composed large studies on both ancient and medieval Roman law, which allows for a more thorough comparison of a single author’s vision on the ideal type of jurist in both time periods. Some similarities between Schulz’s conception of the Roman jurists and that of Wieacker are immediately apparent: for instance, with regard to the jurists’ independence and autonomy from the Roman government,⁴⁴ their position in Roman aristocracy⁴⁵ and the relatively minimal role played by Greek philosophy and culture in their works.⁴⁶ An interesting case in point as regards the political function of jurists was their relationship with the government and with the emperor in particular: For instance, the relationship between the Roman jurists and the early emperors receives a separate section in *Römische Rechtsgeschichte* II.⁴⁷ Here, a narrative similar to that in Schulz emerges in Wieacker: On the one hand, the Roman jurists as a professional class remained autonomous from state power and emperor;⁴⁸ on the other, they no longer issued their juristic opinions on the basis of their own authority but rather by that of Augustus and his successors (Wieacker and Wolf 2006: 31). Nowhere in presenting this paradoxical argument does Wieacker refer to Schulz directly; then again, Schulz was not the first or the only scholar to make this claim.⁴⁹ However, the political relationship between state and jurist did play a role in Wieacker’s ‘Vom römischen Juristen’,⁵⁰ an article published around the same time as Schulz’s *Prinzipien*. This article is noteworthy for several reasons: Firstly, the dichotomy between autonomy and authority is not yet present here, at least not to the extent that it is in Wieacker’s later monograph; and, secondly, the degradation of the professional class of jurists into an office in the imperial bureaucracy is only roughly sketched out.⁵¹

The references to ‘bureaucratization’ are not, at any rate, the only aspects of Wieacker’s writings reminiscent of Schulz: Also striking is Wieacker’s description of the role of Greek philosophy during the formation of Roman jurisprudence as a scientific endeavour. In ‘Vom römischen Juristen’, we come across a peculiar distinction that Schulz would later discuss in much more detail (Schulz 1946: 62–9) – namely the assertion of a large-scale systematizing influence of Greek philosophy on

Roman jurisprudence as a science in the late Republic (Tuori 2007: 80–4), followed by what is merely lip service to more ethically charged Greek philosophical notions in later periods as a sign of the degradation of legal science.⁵² This same distinction is also still clearly visible in Wieacker's monograph on Roman legal history⁵³ and resurfaces in a work published even more proximately to the *Prinzipien* than 'Vom römischen Juristen': a letter from Wieacker to the famous legal philosopher Carl Schmitt dated July 1935.⁵⁴ In the letter, Johannes Stroux and Bernhard Kübler are particularly singled out as *bêtes noires* for their emphasis of the influence on the Roman jurists by other Greek philosophies than those considered in the late Republic to pertain to considerations of system and logic.⁵⁵ Again, this criticism is very similar to that of Schulz.⁵⁶ Furthermore, as Schulz did before him, Wieacker explicitly contrasts ethical 'considerations of equity' (*Billigkeitserwägungen*), those being of a later date and probably all interpolated⁵⁷ with the use of Greek philosophy as a model for juristic technique and system. In this context, the relevant paragraph is worth quoting in full:⁵⁸

As one can see, Stroux emphasizes the direct influence of the Hellenistic speculations on the legal science of the early Classical period. My own preliminary view is something along the lines of the following: the Hellenistic theory of science had a deep impact on the jurists of the late Republic (particularly on Mucius Scævola maior, who lived ca. 100 BC). While the theoretical divisions had previously been employed in empirical – sometimes quite poignant, sometimes rather overcooked but still logically grounded – standards (they are closer to a German legal proverb than an Enneccerus teaching maxim), the attempt toward a systematic subdivision began only then (the distinctive animosity towards systems in Roman legal thinking stood in the way of the success of these efforts, as the living Edict already had); for once, this system led to a legal theory of Greek pedigree which proved to be somewhat [insignificant] to Classical Roman law on the relationship between the natural law and the law proper to Roman citizens.

Here, Wieacker does employ a similar narrative to that of Schulz in the *Prinzipien*: an initial influence of Greek dialectic on legal system building in the late Republic spearheaded by Mucius Scaevola, followed by what amounts to lip service to this theory through the division between *ius naturale* and *ius civile* in the subsequent Classical period.⁵⁹ Moreover, concepts presented as principles of Roman law by Schulz – like 'authority', 'tradition', 'isolation', 'fidelity' and 'humanity' – play a significant role in Wieacker's later works.⁶⁰ Thus, in his consideration of the methods of the Roman jurists, it appears that Wieacker was possibly influenced by Schulz's *Prinzipien*.

What primarily connects Schulz and Wieacker (and certainly also Pringsheim⁶¹ and Koschaker)⁶² is that they both seem to imagine a pre-existing ideal type of the Roman jurist. That Wieacker does not seem to have any ideal type of 'the jurist' based on the Roman jurists is confirmed not by his academic writings⁶³ but by another personal letter written by him to Carl Schmitt several years later, in 1942.⁶⁴ The context of the letter seems to be a comparison between Schmitt's 1934 work on the three types of legal

scientific thinking and Wieacker's 'Vom römischen Juristen'.⁶⁵ The relevant passage reads as follows:⁶⁶

On the matter, I cannot provide you with a [judgement], even though the proof in the account is [enthraling]. Your claim of reifying general [aspects] of the French spirit or character by employing the specific [professional] image is well-founded; [the same] goes for the starting point that there is no such thing as a legal talent proper only to some persons but not [to others]. Nor do I see the talent of the Roman jurists as 'the' single possible type of legal talent, solely for that which comes closest to a possible phenomenal type of 'the' jurist. When you take heed of the particular English, French and German [modes] of [applying] the law, one may wish that we also learn from this.

The letter is all the more interesting not only because it refers to the Roman jurists (much more than Schulz) but because Wieacker appears to explicitly extend the ideal notion of a 'jurist' beyond Roman law as such and into later historical periods. To test whether this is indeed the case, I turn now to the search for hallmarks of the ideal type in Wieacker's main work, the *Privatrechtsgeschichte der Neuzeit*.⁶⁷

The ideal type of the jurist in *Privatrechtsgeschichte der Neuzeit*

The employment of 'the jurist' as an ideal type by both Schmitt and Wieacker seems to fit into a more general trend in Germany during the 1930s to recalibrate the position of legal science to the new political atmosphere. The field of Roman legal scholarship was not the only one to be made redundant in a system that emphasized the administrative application of largely unwritten ideological norms; so, too, were the law faculties as a whole forced to rethink their function under a new German legal order (Stolleis 2004: 332–40). The notion of 'the jurist' as a legislative organ under an authoritarian state framework found expression in the attempts to create a *Volksgesetzbuch*, per Article 19 of the NSDAP programme by the Academy of German Law, which would host many of such figureheads of the 'new legal science' as Schmitt himself (Stolleis 2004: 340–3). Any potential role for Roman legal science prior to 1942 was complicated by the existence of this article (Koschaker 1947: 311–36; Stolleis 1989: 183). With respect to both Roman law in the Classical period and its later history of reception from the eleventh century CE onwards, new arguments had to be made to justify the continued study of Roman law under a fascist regime.⁶⁸ The exact function of the *Prinzipien* in this context is debatable: According to Stolleis, Schulz attempted to support the study of Roman law in the new political landscape by emphasizing its authoritarian (*imperiale*) aspects and communal values (*Gemeinschaftswerte*).⁶⁹ Against this, Wolfgang Ernst, highlighting the reaction of Lange and the great personal and professional risk Schulz took in writing the work in the first place, has criticized this argument as 'off the mark' (Ernst 2004: 125, n. 160). It thus remains to be seen whether or not certain notions pertaining to Roman law as formulated in the *Prinzipien* can also be found in the *Privatrechtsgeschichte der Neuzeit*.

Already in the second paragraph of the first section of the latter work dealing with the Medieval Roman origins of European legal culture, we encounter the themes also present in Schulz: the vulgarization and bureaucratization of Roman law and the separation of imperial legislation from juridical legal science (Wieacker 1967: 27). Moreover, Wieacker explicitly states that the ‘deeper and more difficult form’ resurged in the later Middle Ages (Wieacker 1967: 27, that is, 55, 69, 81–2). In this context, there are other familiar tropes to be found, such as the application of Greek philosophical thought in legal thought.⁷⁰ Wieacker elaborates on the equal social standing and level of expertise among the German learned lawyers from the fifteenth century on: *Doctores iuris* were also able to reach a status similar to the rank of *Ritter*,⁷¹ whereas non-educated practitioners formed a type of proletariat class of jurists (Wieacker 1967: 160). As in Schulz, the only good jurist is a noble jurist. Closely related to Schulz’s concept of nobility are his notions of autonomy and authority, most clearly in the context of the imperial *ius respondendi*, a discussion which Wieacker would later take up.⁷² Certainly, *autonomy*⁷³ and *authority*⁷⁴ are the two central terms of the *Privatrechtsgeschichte der Neuzeit* – autonomy relating specifically to the reinvention of legal science in the west, authority not to that of the (Holy Roman) emperor but rather to that of Roman law as *ratio scripta* itself, from which the authority of the Medieval learned lawyers is derived.⁷⁵

Without doubt, an ongoing theme in the *Privatrechtsgeschichte* is the relationship between an autonomous legal science and centralized state power in its various forms, specifically as a reflection of the original Roman situation. The following passage is worth quoting in full:⁷⁶

He [the lawyer] started out by marshalling ideological and jurisprudential arguments mined from the texts of the absolutist Justinian in support of the prince’s claim to sovereignty and then, more importantly, used his superior techniques of documentation and astute negotiation to help make the principality more powerful than the old estates.

As is evident from this quotation, even in a work on Medieval learned law, Wieacker decries Justinian and his code as absolutist and despotic.⁷⁷ In spite of their reliance on the authority of the *Corpus iuris civilis*, according to Wieacker the glossators of the twelfth century were the first to reinvent legal science in the Middle Ages. Still, it was the subsequent generation of jurists, known as the commentators or conciliators, who put the legal notions developed by their predecessors into Europe-wide practice.⁷⁸ This is relevant primarily because of the possible analogy with the Roman practice of *responsa* and the juristic image it carries.⁷⁹ The relationship between legal science and autonomy from state power is then made explicit on various occasions. Most poignantly, Wieacker compares the ‘scientific authority’ of the conciliators to that of the professors in the German law faculties,⁸⁰ the point being that, regardless of whether or not it reflects historical reality,⁸¹ this is very similar to the image Schulz had presented us with in the *Prinzipien* regarding the position of ‘the jurists’ vis-à-vis the emperor in Roman Antiquity. German law professors like Roman jurists to a large extent are autonomous law makers, independent from central state power.

Another link to the *Prinzipien* seems to be Wieacker's discussion of the natural-law-inspired legal books of the eighteenth and nineteenth centuries.⁸² Wieacker states:⁸³

But when these tenets hardened into recipes for legislators determined to lay down rules of eternal validity, they became something of a straightjacket, for different historical situations call for different legal rules, lest justice should die.

Similarly, Schulz before him states the following:⁸⁴

Codification is apt to lead to literal translation and to deflect attention from the nature of the matter itself; a code purports to be a complete and finished whole, which it is not; it demands abstract formulation of legal rules, a process which seems full of danger to the Roman mind and is too rigid of a system to be capable of adaptation.

Both Schulz and Wieacker present an argument against the codification of law very much in the vein of Savigny: General, abstract rules laid down by a concrete centralized state divorced from the nature of the individual legal case and real-life justice are to be avoided at all costs. Thus, according to both Wieacker and Schulz, individual judges and jurists not only have been but should be understood as authoritative law makers.⁸⁵ Furthermore, the only proper legal orders are casuistic and legal-remedy-based ones, such as the legal orders in (Classical)⁸⁶ ancient Rome, Medieval Germany, and common law.⁸⁷ We may therefore make the following conclusion: Although Wieacker and Schulz wrote about two historically different epochs, the images of 'the jurist' Schulz and Wieacker present us with are similar if not the same. This seems to be the case regardless of whether or not such an image reflects historical reality, whether by coincidence or through a wider conscious scholarly tradition.

Conclusion

To be clear, I do not doubt either the veracity of what Schulz and Wieacker claim or the scientific vigour with which they pursue their sources. However, there also seem to have been selective processes of source selection in both Schulz and Wieacker, leading to several idiosyncratic similarities that suggest either that they were participating in a more generally held set of pre-conceived notions in the Romanist field at the time or that one was heavily inspired by the other. Particularly the projection of ancient concepts on later periods in the works of both scholars suggests this conclusion. This conclusion is not surprising considering that neither Schulz nor Wieacker has ever been really shy about working with anachronistic notions and concepts or investigating particular historical or sometimes modern developments, of which various instances have been given in this chapter. However, the possible presence of more contemporary considerations also leads to the question of the veracity of what might be deemed the more idiosyncratic aspects of their works: the Roman jurists as 'fungible Personen', the autonomous position of the role of jurists vis-à-vis the government and legislator

and the otherwise still troublesome relationship between (Greek) philosophy and (Roman) law. In my view, the veracity of these claims is worth considering but only when done alongside contemporary considerations that go beyond the mere reflection of historical sources as such.

If their ideas were at least influenced by the contemporary political circumstances, it is all the more peculiar that Schulz and Wieacker were on fairly opposite ends of the political spectrum before and during the Second World War. Congruence in their scholarship may have been the result of a post-war turn to one another, something that happened more generally upon the return of refugee scholars to Germany. However, the wartime publication 'Vom römischen Juristen' as well and the letters of Wieacker to Schmitt suggest that this is not the case, since similarities in thought were already present in these documents. One explanation for this fact might be that Schulz was simply authoritative and widely circulated to the degree that even scholars who may have had political differences adopted the book's ideas, at least initially. As such, despite their political differences, there seem to be strong links and similarities between the scientific thought of Schulz and Wieacker, particularly in their image of the Roman jurists.

Another possibility may simply have been that this line of thought was generally present at the time, shared, for example, with Pringsheim and Koschaker, and that both Schulz and Wieacker, being a part of that close-knit group of academics, adopted this line of thought for their respective areas of research. In this case, the historical image of the juristic profession as an authoritative and autonomous group with respect to the political sphere would have been developed by a group of professional jurists who perceived themselves as autonomous and authoritative vis-à-vis the political sphere, a notion that lives on in the idea of a common European legal culture.

Notes

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- 2 Somewhat implicitly, Ries 1979: 608–9.
- 3 The veracity of this claim will not be treated in this chapter, but see Van Caenegem 2002.
- 4 Cf., for instance, Schulz 1951: 17 (on the *lex-iusdictio* relationship and the minimal role of *lex*): 'It is a true Roman principle revealing the whole attitude of Roman jurists towards law-creating acts of State, viz. their unconcealed distaste for legislation.' For Pringsheim, see Honoré 2004: 214–16.
- 5 Meaning the early empire, up to about 250 CE, corresponding roughly to the death of the late Classical Roman jurist Ulpian and the heyday of his pupil Modestinus; Schulz 1946: 99–261 (as opposed to the Hellenistic and bureaucratic periods), perhaps even more so than Schulz 1951.

- 6 The main source is the work of a later Roman jurist himself, Pomponius's *Enchiridium* in *Dig.* 1.2.2, with the group being referred to as *jurisconsulti, juris prudentes*, and so forth, already by Cicero: Wieacker 1988: 531–2.
- 7 See, for instance, the list of works in Tuori 2007: 56–7.
- 8 Stein 2004: 77.
- 9 Due to Kaser 1972: 94–102, in particular. For the roles of Schulz and Wieacker, see Liebs 2010: 42–4.
- 10 Referred to by Kunkel 1952: 3, n. 1, noting ‘Die obige Abhandlung war Sch. bei der Abfassung seines Werkes noch nicht zugänglich’, seemingly referring to Jörs 1888.
- 11 Diplovatatus 1919, as well as fragments of Sabinus in Schulz 1906.
- 12 The chapters are named as follows: *Gesetz und Recht, Isolierung, Abstraktion, Einfachheit, Tradition, Nation, Freiheit, Autorität, Humanität, Treue und Sicherheit*.
- 13 Cf. Stolleis 1989: 184–6, Ernst 2004: 123–5 and Schermaier 2010: 691–2. The political background can be deduced from Schulz's dedication of the book to his wife, who was of Jewish descent. Moreover, the *Schlußwort* states (Schulz 1934: 172): ‘Neues staatlich-politisches Erleben läßt uns auch das römische Reich und sein Recht neu erleben und zeigt uns vieles in neuem und klarerem Lichte.’ See the review of Lange 1934: 1493–500 as referred to by Stolleis 1989: 185; Ernst 2004: 124–5 and Schermaier 2010: 699.
- 14 For the context of the principle of ‘tradition’, see Schulz 1934: 72, who refers to Savigny 1828: 28, 157.
- 15 Schulz 1934: 72–3, contrary to later times, as is the case with jurists such as Cujacius, Donellus, Grotius and Savigny himself. It should be noted of the ‘scientific personalities’ Schulz mentions, at least three (*viz.*, Donellus, Grotius and Thomasius) were exiled during their lifetime due to politico-religious circumstances.
- 16 See the literature in Schulz 1936: 72, n. 90 and n. 91, mainly Kübler's lecture at the celebration of the fourteenth centenary of the *Digest* in 1931, at which Schulz was also present. Schulz does acknowledge some changes in style between the jurists (72) but suggests that these may have been the result of later alterations to the texts (73, n. 90).
- 17 Interesting in this respect is Winkel 2005: 425, who cites Schulz 1946 (and Wieacker 1969) against this theory, suggesting the anomalous character of the idea in the works of Schulz in general.
- 18 Schermaier 2010: 682: ‘Mit Interpolationsvermutungen geht Schulz- gemessen an der Mode der Zeit- recht Vorsichtig um.’
- 19 For example, Tuori presents Schulz as claiming the late Republican jurist Quintus Mucius Scaevola *pontifex* as the ‘founding father’ of Roman legal science; Tuori 2007: 64 referring to Schulz 1934: 33 and 36–7. Furthermore, pride of place is given to Papinianus, *Quaestiones* and other specific works of classical Roman jurists in Schulz 1946; Ernst 2004: 175–7.
- 20 For instance, Van Caenegem 2002: 95–7; Schermaier 2010: 696–7.
- 21 See, for example, Schulz 1934: 107 (liberalism, capitalism). Other examples in Schermaier 2010: 696–7.
- 22 Schulz 1934: 73: ‘Das individualistische neunzehnte Jahrhundert hat diesen Mangel an Individualität als Mangel der römischen Jurisprudenz empfunden und – natürlich Vergebens- versucht, die so heiß verehrten römischen Meister von diesem Mangel zu reinigen’ as well as quoting (n. 84) Nietzsche's *Wille zur Macht*, nr. 783: ‘Hier will der einzelne in einem großen Typus untertauchen.’ Schulz 1934: 120: Mommsen's *Liberalismus*.
- 23 Schulz 1934: 73: ‘like Oxford and Cambridge’. Again, against Kübler: n. 91.

- 24 See the discussions in Liebs 1976: 198–286 and Leesen 2010.
- 25 Schulz 1934: 13–44 (for moral considerations, see 15: ‘Auch schließt das feine römische Gefühl für die Grenzen des Rechtes Gebiete wie das persönliche Familienrecht von der rechtlichen Regelung aus (...)’), 84–91; Schermaier 2010: 693, 698; on Jewish law, see 89.
- 26 Schulz 1934: 125, where Schulz contrasts Cicero’s conception of authority to that of the Greeks, stating that even the latter do not blindly follow authority; this remains an important argument in regards to accepting legal opinion.
- 27 The *ius publice respondendi ex auctoritate*. See Tuori 2007: 104–20 for an overview of the discussion.
- 28 Schulz 1934: 123–4. The English edition gives the more neutral ‘leader’: Schulz 1936: 181.
- 29 Schulz 1934: 62, n. 30, ‘Noch Justinian ist überzeugt, im ‚dritten Reich‘ zu leben, das von Augustus an kontinuierlich bestanden hat (...)’. The English edition is again more neutral (Schulz 1936: 91, n. 5): ‘Justinian was still convinced he was living in the “Third Empire” which had existed without a break from the time of Augustus.’ The reference here is to the *tertia principia* of Justinianus, *Novellae* 47.
- 30 Schulz 1934: 82; Schulz 1936: 120; Schermaier 2010: 698. According to Schulz, such legislation was doomed to fail.
- 31 Schulz 1934: 125: ‘Angehörige der vornehmste Geschlechter.’
- 32 On nobility as a prerequisite to hold office and the aristocratic and timocratic character of the state, see Schulz 1934: 115–16.
- 33 Pringsheim 1961: 53–62, 54 in particular.
- 34 For example, Kunkel 1952: 42. Both Schulz 1946: XV and Kunkel 1952: 4 refer to Münzer 1920.
- 35 That is, Archaic (pp. 5–37), Hellenistic (pp. 38–98), Classical (pp. 99–277) and Bureaucratic (pp. 278–329).
- 36 Schulz 1934: 3; contra, for example, Pringsheim 1961: 54: ‘Das ist in ersten Zeit des Prinzipates, also bis zum Jahre 150 etwa, nicht anders geworden.’
- 37 Schulz 1946: 60–9 and the introduction on pp. 38–9; on the exclusion of other branches of philosophy, see pp. 69–75.
- 38 Schulz 1946: 129–32, 130; Greek philosophy, in general, was (135) ‘taken no more seriously by them than by their predecessors’, in spite of ‘observations of a philosophical nature’ on justice and jurisprudence (*Dig.* 1.1.10), (136) law (*Dig.* 1.1.1pr.) and natural law (*Dig.* 1.1.1.3).
- 39 Schulz 1946: 125, n. 3 referring to Schulz 1936: 106 (= Schulz 1934: 72), Savigny’s theory of ‘fungibele Personen’.
- 40 Schulz 1946: 125: ‘This aristocratic atmosphere gave little scope for scientific individuality.’ However, (102) instead of the aristocracy the jurists of the Classical period rather stem from ‘urban Roman families that had come to the front only in the last decades of the Republic.’ ‘The old families were extinct or worn out.’
- 41 Schulz 1946: 125: ‘The old republican *esprit de corps* was kept alive by the sturdy professional tradition of the small select band of leading jurists.’
- 42 Cf. Schulz 1946: 62–9 and e.g. Tuori 2007: 64.
- 43 Particularly in the field of ‘Textstufenforschung’; Ernst 2004: 177–8, n. 552; Winkler 2014: 231. Babusiaux indicates many similarities between Schulz 1934: 234 and Wieacker 1960: 336–40, particularly regarding their views on Papinianus’s *Quaestiones*; Babusiaux 2011: 10–12.
- 44 Wieacker 1988: I, 553: ‘Unparteilichkeit und Unentgeltlichkeit bestimmen auch das Leitbild juristischer Berufsmoral’, etc.; Wieacker and Wolf 2006: 90, 99.

- 45 See, for instance, Wieacker 1939: 446–7: ‘regierenden Geschlechter’, ‘adelige Rechtskenner wie die Scævola’, etc., and, later, Wieacker 1988: 528–31; Wieacker and Wolf 2006: 30.
- 46 Cf. Winkler 2014: 235–6 on Wieacker’s works in the 1950s. Highly telling is Wieacker 1965: 27 (with reference to Schulz 1946: 66): ‘vor allem aber eben der demagogische und advokatorische Geist der öffentliche Rede- zuletzt also die maßlose Leidenschaft für das schöne Wort: trug all dies Schuld daran, daß dieses begabteste Volk nicht nur des Altertums eine seiner würdige Fachjurisprudenz so wenig hervorgebracht hat wie ein dauerndes Reich.’ Despite his criticism of Schulz, Wieacker refers only indirectly to Greek philosophical influences – contrary to Wieacker 1988 but much like in Schulz 1946 and Wieacker and Wolf 2006 – via, for example, the notions of *ius naturale*, *ius gentium*: 87–90.
- 47 *Der frühe Prinzipat und die Juristen*: Wieacker and Wolf 2006: 28–35.
- 48 Wieacker and Wolf 2006: 28: ‘In der Tat hat er sich offenbar bewußt um der Kräftigung des Ansehens der Juristen bemüht. Es gibt keinen Anhalt dafür, daß er dieses Ziel im Prinzip digiristisch, durch Auslese, Einflußnahme oder Mißbrauch der Juristen für seine politischen Zwecke verfolgte.’ Reluctance of Augustus to take sides: 29, referring to Justinianus, *Institutiones* 2.25pr., describing Augustus requesting advice for judging on the application of codicils.
- 49 Schulz 1934: 127 refers to Wlassak 1924. Tuori 2007 has compiled a bibliography on the relevant text in Pomponius (*Dig.* 1.2.2.48–50) at 107, n. 15, that goes back to Zasius in 1541 but starts the modern works with De Visscher 1936: 615–50 rather than with Schulz 1934. Schulz 1946 calls the text ‘post-classical’ and ‘corrupted’: Tuori 2007: 109.
- 50 Wieacker 1939: 440–63. Other articles Wieacker published on the topics mentioned include Wieacker 1969: 331–49 and Wieacker 1985: 71–94.
- 51 Wieacker 1939: 444: ‘In der Kaiserzeit wird die freie Jurisprudenz freilich mehr und mehr Amtsjurisprudenz ... Diese Verlagerung der Rechtsbildung wirkte auch auf die Jurisprudenz zurück, die vom Prinzipat in seinen Dienst gestellt wird und dadurch aus der alten Amtlosen Autorität zu glänzender bürokratischer Wirksamkeit aufsteigt. Schon Augustus legitimiert, seinem Konservatismus getreu, die alter Gutachtung aus seiner *auctoritas principis* und bringt sie damit wie zu gesteigerter Geltung so auch in seinen Bereich. Wenige Generationen später beginnt die Eingliederung in die kaiserliche Bürokratie.’ The term *bureaucracy*, however, is not used in Schulz 1934; cf. the introduction: 3 (‘nachklassisch’); nevertheless, the idea is present: 164.
- 52 Wieacker 1939: 449–60, ‘pedantische Abstraktionswahn’, ‘Orientalisierung’.
- 53 Wieacker 1988: 522 criticizes Schulz for overestimating the role of Mucius Scævola (‘folglich die (vorausgehende) „archaische“ Periode bis zum Ende des 2. Jhs. erstrecken müßte’), and underestimating his influence on the jurists of the Classical period (‘den fortdauernden Einfluß der griechischen wissenschaftlichen Kultur auf die klassischen Juristen außer acht’).
- 54 On the relationship between Wieacker and Schmitt, see Winkler 2014: 316–17. For a recent biography of Schmitt see Mehring 2009, which discusses their relationship on pp. 365 (‘Auffällig ist Schmitts Neigung zu adeliger Herkunft’) and 434. Schulz is also described as a colleague of Schmitt both in Bonn: 141, and Berlin: 332, Schulz being quoted to him on p. 356.
- 55 LAV NRW R, RW 265 Nr. 17971 (letter from Franz Wieacker to Carl Schmitt (13 July 1935), p. 1: ‘Die Schrift ist für uns Romanisten umso eindrucksvoller gewesen, als man hierorts jeder fachmännisch-philologischen Äusserung als besonderer

Erleuchtung unbeschränkte Autorität zumisst (was der glänzende Strouxche Aufsatz eher verdient als andere) und weil sie mitten in die modernste Fragestellung der Disziplin einschlägt. Streitig ist nämlich das Ausmass in dem die grosse hellenistische Kulturrezeption seit Beginn des 2. Jhs. v. Chr. auf die zünftlerische Sonderwelt der älteren römischen Rechtslehre, einer artistisch-pontifikalischen Kunstlehre kasuistisch-empirischer Art, gewirkt hat. Einige (eine italienische Schule, die sich um Riccobono nicht ohne Einfluss des neuen Imperiumsgefühls gruppiert, bei uns etwa Wenger-München, Schönbauer-Wien, auch Kübler-Erlangen glaubt [corrected to glauben] mit Stroux dass die hellenistische, insbesondere stoische Gerechtigkeitsphilosophie schon damals für immer in die römische Fachjurisprudenz eingebrochen und den naturrechtlichen Kontrollen der *aequitas* usw. schon in der klassischen Jurisprudenz Raum gegeben hat.⁷

- 56 Schulz 1934: 88–9 (n. 109 and 114 in particular).
- 57 LAV NRW R, RW 265 Nr. 17971 (letter from Franz Wieacker to Carl Schmitt (13 July 1935), p. 1: ‘Vorwiegend nimmt man jedoch in Deutschland an, dass die etwas verwaschenen und abstrakt-humanitären Billigkeitserwägungen, die die Digestentexte beherrschen, erst seit Konstantin (die formale Substanz des römischen Rechtsdenkens zerrissen haben, in den Digesten (*aequitas*, *humanitas* usw.) also in aller Regel interpoliert sind; man führt dann diese mittelbar natürlich gleichfalls hellenistischen, besser nachsokratischen, selbst schon sophistischen Theoreme auf den Einbruch des Christentums, des Neuplatonismus und auf das obrigkeitsstaatliche Gefüge des frühbyzantinischen Dominats zurück; an die Stelle der nach Papinian überreifen spätclassischen Theorie, die gegen 230 zusammenbrach, tritt seit dem 4. Jh und vor allem im 5. Jh. in den östlichen Rechtsschulen ein „pneumatisches“ Denken, dessen Stillfremdheit deutlich nachweisbar, dessen Herkunft noch ziemlich ungewiss ist; ich persönlich bin von einem entscheidenden Einfluss der antiochenischen und anderer Rechts[corrected to Theologen]schulen überzeugt. Der äussere Wendepunkt ist Konstantin: die noch männlich klaren Reskripte Diokletians und den wüsten Prunkstil Konstantins trennen Welten.’ Wieacker seems to change his opinion on this later on: see Wieacker 1977: 5–6, 33–4; Wieacker and Wolf 2006: 89–90. See Schulz 1934: 129–30 on such interpolated terms as *humanitas*. Several passages in the manuscript of the letter have been underlined and corrected, possibly by Schmitt himself, but the underlines have been left out of the transcription here and those cited later in this chapter.
- 58 LAV NRW R, RW 265 Nr. 17971 (letter from Franz Wieacker to Carl Schmitt (13 July 1935), p. 2: ‘Stroux, wie man sieht, misst der unmittelbaren Einwirkung der hellenistischen Spekulation auf die frühclassische Jurisprudenz ein ziemlich grosses Feld zu. Meine unvorgreifliche Ansicht ist etwa: die hellenistische Wissenschaftstheorie hat einen tiefen Einfluss auf die spätrepublikanischen Juristen (besonders den älteren Mucius Scaevola, um 100 a. Chr.) gehabt. Während sich bisher die theoretische Stoffgliederung mehr in empirischen, teilweise wirklich kernigen, teilweise etwas überspitzten aber logisch noch ungefügigen Kunstregeln niederschlug (sie stehen einem deutschen Rechtsspruchwort noch näher als etwa einem allgemeinen Lehrsatz des Enneccerus), beginnt jetzt der Versuch zu systematischer Durchgliederung (die ausgeprägte Systemfeindlichkeit römischen Rechtsdenkens hat einen Erfolg dieser Bemühungen verhindert, dem schon das lebende Edikt im Wege stand); dies System bringt einmal ei[n]e für das classische römische Recht ziemlich [unerhebliche] Rechtstheorie griechischen Musters über das Verhältnis von natürlichem und bürgerlichem Recht hervor.’

- 59 Schulz 1934: 33–44.
- 60 For instance, in Wieacker 1961: 14–17: *fides* is defined in Schulz 1934: 15 as ‘sittliche Bindung an eigenes Wort und Verhalten’. On *humanitas*, see Wieacker 1961: 14 and Wieacker and Wolf 2006: 89–90. On isolation, see Wieacker 1961: 1, 9: ‘Er ist berechtigt, wenn F. Schulz in seinen „Prinzipien des römischen Rechts“ ein ganzes Kapitel der „Isolierung“ widmet’ and Wieacker 1977: 2, n. 3 and 15, n. 54.
- 61 Winkler 2014: 59–134 emphasizes an early influence of Pringsheim on Wieacker, as well as of Andreas Bertalan Schwarz, Hermann Kantorowicz and Max Weber. On Pringsheim’s conception of the relationship between Greek philosophy and Roman law, see Giltaij and Erkkilä 2015: 47–53.
- 62 The notion of ‘authority’ is paramount in Koschaker; see Koschaker 1947: 48, in particular. For the Wieacker–Koschaker relationship, see Winkler 2014: 174–6 and 239–43.
- 63 Wieacker 1939: 462, ‘Was sagt am Ende das Bild des römischen Juristen über Recht und Richter unseres eigenen Volkes?’, but: ‘Ich glaube, er ist vielmehr die reinste Verwirklichung schöpferischer Rechtskunde in einem großen fremden Volk: als solcher nicht wiederholbar und als er selbst auch nicht wiederholenswert.’
- 64 On the influence of Weber and Schmitt (2004 in particular) on the ideal type of the jurist in Wieacker, see Winkler 2014: 318–20.
- 65 For Schmitt’s take on Wieacker’s chapter on legal thinking in France (and England), see Schmitt 2004: 85–8.
- 66 LAV NRW R, RW 265 Nr. 17976 (letter from Franz Wieacker to Carl Schmitt (25 August 1942), p. 2: ‘Zur Sache darf ich mir, auch wo man durch den Evidenz der Darstellung mitge[zogen] wird, ein [Urteil] nicht zusprechen. Ihre Förderung, durch Herausarbeitung eines besonderen [Berufs]bildes die allgemeinen [Aufstellungen] über den französischen Geist oder Charakter erst konkret zu machen, ist sehr berechtigt; [ebenso] der Grundsatz, daß es nicht eine juristische Begabung gibt, die einigen Völkern zukommt, [anderen] nicht. Ich halte auch den römischen Juristen nicht für den einzigen denkbaren Typus „der“ juristischen Begabung, freilich für einen, der einem etwa denkbaren phänomenalen Typs „des“ Juristen am nächsten kommt. Wenn Sie die Aufmerksamkeit auf die spezifisch englische, französische und deutsche [Weise] der Ausf[.]ung des Rechts lenken, so möchte man wünschen, daß bei uns auch die Lehre daraus gezogen werde.’
- 67 On the work, see Landau 2010: 49–74.
- 68 See, for example, Kreller writing in 1936 as referred to by Simon 1989: 166–7 for the dichotomy between jurists as a true ‘*Rechtswahrer*’ as opposed to a positivist ‘*Paragraphenkenner*’.
- 69 Stolleis 1989: 186. Also, Schermaier 2010: 696–7, with reference to Stolleis.
- 70 Meaning the method of the Roman jurists: Wieacker 1967: 53, 92–3, 163–5. Particularly in the period of ‘*Vernunftrecht*’; Winkler 2014: 36–7.
- 71 Wieacker 1967: 159. Cf. 93: ‘Das Ansehen der neuen Rechtswissenschaft teilte sich überall der Erziehungs- und Standesgemeinschaft der Juristen mit’ and Wieacker 1964: 19: ‘Ritterideal Europas’. See also Lange 1980: 279–94.
- 72 Tuori 2007: 131–44; Wieacker 1985: 336–40, citing Schulz on several instances.
- 73 Wieacker 1967: 69: ‘autonomen juristischen Sachproblems’. Compare Winkler 2014: 28, 34, 37, 39, 49 and 50.
- 74 Wieacker 1967: 55. Compare Winkler 2014: 27, 28 and 31.
- 75 Wieacker 1967: 69: ‘Kult der Autorität’. See also, Winkler 2014: 53 and Haferkamp 2016: 794–5.

- 76 'Gab er dem Souveränitätsanspruch des Fürsten erst die ideologische und juristische Begründung aus den Quellen des justinianischen Absolutismus, so hob er praktisch vor allem durch die überlegene Technik der Aktenführung und der sachlichen Verhandlung den Fürstenstaat über die altständischen Gewalten hinweg in den Sattel.' Wieacker 1967: 94. Translation by T. Weir in Wieacker 1995: 66.
- 77 See also Winkler 2014: 76–82 and 180–4 for legal science in Byzantium under Justinian in particular.
- 78 Wieacker 1967: 81–8; 88, 'Auch die „Rezeption“ des römischen Rechts in Deutschland ist in ihrer reifsten Form nichts anderes als ein Sonderfall dieser Wirkung.' The categories and starting points were derived from Kantorowicz: Landau 2010: 54. On the term *conciliators*, see Landau 2010: 59. See also Winkler 2014: 27–9 and, more specifically, the *Usus modernus*; Winkler 2014: 35.
- 79 Wieacker 1967: 82: 'Konsultationspraxis'. See also Wieacker 1964: 27, 'Als die Europäer im Hochmittelalter durch die Digesten mit dieser großen Kunst der römischen Juristen bekannt wurden, entwickelte sich daraus für alle Zeiten eine sachlich und technisch bestimmte Rechtswissenschaft. Diese Herrschaft des gelehrten Juristen hat Europa nicht nur Segen gebracht; aber sie schuf eine neue öffentliche Macht, die über Interessen und Emotionen der Einzelnen wie der Völker hinweg eine von der Sache her begründete objective Entscheidung der soziale Konflikte durchsetzte, und die bis in unsere Zeit maßgebend geblieben ist.'
- 80 Wieacker 1967: 181–2. Also see 184: 'Bindung an die Wissenschaft.'
- 81 See, for example, the discussion between Whitman 1990 and Nörr 1992 (and Tuori 2007: 122–6) regarding the 'later history' of *ius respondendi*, for which the lack of sources both in Antiquity and the Early Modern period is extremely problematic.
- 82 Winkler 2014: 39 on the ALR (1798). See Wieacker 1967: 334: 'Dem Selbstgefühl des Gesetzgebers entsprach eine Skepsis gegen die wissenschaftliche Jurisprudenz, die nicht nur in den persönlichen Meinungen des alternden Herrschers und in ihrem Zurückbleiben hinter den besten Geistern der Zeit.' Wieacker does not so much criticize the law books as he does the legal positivism they inspired in the nineteenth and twentieth centuries; Winkler 2014: 46 and 55–7.
- 83 'Erstarrt zu Rezepten einer Gesetzgebung, die sich anmaßte, für einen konkreten Staat das ein für allemal richtigen Recht zu finden, wurden sie eher zum Hemmschuh lebendiger Gerechtigkeit, die ja gerade als unveränderliche Richtschnur verschiedenen geschichtlichen Lagen je verschiedenes positives Recht abfordert.' Wieacker 1967: 349, translated by T. Weir in Wieacker 1995: 280. On the link between natural law and the law books, see Landau 2010: 67. On Wieacker's conception of the role of Roman *leges* and the Law of the XII Tables in particular, see Wieacker 1944: 38–85, where Wieacker contrasts the case-based Republican legislation with the general imperial 'Reformgesetze' (80–5).
- 84 '(D)ie Kodifikation verleitet zur Wortinterpretation und lenkt ab von der Natur der Sache: sie täuscht eine Geschlossenheit und Vollständigkeit vor, die sie nicht hat: sie fordert eine den Römern gefährlich dünkende abstrakte Formulierung der Rechtssätze, legt auch die Rechtsordnung zu stark für die Zukunft fest.' Schulz 1934: 9; Schulz 1936: 13.
- 85 Wieacker 1967: 190: '[D]och gelingen vor allem bei Beteiligung bedeutender Juristen auch wohlüberlegte und glückliche Neuschöpfungen.' Cf. Van Caenegem 2002: 44–8.
- 86 Wieacker 1967: 186. On the idealization of the (Republican) Roman jurists in his works on Roman law, set against Hellenistic theories of state and the law and statutory abstractions, see Winkler 2014: 248–9.
- 87 Wieacker 1967: 186–9, 187, n. 48, in particular. Cf. Schulz 1934: 9–11 and Winkler 2014: 32.

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