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KYLE GRAHAM

The Refugee Jurist and American Law Schools, 1933–1941

*The position of younger men, just about to enter upon their career as academic men is almost more distressing than that of the fully arrived professor. The latter can find a home elsewhere. The former have the roots cut out from under them.*¹

— Yale Law School Professor Edwin Borchard, 1933

*With patience younger men can fit into the American scheme of things. Older men will find difficulty.*²

— Borchard, 1938

In 1933, Adolf Hitler and his National Socialist party assumed control of the German government. Over the next decade, Nazi-orchestrated persecution would force hundreds of academics, including several dozen law teachers, from their positions at European universities.³ Many displaced jurists sought to continue their careers in the United States. They thought a spirit of scientific brotherhood and respect for Continental scholarship would impel U.S. law schools to grant them refuge and succor. Despite a somewhat promising start, most of these scholars' hopes were never realized. By the end of the decade, placing foreign jurists at U.S. law schools was considered an almost impossible task.

This outcome was in some respects predictable, but in other ways not. Looking back, a modern observer might conclude that relief ef-

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1. Edwin Borchard to Stephen Duggan, July 25, 1933, Folder 356, Box 31, Series II, Edwin Borchard Papers, RG 670, Yale University Archives, New Haven, CT (hereinafter "Borchard Papers").

2. Edwin Borchard to Dr. Karl von Lewinski, Oct. 19, 1938, Folder 464, Box 41, Series II, Borchard Papers.

3. By 1941, more than 600 European scholars, mostly German, had fled to America. Karen J. Greenberg, *The Mentor Within: The German Refugee Scholars of the Nazi Period and Their American Context* 70 (1987) (unpublished Ph.D. dissertation, Yale University) (on file with the Yale University Library). This paper owes much to Greenberg's work; it charts developments in American legal education in some ways similar to the ones she identifies as having taken place throughout American academia in the 1930s and 1940s.

forts on behalf of displaced jurists were fatally compromised from the outset by the fact that law teachers, unlike mathematicians, chemists, or physicists, practice an inherently provincial craft. There was perhaps never another time, however, when the law professor's trade seemed so likely to overcome its local limits as in the years just before Hitler's rise to power. At that time, prominent American law professors were emphasizing the similarities across legal systems and recommending greater investment in comparative studies. Continental scholars were recognized worldwide as among the most influential jurisprudents. American and foreign law professors were meeting and sharing ideas to a greater extent than ever before.

Unfortunately for the displaced jurists, economic, political and professional developments of the 1930s led to retrenchment, then a reversal of course by American legal academia. Reduced or stagnant budgets stymied the development of comparative and international law as components of the law-school curriculum. In an era of many crises, U.S. professors looked to the constellation of values they considered embedded in their own legal system, and only in the American scheme, as professional polestars. At the same time, they rejected self-consciously "scientific" approaches to legal study that many within the profession had rallied around just a few years before. In doing so, American professors cultivated a resistance to pleas for aid predicated on respect for Continental scholarship or a spirit of global scientific kinship. This meant that most among the few émigrés who found refuge at U.S. law schools in the years immediately preceding Pearl Harbor did so only after undergoing a baptismal re-education in American law, or were the recipients of sparing charity.

This essay addresses American law schools' evolving response to European scholars displaced by the Nazis. This subject has been overlooked or given short shrift by surveys of the influx of "illustrious immigrants" from Europe to America;⁴ by profiles of particular displaced jurists and their influence;⁵ and by histories of certain law schools, or legal education in general.⁶ This has been an unfortunate oversight. This story sheds light upon an important phase in the development of the modern American law professor. It illustrates how law schools can behave as both inclusive and exclusive social and in-

4. E.g., Laura Fermi, *Illustrious Immigrants* (1968); *The Intellectual Migration: Europe and America, 1930-1950* (Donald Fleming & Bernard Bailyn, eds., 1969); Lewis A. Coser, *Refugee Scholars in America* (1983).

5. E.g., *Der Einfluss deutscher Emigranten auf die Rechtsentwicklung in den USA und in Deutschland* (Marcus Lutter et al. eds., 1993); Ernst C. Stiefel & Frank Mecklenburg, *Deutsche Juristen im amerikanischen Exil (1933-1950)* (1991).

6. A few exceptions exist. See, e.g., Sandra Epstein, *Law at Berkeley: The History of Boalt Hall 159-60* (1997) (discussing Berkeley's relationship with Stefan Riesenfeld).

tellectual communities. And it places in proper context tributes to émigrés who eventually carved out niches in American academia.⁷

The story that follows begins with a brief overview of the relationship between German and American legal education (and educators) before Hitler's rise to power. Part II then explores American law faculties' reaction to the Nazis' initial purge of German universities. Part of this response involved decisions whether and in what manner to host a displaced scholar or scholars. The article details some of the first connections made between foreign jurists and American law schools. A few of these associations worked out well; others did not. These experiences were both influenced by and influences upon concurrent developments in American legal education, as detailed in Part III. Because of these changes, displaced scholars who called upon American law schools later in the 1930s and in the early 1940s sought entry into a very different environment than that of just a few years before. Part IV of this article discusses how the changes that had occurred worked to the benefit of some foreign scholars, but to the detriment of most. Finally, this article concludes with a brief overview of the respective positions of the American law professor and the émigré jurist on the eve of America's entry into World War II.

I.

The American law professor carved out his unique academic niche in the late 1800s and early 1900s. In this formative period of professional development, instructors in law labored to establish their craft as a discipline worthy of inclusion in the university. The "hard work and effective propaganda"⁸ they directed toward this goal incorporated a view of their work that hearkened to the spirit of German scientism.⁹ Establishing the scientific *bona fides* of their craft was a professional imperative since, as Christopher Langdell said in 1887, "If law be not a science, a university will consult its own dignity in declining to teach it."¹⁰ German law professors provided American scholars with particularly attractive professional role models because they had successfully cast their work as a "scientific" endeavor and

7. Few of these reflections capture the hesitance and, in some quarters, hostility that greeted the displaced scholars. Most bend over backward to paint the opposite picture. See, e.g., Max Rheinstein, "In Memory of Ernst Rabel," 5 *Am. J. Comp. L.* 185, 195 (1956).

8. John Henry Schlegel, "Between the Harvard Founders and the American Legal Realists: The Professionalization of the American Law Professor," 35 *J. Legal Educ.* 311, 315 (1985).

9. See Robert Stevens, *Law School* 134 (1983); Mathias Reimann, "Nineteenth Century German Legal Science," 31 *B.C. L. Rev.* 837, 838-39 (1990); Howard Schweber, "The 'Science' of Legal Science: The Model of the Natural Sciences in Nineteenth-Century American Legal Education," 17 *Law & Hist. Rev.* 421, 462 (1999).

10. Christopher Langdell, "The Harvard Law School," 3 *L.Q. Rev.* 118, 124 (1887).

had secured legal education a place within the research university.¹¹ This, in turn, was believed to have brought them great prestige; James Barr Ames perceived that Germany considered its law professors the "lights of the legal profession."¹²

Given the differences between their respective legal systems; the distinct purposes and positions of legal education in the United States and Germany; and the differences in how American and German students were taught, for most U.S. law teachers of the era German scholars and scholarship were only modestly influential. What importance they had was derived chiefly from a vague association with refined (in the minds of some Americans, too refined) professionalism. Few American instructors drew on the methods and teachings of their foreign counterparts.¹³ But there was some transatlantic intellectual pollination. A handful of American academics, concentrated at elite institutions that could afford a professor of jurisprudence were influenced by the work of Continental scholars such as Karl Savigny, Hans Kelsen and Hermann Kantorowicz.¹⁴ By the early 1930s, with the tensions and disappointments of World War I having dissipated somewhat, Americans had returned to studying, lecturing and serving as visiting professors in Germany.¹⁵

At around the same time, some American law teachers also began to identify shared interests with their colleagues in Europe.¹⁶ Comparative law had been forced from the American law-school curriculum in the late 19th Century as a subject "of no apparent immedi-

11. See James Barr Ames, *The Vocation of the Law Professor*, Address Delivered at the Dedication of the New Building of the Department of Law of the University of Pennsylvania (Feb. 21, 1901), in *Lectures on Legal History* 354, 360 (1913); Langdell, *supra* n. 10, at 123-24 (characterizing the case-study approach as capable of making the "teaching and study of law [at Harvard] worthy of a university . . . toward placing the law school, so far as differences of circumstances would permit, in the position occupied by the law faculties in the universities of continental Europe");

12. Ames, *supra* n. 11, at 364.

13. Report of the Committee on Curriculum, 33 *Handbook of the Association of American Law Schools* 169, 169 (1936).

14. See Joseph H. Beale, Jr., "The Development of Jurisprudence During the Past Century," 18 *Harv. L. Rev.* 271, 283 (1905); Roscoe Pound, "Law and the Science of Law in Recent Theories," 43 *Yale L.J.* 525, 530 (1934); James Herget and Stephen Wallace, "The German Free Law Movement as the Source of American Legal Realism," 73 *Va. L. Rev.* 399, 421-36 (1987); Reimann, *supra* n. 9, at 837-39, 896-97; James Whitman, "Commercial Law and the American Volk: A Note on Llewellyn's German Sources for the Uniform Commercial Code," 97 *Yale L.J.* 156 (1987).

15. For example, Columbia Law School's Arthur Schiller spent 1929-1930 in Berlin and Munich, Julius Goebel, Jr., *A History of the School of Law, Columbia University* 321 (1955), and Karl Llewellyn spent 1928-1929 and 1931-1932 at the University of Leipzig, William Twining, *The Karl Llewellyn Papers* 31 (1968). In 1925, Yale Law School's Edwin Borchard became the first American law professor since World War I to lecture in Germany. "Retired Yale Law Professor Dies at Home," *New Haven Journal-Courier*, July 23, 1951, at 1.

16. In doing so, American law professors behaved similarly to colleagues in other disciplines. See Greenberg, *supra* n. 3, at 6.

ate utility to the private practitioner.”¹⁷ But interest in the field re-emerged in the 1920s and early 1930s,¹⁸ concomitant with a view that legal study should be approached as if law were a social science not too different from sociology, anthropology or psychology. The resurgent interest in comparative law encouraged interaction among law professors from different nations, and in doing so helped forge professional bonds between Continental and American jurists. In 1932, for example, more than thirty American law professors attended the International Congress of Comparative Law at The Hague.¹⁹ Eleven of these delegates reported to the Association of American Law Schools that at the Congress they had “established acquaintanceship with kindred spirits in other countries, who will probably be willing to render scientific assistance in the study of legal problems.”²⁰ This sort of announcement offered encouragement to foreign scholars seeking appointments or fellowships in the United States.²¹

Similarly heartening were calls by prominent American law professors for increased instruction in foreign law. In his annual report for the 1929–1930 academic year, Columbia Law School Dean Young Smith wrote, “if law be regarded as a social institution, it transcends geographical lines and its study becomes a science. As such, the laws of Germany, of France, of Italy or of Argentina should offer much to the student whether he be in London or in New York.”²² Smith also perceived that America’s legal system was essentially similar to those of other countries. In his report for 1929–1930, Smith opined, “When one considers the many similarities in other phases of the culture of western Europe and of the United States, it is difficult to believe that the differences in the systems of law which have been developed are as great as is commonly assumed.”²³ Other U.S. schol-

17. Alfred Zantlinger Reed, *Training for the Public Profession of the Law* 299–300 (1921).

18. See Report of the Committee on Curriculum, 31 *Handbook of the Association of American Law Schools* 148, 155 (1934).

19. Charles C. Linthicum Foundation, *List of Committees Appointed from the United States of America* (1932); Report of the Special Committee on the International Congress of Comparative Law, 30 *Handbook of the Association of American Law Schools* 155, 157 (1933).

20. Report of the Special Committee on the International Congress of Comparative Law, *supra* n. 19, at 157.

21. Several foreign jurists were awarded Rockefeller Fellowships for study in the United States in the 1920s and early 1930s. See, e.g., Erich Voegelin to Edwin Borchard, April 30, 1938, Folder 453, Box 40, Series II, Borchard Papers (discussing his fellowship).

22. Young Smith, “School of Law – Report of the Dean for the Academic Year Ending June 30, 1930,” *Columbia University, Annual Report of the President and Treasurer to the Trustees* 90, 104 (1930). In 1931, a substantial bequest allowed Columbia to launch the Parker School of Foreign and Comparative Law. Goebel, *supra* n. 15, at 330.

23. Smith, *supra* n. 22, at 103.

ars identified similarities across the approaches to legal study employed by foreign and American jurists. As Yale Law School Professor Edwin Borchard wrote in 1932, "It is fair to say that there is some evidence that the continental and American conceptions of legal technique are approaching a more common denominator."²⁴

For the most part, to be sure, foreign and comparative law remained peripheral to the American law-school curriculum in the 1920s and early 1930s. Yet expressions of camaraderie such as Smith's and Borchard's undoubtedly and understandably caused Continental teachers to believe that their American counterparts were at least somewhat interested in them and their work. When the situation in Germany took a turn for the worse, these assertions also suggested to displaced scholars that American law schools would welcome the opportunity to save them and the scientific tradition they embodied.

II.

On April 7, 1933, Germany's newly installed Nazi government enacted the Law for the Restoration of the Professional Civil Service. This law summarily expelled most Jews and certain dissidents from government employment.²⁵ Since German universities were government-run, the Civil Service Law forced more than 1,200 professors from their posts.²⁶ The Civil Service Law and related persecution caused many deposed law teachers to look abroad for places where they might continue their academic careers. Though most of these scholars went to other European countries, a few, perhaps recalling conversations at The Hague or comments like Smith's, cast their eyes toward the United States.

These would-be émigrés recognized that the Great Depression had led to belt-tightening by American law schools.²⁷ According to a study by the AALS, total expenditures by member schools fell from \$5.6 million in 1931 to \$4.6 million in 1933.²⁸ Even elite schools felt the pinch; the University of Chicago Law School's income dropped

24. Edwin Borchard, "Some Aspects of Comparative Law in the United States" (unpublished draft) 8 (1932), Folder 1348, Box 142, Series V, Borchard Papers.

25. See Doron Niederland, "The Emigration of Jewish Academics and Professionals from Germany in the First Years of Nazi Rule," 33 *Leo Baeck Inst. Y.B.* 285, 290 (1988).

26. *Id.* at 291.

27. See, e.g., Hermann Kantorowicz to Dr. (first name not given) Cohen, Apr. 2, 1933, *microformed on* Reel 85, Felix Frankfurter Papers, Library of Congress, Washington, D.C. (hereinafter "Frankfurter Papers, Library of Congress") ("I know that foreign countries and especially America are in such distress themselves that they can't even help their own citizens. But sometimes miracles happen.")

28. 32 *Handbook of the Association of American Law Schools* 10 (1935).

from \$147,948 in 1929–1930 to \$107,010 in 1934–1935.²⁹ Instruction and research budgets took particularly severe blows. Between 1931 and 1933 alone, AALS schools cut their professors' salaries by an average of 14 percent.³⁰ Yale Law School, once teeming with empirical legal studies, slashed its research budget from more than \$18,000 in 1929–1930 to less than \$4,000 in 1936–1937.³¹ Tensions provoked by the hard times also exacerbated the anti-Semitism already prevalent within American higher education.³² As Harvard Law School Dean James Landis acknowledged in 1939, "There are anti-Semitic tendencies with reference to the introduction of Jews into the teaching staffs of most universities. The quota along that direction is also regarded by many of the universities as filled and they refuse to listen to any increase."³³

Financial woes made law schools reluctant to take on new hires. Perhaps more important as far as the displaced scholars were concerned, the depression did more than just reduce institutional budgets; it also altered the balance among different sources of income. The depression chilled grant-making and reduced returns on endowments, causing most law schools to depend more heavily on student tuition and fees. At Yale Law School, for example, tuition and student fees provided only 46 percent of total income in 1930–1931, but 58 percent in 1936–1937.³⁴ Students, for the most part, demanded a

29. N.C. Plimpton to Robert Hutchins, Jan. 8, 1937, Folder 7, Box 112, University of Chicago President's Papers, 1925–1945, University of Chicago Archives, Chicago, IL (hereinafter "University of Chicago President's Papers").

30. Handbook, *supra* n. 28, at 10.

31. Yale University, *Report of the Treasurer and Associate Treasurer and Comptroller of Yale University* 194 (1930); Yale University, *Report of the Treasurer and Associate Treasurer and Comptroller of Yale University* 149 (1937). In 1933, financial problems caused the closure of the Institute for the Study of Law at Johns Hopkins. John Henry Schlegel, *American Legal Realism and Empirical Social Science* 193–94 (1995).

32. Greenberg, *supra* n. 3, at 102. Cf. Charles Clark to Charles Seymour, Feb. 10, 1934, Folder 1239, Box 120, Records of James Rowland Angell as president of Yale University (RU 24), Manuscripts and Archives, Yale University Library (hereinafter "Angell Presidential Records") (noting the "lack of balance" in the applicant pool for teaching jobs, which was populated by a disproportionate number of Jewish graduates who could not get jobs with New York law firms); Leon Green to Thurman Arnold, Feb. 28, 1936, Folder 11, Box 2, Leon Green Papers, Northwestern University Archives, Evanston, IL (hereinafter "Green Papers") (explaining faculty reluctance to hire Jewish applicants).

33. James Landis to Edmund Whitman, June 12, 1939, German Refugees, Committee for the Guidance of Professional Personnel – General Folder, Box 4, Harvard Law School Dean's Subject Files, 1932–1946, Harvard University Archives, Cambridge, MA (hereinafter "Harvard Law School Dean's Subject Files")

34. See Yale University, *Report of the Treasurer and Associate Treasurer and Comptroller of Yale University* 190–91 (1931); Yale University, *Report of the Treasurer and Associate Treasurer and Comptroller of Yale University* 148–49 (1937). Some exceptions existed, of course. See Reply to Association of American Law Schools Questionnaire (1934), Folder 1640, Box 13, UPB 6.43 (Law School – Secretary's Correspondence), University of Pennsylvania Archives, Philadelphia, PA (hereinafter "University of Pennsylvania Law School – Secretary's Correspondence") (indicating that

practical curriculum.³⁵ They had little interest in comparative legal studies or foreign law.³⁶ Accordingly, few schools offered these courses. Of seventy-nine law schools surveyed in a 1940 Yale Law School study, only eight offered a course on Roman law, and only seven a comparative law course.³⁷

Professors interested in these subjects found themselves on their heels. Columbia Law School's Karl Llewellyn wrote Borchard in 1933 that "comparative law work at Columbia is languishing, as it is elsewhere."³⁸ Although Smith reaffirmed the value of comparative legal studies in his annual report for 1934–1935, he also conceded, "The limitations of time and language equipment prevent the exploitation of such comparisons in any complete sense, even if such complete development were necessary or even desirable."³⁹ The flagging interest in comparative law further limited the opportunities available to refugee jurists at American schools. The expertise of German private-law teachers was frequently limited to sections of their country's code. German public-law scholars mostly taught courses better aligned with America's political science departments than its law schools.⁴⁰ Given these limitations, many foreign applicants pitched

student income represented 87 percent of the University of Pennsylvania Law School's total income in 1929–1930, but only 74 percent in 1932–1933).

35. The University of Michigan Law School kept track of the popularity of all elective courses available to students between 1936 and 1939. Constitutional Law was the most popular elective, being chosen by more than 95 percent of students in each of the surveyed years. This comes as little surprise, given the array of constitutional issues raised by the New Deal. Constitutional Law was followed by Bills and Notes, Business Associations, Trusts and Estates, Securities, and Creditors' Rights. Jurisprudence, Legislation, and International Law were among the least popular electives. Report of the Michigan Law School Curriculum Committee (May 12, 1939), University of Michigan Law School Records, University of Michigan Archives, Bentley Historical Library, Ann Arbor, MI.

36. Report of the American Bar Association Committee on Teaching of International and Comparative Law, Section of International and Comparative Law (1939), Folder 472, Box 42, Series II, Borchard Papers.

37. Memorandum from the Yale Law School Curriculum Committee, Changes in the Curriculum: A Survey of Other Schools 3 (May 22, 1940), Yale University Law School Records, YRG 26, Manuscripts and Archives, Yale University Library (hereinafter "Yale University Law School Records").

38. Karl Llewellyn to Edwin Borchard, Apr. 28, 1933, Folder 353, Box 31, Series II, Borchard Papers.

39. Young Smith, "School of Law, Report of the Dean for the Academic Year Ending June 30, 1935," *Annual Report of the President and Treasurer to the Trustees* 74, 77 (1935).

40. For example, while at the University of Munich in the early 1930s, subsequently displaced *privatdozent* Karl Loewenstein taught British Constitutional Law, Constitutional Law of the British Empire, Institutions of Democratic Government, Development and Evolution of the Constitutional Law in our Time, Constitutional Law of the German Reich, and Public International Law; only the last of these courses had a close analogue at American law schools. List of Courses Taught (Karl Loewenstein), *microformed on* Reel 83, Felix Frankfurter Papers, Library of Congress. See also James Landis to E.W. Hunt, Jan. 16, 1939, German Refugees – Applications H–K Folder, Box 4, Harvard Law School Dean's Subject Files ("The systems of continental law and common law are so different that the only opportunities open to continental

themselves to U.S. institutions as capable of teaching American students only comparative, international and / or Roman law.⁴¹ Borchard captured the lack of student interest in these subjects in 1939 when he bluntly advised one foreign jurist, "As perhaps you do not know, German legal scholarship is not in excessive demand in this country. In a sense, it is something of a luxury for our universities."⁴²

Despite all of these grounds for pessimism, scholars displaced by the Nazis still believed that their American counterparts might aid them out of respect for German academia's "scientific reputation,"⁴³ or, as Smith might have put it (and one refugee later did) to support "the common cause of the science of law."⁴⁴ Relief operations also offered hope. Not long after the purge of German universities, the Rockefeller Foundation and the newly formed Emergency Committee in Aid of Displaced German Scholars (created by the Institute of International Education) launched complementary programs designed to encourage American colleges and universities to host deposed scholars (across all disciplines) until the storm in Germany passed.⁴⁵ Both promised to subsidize the salaries of refugee scholars chosen by academic institutions. Restricted grants, the organizations thought, would allow schools to provide refugees with temporary safe harbors without provoking resentment among native-born job-seekers or professors whose salaries had just been cut.⁴⁶ In theory, an institution had to petition the agencies for a grant, after identifying a particular scholar it wished to retain. In practice, the organizations often contacted schools to gauge their interest in recently dismissed talent. Since it was hoped that the crisis in Germany would soon pass, each

scholars are in the field of Comparative Law. Unfortunately there are not a half dozen of these posts in the country, and most of them are occupied.")

41. See, e.g., Elemer Balogh to Edmund Morgan, April 7, 1941, Folder 11, Box 11, Edmund Morgan Papers, Harvard Law School Library, Cambridge, MA (hereinafter "Morgan Papers").

42. Edwin Borchard to Dr. Walter Ullman, Oct. 7, 1939, Folder 485, Box 43, Series II, Borchard Papers.

43. Karl Loewenstein to the Rockefeller Foundation, Jan. 10, 1934, Folder 4978, Box 419, Series 200, RG 1.1, Rockefeller Foundation Archives, Rockefeller Archive Center, North Tarrytown, NY (hereinafter designated RAC).

44. Georg Petschek to James Landis, June 15, 1939, German Refugees: Applications N-P Folder, Box 4, Harvard Law School Dean's Subject Files.

45. The Emergency Committee changed its name to the Emergency Committee in Aid of Displaced Foreign Scholars in 1938. Stephen Duggan & Betty Drury, *The Rescue of Science and Learning* 7 (1948). For a discussion of the Rockefeller Foundation's early relief efforts, see Claus-Dieter Krohn, *Intellectuals in Exile* 29-38 (1993).

46. See Stephen Duggan to A. Lawrence Lowell, May 27, 1933, German Scholars 1933-34 Folder, Box 31, James Conant Papers, Harvard University Archives, Cambridge, MA (hereinafter "Conant Papers"); Thomas Appleget to Warren Weaver, July 18, 1933, Folder 728, Box 91, RG 2, Rockefeller Foundation Archives, RAC.

grant was usually limited to an amount that would cover only a one- or two-year visit at the designated school.⁴⁷

Some individual American law professors also contributed to relief efforts soon after the enactment of the Civil Service Law. Felix Frankfurter, describing the situation in Germany as one calling for "simple directness and not for finesse,"⁴⁸ assiduously pressed his contacts in Washington, D.C., to open America's doors more widely to German Jews.⁴⁹ In light of Harvard University President A. Lawrence Lowell's hostility to the Emergency Committee (he reportedly called it "an attempt to use the College for purposes of propaganda"⁵⁰), Frankfurter became the relief agency's primary Cambridge contact.⁵¹ Frankfurter also agreed to serve on the Advisory Committee for Alvin Johnson's University in Exile, a hastily assembled refuge for several displaced professors.⁵²

Other law professors preferred finesse. The University of California's Max Radin canvassed his peers to find a position for Kantorowicz,⁵³ who eventually was placed at the University in Exile for 1933–1934.⁵⁴ In May 1933, Borchard and Llewellyn devised a draft petition to be signed by other American law professors that would, in Borchard's words, provide the German government with a "friendly admonition . . . pointing out how unhappy the consequences for culture, for the world, and for Germany will be if people in scientific positions are to be ousted because of their political views or their race."⁵⁵ The production of a similar petition by a group of social scientists later that year prompted Borchard and Llewellyn to abandon

47. Of course, the crisis intensified. Relief operations continued up through World War II. Duggan & Drury, *supra* n. 45, at 78.

48. Felix Frankfurter to Charles C. Burlingham, May 2, 1933, Folder 11, Box 4, Charles C. Burlingham Papers, Harvard Law School Library, Cambridge, MA.

49. Felix Frankfurter to Franklin D. Roosevelt, undated telegram, *microformed on* Reel 85, Frankfurter Papers, Library of Congress; Frankfurter to Frances Perkins, Apr. 27, 1933, *microformed on* Reel 85, Frankfurter Papers, Library of Congress; Frankfurter to Cordell Hull, May 23, 1933, *microformed on* Reel 85, Frankfurter Papers, Library of Congress.

50. Henry Shattuck to Harlow Shapley, Aug. 3, 1933, German Scholars 1933–34 Folder, Box 31, Conant Papers.

51. See E.R. Murrow to Felix Frankfurter, June 6, 1933, Harvard Coll., 1933, May–September Folder, Box 113, Records of the Emergency Committee in Aid of Displaced German Scholars, New York Public Library, New York, NY; Stephen Duggan to Frankfurter, June 10, 1933, Harvard Coll., 1933, May–September Folder, Box 113, Emergency Committee Records; Duggan to Frankfurter, July 18, 1933, Harvard Coll., 1933, May–September Folder, Box 113, Emergency Committee Records.

52. See Felix Frankfurter to Alvin Johnson, Apr. 26, 1933, *microformed on* Reel 85, Frankfurter Papers, Library of Congress.

53. See Yale Law School Faculty Minutes, May 18, 1933, Yale University Law School Records.

54. 2 *International Biographical Dictionary of Central European Emigrés 1933–1945*, Part 1: A–K 594 (Herbert A. Strauss & Werner Roder, eds., 1983).

55. Edwin Borchard to Karl Llewellyn, May 17, 1933, Folder 352, Box 31, Series II, Borchard Papers.

their protest, however.⁵⁶ In addition to this aborted effort, in private correspondence Borchard urged influential German acquaintances to do what they could to moderate their nation's policies.⁵⁷ Borchard also worked with the Emergency Committee to secure individual displaced scholars places in American academia.⁵⁸

As early as mid-1933, Borchard tried to interest his colleagues at Yale Law School in hosting a displaced scholar.⁵⁹ Institutions, though, acted more slowly than individuals. At the outset of relief efforts, few law schools were motivated or organized enough to recruit a foreign jurist.⁶⁰ Yale's Political Science Department retained a displaced law professor long before Yale Law School did, taking in Karl Loewenstein of the University of Munich in September 1933.⁶¹ Yale Law School Dean Charles Clark did consider his school duty-bound to take on at least one displaced professor, at least if relief agencies picked up the tab and there was no expectation of the émigré's permanent placement at Yale.⁶² But Clark also believed that foreign scholars could not relate to American audiences, meaning he was less than enthusiastic about answering duty's call.⁶³ Throughout the summer of 1933, he ducked Frankfurter's repeated suggestions that Yale retain Max Ascoli.⁶⁴

56. Karl Llewellyn to Edwin Borchard, July 13, 1933, Folder 357, Box 31, Series II, Borchard Papers; Borchard to Llewellyn, Aug. 11, 1933, Folder 357, Box 31, Series II, Borchard Papers.

57. Edwin Borchard to Dr. Hjalmar Schacht, March 30, 1933, Folder 352, Box 31, Series II, Borchard Papers.

58. See, e.g., Edwin Borchard to Stephen Duggan, June 28, 1933, Yale Univ. 1933 Folder, Box 126, Emergency Committee Records; Borchard to Duggan, July 25, 1933, Yale Univ. 1933 Folder, Box 126, Emergency Committee Records; Borchard to Duggan, Oct. 27, 1933, Yale Univ. 1933 Folder, Box 126, Emergency Committee Records.

59. See, e.g., Edwin Borchard to Charles Clark, Aug. 2, 1933, Folder 357, Box 31, Series II, Borchard Papers.

60. Confusion regarding the scope of the relief agencies' efforts and the terms of their grants at first made some law schools hesitant to apply for aid. See, e.g., J.P. Chamberlain to Edwin R. Murrow, June 12, 1933, Colum. Univ. 1933, June–Aug. Folder, Box 111, Emergency Committee Records.

61. Nicholas Spykman to Karl Loewenstein, Sept. 27, 1933, Folder 4, Box 25, Karl Loewenstein Papers, Amherst College, Amherst, MA. Yale also retained Arnold Wolfers, a German professor who was already visiting New Haven when the Nazis took power. John Van Sickle to Ernest J. Jaqua, Feb. 23, 1937, Folder 4943, Box 416, Series 200, RG 1.1, Rockefeller Foundation Archives, RAC.

62. Charles Clark to James Angell, Feb. 9, 1934, Folder 1239, Box 120, Angell Presidential Records; Yale Law School Faculty Minutes, Apr. 12, 1934, Yale University Law School Records.

63. See Charles Clark to Stephen Duggan, Nov. 10, 1933, Yale Univ. 1933 Folder, Box 126, Emergency Committee Records (discussing his impressions regarding foreign scholars).

64. See Charles Clark to Felix Frankfurter, June 22, 1933, *microformed on* Reel 26, Frankfurter Papers, Library of Congress; Frankfurter to Clark, July 7, 1933, *microformed on* Reel 26, Frankfurter Papers, Library of Congress; Clark to Frankfurter, July 11, 1933, *microformed on* Reel 26, Frankfurter Papers, Library of Congress; Clark to Frankfurter, July 14, 1933, *microformed on* Reel 26, Frankfurter Papers, Library of Congress; Yale Law School Faculty Minutes, Sept. 28, 1933, Yale University Law School Records.

After prodding by Llewellyn, in early 1934 the Yale Law School faculty seriously considered whether to retain a displaced scholar.⁶⁵ Although he personally preferred a younger scholar, Clark acknowledged, "the general feeling in this country (which under the circumstances ought considerably to guide our course) is that the older men are immediately our obligation."⁶⁶ The Yale faculty first considered Ernst Levy, a Roman law expert at Heidelberg recommended by Llewellyn. Few professors knew anything about Levy or his work. Despite this, the faculty voted 11-5 to authorize Clark to speak with relief agencies about an appointment.⁶⁷ A few weeks later, Yale's attention shifted to Albrecht Mendelssohn-Bartholdy, a better-known scholar.⁶⁸ When the faculty discovered that Mendelssohn-Bartholdy had already accepted an offer to go to Oxford, interest in recruiting any foreign scholar lapsed.⁶⁹ Borchard and Llewellyn continued to press the issue,⁷⁰ but the subject was dead for the 1933-1934 academic year.⁷¹

As will be discussed in more detail later in this essay, a handful of American law professors at other schools also made inquiries with relief organizations and colleagues about the displaced scholars in the early and mid-1930s.⁷² Most professors, on the other hand, offered sympathy and little more.⁷³ Dean Marion Kirkwood at Stanford Law School declined to apply for an Emergency Committee grant for

65. Yale Law School Faculty Minutes, Feb. 8, 1934, Yale University Law School Records.

66. Charles Clark to Harold Laski, Mar. 28, 1934, Folder 176, Box 73, Series III, Records of the Yale Law School Dean, 1946-1961 (RU 449), Manuscripts and Archives, Yale University Library (hereinafter "Records of the Yale Law School Dean").

67. An unusual alliance of radicals and conservatives voted in the negative. Arthur Corbin, William O. Douglas, Ashbel Gulliver, Frederick Hicks and Wesley Sturges opposed the proposal. Yale Law School Faculty Minutes, Feb. 8, 1934, Yale University Law School Records.

68. See Yale Law School Faculty Minutes, Apr. 12, 1934, *supra* n. 62.

69. See Yale Law School Faculty Minutes, May 3, 1934, Yale University Law School Records; Edwin Borchard to Eduard Heimann, June 20, 1934, Folder 374, Box 33, Series II, Borchard Papers.

70. Borchard offered the names of two other German professors he considered worth pursuing at a faculty meeting near the end of the spring term. Weary of the chase and doubtful of its merit, Arthur Corbin made and the faculty approved a motion that Clark appoint a committee to consider the matter, which would report back to the faculty. Clark appointed Ernest Lorenzen, Borchard and William O. Douglas to the new body. Yale Law School Faculty Minutes, May 3, 1934, *supra* n. 68. This committee took some steps to identify an appropriate scholar. See Edwin Borchard to the Institute of International Education, May 4, 1934, Folder 372, Box 33, Series II, Borchard Papers. Nothing came of their efforts.

71. See Edwin Borchard to Eduard Heimann, June 20, 1934, *supra* n. 69.

72. See, e.g., Harry Bigelow to Edwin Borchard, Oct. 9, 1933, Folder 359, Box 31, Series II, Borchard Papers; Edwin Bigelow to Stephen Duggan, Nov. 10, 1933, Folder 363, Box 32, Series II, Borchard Papers; Borchard to Eduard Heimann, June 20, 1934, *supra* n. 69.

73. See, e.g., Charles Burdick to Stephen Duggan, Dec. 5, 1933, Cornell Univ. 1933-34 Folder, Box 111, Emergency Committee Records (expressing his sympathies

a foreign scholar brought to his attention by University President Ray Liman Wilbur, telling Wilbur, "From the point of view of the Law School I do not believe that the appointment would be of substantial value."⁷⁴ Northwestern University Law School Dean Leon Green apologetically rejected Thurman Arnold's letter on behalf of one displaced scholar, saying that although Northwestern was "not only sympathetic but very anxious" to host a refugee, the school could not do so because the "University is so hard pressed financially that the President and trustees will not commit themselves to anything."⁷⁵

At Harvard, still the country's pre-eminent law school, Frankfurter continued to champion the displaced scholars' cause throughout the decade, even making their plight the centerpiece of his keynote speech at the AALS's annual conference in 1935.⁷⁶ Most of Harvard faculty, on the other hand, had little desire to continue a series of failed experiments with foreign scholars. In 1932, Harvard had only with difficulty disengaged itself from Ernst Feilchenfeld, a German professor who Edmund Morgan later said had an "exceedingly unattractive personality" and who had wrongly thought himself in line for a permanent appointment at the school.⁷⁷ Three years later, Harvard forced Josef Redlich into retirement. A professor at Harvard since 1925, financial and personal setbacks had since destabilized the Austrian author of *The Common Law and the Case Method in American University Law Schools*. Redlich died shortly after leaving the faculty.⁷⁸

And so for the most part, Harvard Law School kept its distance from refugee scholars in the mid-1930s.⁷⁹ The school nonetheless became closely associated with events overseas. In the summer of 1934, Dean Roscoe Pound toured the Austro-German border. Speaking to reporters, he remarked on what he considered a peaceful and pros-

with relief efforts but a lack of interest in hosting a displaced scholar, even with a grant).

74. Marion Kirkwood to Ray Liman Wilbur, Oct. 29, 1934, Folder 9, Box 161, Ray Liman Wilbur Papers, Stanford University Archives, Stanford, CA.

75. Leon Green to Thurman Arnold, Jan. 2, 1936, Box 9, Thurman Arnold Papers, American Heritage Center, University of Wyoming, Laramie, WY.

76. Felix Frankfurter, I Have No Speech, Address Before the Annual Conference of the Association of American Law Schools (Dec. 28, 1935), in 33 *Handbook of the Association of American Law Schools* 90, 93-94 (1936).

77. E.M. Morgan to Ralph J. Baker, Nov. 2, 1943, Feilchenfeld, Ernst Folder, Box 3, Law School - Dean's Subject Files, 1932-46.

78. Charles C. Burlingham, "Josef Redlich," 50 *Harv. L. Rev.* 392, 394 (1937).

79. Harvard did award a study fellowship to Rudolf Callman in 1936, Roscoe Pound to Jerome Greene, June 4, 1936, Foreign Students Folder, Box 12, Law School Dean's Office, Correspondence 1925-1937, Harvard University Archives (hereinafter "Harvard Law School Dean's Correspondence"), and other foreign jurists worked as research assistants to Harvard Law School professors, Edwin Borchard to Thurman Arnold, Apr. 2, 1938, Folder 9a, Box 1, Series II, Borchard Papers (discussing Friedrich Hofer's work with Sheldon Glueck).

perous scene.⁸⁰ Later that year, Pound received an honorary degree from Germany's ambassador to the United States on the steps of Harvard's Langdell Hall. New Harvard University President James Conant pointedly refused to be photographed with the ambassador at the ceremony.⁸¹ Remarking on the event, as well as Pound's earlier comments, the *New York Post* described the dean as "a great legal scholar whose reputation has grown somewhat tarnished."⁸² *The New Republic* wrote, "Dean Pound's action will be interpreted by German propagandists around the world as an answer to Nazi critics."⁸³ Harold Laski characterized Pound's decision to accept the degree as a "tragic lapse."⁸⁴ Pound's actions also infuriated Frankfurter. When Pound invited Frankfurter to the Langdell Hall ceremony, Frankfurter refused⁸⁵ and asked Conant to cancel the event.⁸⁶ Conant declined to do so, but confided to Frankfurter that he considered Pound (according to Frankfurter's recollection of their meeting) a "pathological" case.⁸⁷

III.

Despite the caution of some American law faculties and the indifference of others, U.S. law schools did come to host a significant share of the relatively small cohort of displaced jurists who sought refuge there in the early days of the Third Reich. These placements, though few and far between, suggested that American academia would not allow Hitler to extinguish German legal science, as exemplified by its leading practitioners. As already intimated by events at Yale Law School, however, time and experience would demonstrate that future appointments would hinge upon refugees' ability to meet their hosts' changing expectations far more than lingering respect for Continental scholarship.

Some schools met whatever obligation they perceived toward the displaced jurists by retaining one as a short-term research fellow, a lecturer, or a similarly jerry-rigged position.⁸⁸ The School of Juris-

80. Charles Beard, "Germany up to Her Old Tricks," 80 *The New Republic* 299-300 (1934).

81. "Harvard Corporation Refuses Scholarship Offered By Herr Hitler's Lieutenant, an Alumnus," *The Jewish Advocate*, Oct. 5, 1934, at 1.

82. "Harvard Rejects the Bribe," *N.Y. Post*, Oct. 5, 1934, at 8.

83. "The Week," 80 *The New Republic* 169, 170 (1934).

84. Harold Laski to James Conant, Oct. 12, 1934, Hanfstaengl Scholarship - Favorable Comments A-L Folder, Box 32, Conant Papers.

85. Felix Frankfurter to Roscoe Pound, Sept. 14, 1934, Felix Frankfurter Folder, Box 13, Harvard Law School Dean's Correspondence.

86. Felix Frankfurter, Memorandum of Conversation with Pound and President Conant Regarding an Invitation from Pound, Sept. 14, 1934, *microformed on* Reel 55, Frankfurter Papers, Library of Congress.

87. *Ibid.*

88. It is impossible to know exactly how many displaced scholars passed through each school. Some refugees worked as unpaid research assistants. See, e.g., Edwin

prudence at the University of California — Berkeley, for example, took in Stefan Riesenfeld as a research assistant in 1934.⁸⁹ Fewer schools retained deposed scholars with the intent that they would act in most respects as typical faculty members. Columbia acted first among elite law schools in recruiting a displaced scholar as a colleague. Keeping with the relief agencies' goal of facilitating the "rescue of science and learning," Columbia focused on a prominent German scholar. In November 1933, Dean Smith applied to the Rockefeller Foundation and Emergency Committee for grants to secure the services of Arthur Nussbaum, recently removed from the law faculty at Berlin. Viewed from afar, the fifty-six-year-old Nussbaum seemed to embody all that was praiseworthy about the German academic tradition. In his grant application to the Emergency Committee, Smith wrote (emphasis original):

[A]bove all, we should propose to have [Nussbaum] canvass what has been *done* (not so much what has been *said*) about realistic research in law in Germany in the last two decades, put the results together, and bring them to bear upon what has been done here. We know some of the German work, and know that it is good. We know that most of it is still unknown to us, and that all of it we need.⁹⁰

Borchard also recommended Nussbaum to the Emergency Committee, advising that the German's reputation would "add distinction to any faculty."⁹¹ The Rockefeller Foundation, which husbanded its funds for top-rank scholars, checked with its German advisor to confirm Smith's view of Nussbaum. The wire back read, "Nussbaum very Jewish appearance but first rate scholar and character."⁹² The Rockefeller Foundation and the Emergency Committee agreed to subsidize Nussbaum's stay at Columbia through the 1934–1935 academic

Borchard to Thurman Arnold, Apr. 2, 1938, *supra* n. 79. Others received research fellowships. See, e.g., Roscoe Pound to Jerome Greene, June 4, 1936, *supra* n. 79. Still others were invited to give lectures, without being added to a faculty or staff. See, e.g., Harry Bigelow to Gerhardt (sic) Husserl, Nov. 18, 1937, Folder 2, Box 113, University of Chicago President's Papers. And a few refugees were given library staff positions, in which capacity they often performed research or translation services. See, e.g., Harvard Law School Faculty Minutes, Apr. 26, 1938, Harvard University Archives (granting a library position to Magdalene Schoch).

89. George Costigan to Monroe Deutsch, Sept. 17, 1934, Folder 421, Box 2, Records of the School of Jurisprudence, CU-48, University of California — Berkeley Archives, The Bancroft Library, University of California, Berkeley, CA (hereinafter "Records of the School of Jurisprudence"). After earning an L.L.B. degree from the University of California, Riesenfeld took a position at the University of Minnesota in 1938. 2 *International Biographical Dictionary of Central European Emigrés 1933–1945, Part 2: L–Z* 970 (Herbert A. Strauss & Werner Roder, eds., 1983).

90. Young B. Smith to the Institute of International Education, Nov. 1, 1933, Folder 3808, Box 320, Series 200, RG 1.1, Rockefeller Foundation Archives, RAC.

91. Edwin Borchard to Stephen Duggan, Oct. 27, 1933, *supra* n. 58.

92. John Van Sickle to the Rockefeller Foundation, Nov. 22, 1933, Folder 3808, Box 320, Series 200, RG 1.1, Rockefeller Foundation Archives, RAC.

year.⁹³ Columbia saw this as a temporary arrangement; it hoped that by mid-1935 conditions in Germany would improve sufficiently to permit Nussbaum's return.⁹⁴ In a similar development, slightly later and further west, the University of Michigan agreed to host Rudolf Laun of the University of Hamburg.⁹⁵ Reflecting the awkward liminal position of German public-law professors when transplanted into the American university, Laun would split his time between the University's Political Science Department and its Law School.⁹⁶

Laun and Nussbaum both had difficulty adjusting to what Loewenstein called the "ways and habits of American academic life."⁹⁷ These troubles would have been of little import if the scholars had been only short-term guests. But once it became clear that the situation in Germany was worsening, and that displaced scholars wished to form permanent connections with American universities, the émigrés' limitations became more problematic. At Columbia, although Nussbaum quickly established himself as a prolific author, his perceived inability to connect with American audiences caused his host to resist a more permanent connection with him. Once his initial stipend from the relief agencies expired, Nussbaum's friends (and especially Llewellyn and J.P. Chamberlain) struggled each year to piece together enough gift and grant money for him to stay at Columbia for another term.⁹⁸ They also looked to place him at another institution up through 1939, when Columbia finally gave him a more secure appointment as a research professor.⁹⁹

A similar story unfolded at Michigan, where Law School Dean Henry Bates considered Rudolf Laun a "fine scholar and gentleman,"¹⁰⁰ but one who "could do little of value to any except a very few students."¹⁰¹ Laun, in one observer's words, "could not adjust

93. Special Research Aid Fund – European Scholars Nov. 25, 1933, Folder 3808, Box 320, Series 200, RG 1.1, Rockefeller Foundation Archives, RAC; E.R. Murrow to Young Smith, Nov. 16, 1933, Nussbaum Folder, Box 27, Emergency Committee Records.

94. Cf. Frank Fackenthal to Stephen Duggan, Dec. 5, 1934, Columbia University, 1934, May–Oct. Folder, Box 111, Emergency Committee Records (stating the Columbia had not intended to become displaced scholars' permanent host).

95. See University of Michigan Law School Faculty Minutes, March 1, 1935, University of Michigan Archives.

96. Rudolf Laun to Stephen Duggan, undated letter (probably May, 1939), Folder 478, Box 43, Series II, Borchard Papers.

97. Karl Loewenstein to James Angell, May 8, 1936, 1934–36 Correspondence Binder, Box 8, Loewenstein Papers.

98. See Columbia University Archives – Columbiana Library, Central Files, Young Smith to Nicholas Butler, March 18, 1936; Columbia University Archives – Columbiana Library, Central Files, Young Smith to Nicholas Butler, Apr. 23, 1937.

99. See Joseph Chamberlain to Joseph McClain, Nov. 1, 1938, Nussbaum Folder, Box 27, Emergency Committee Records.

100. Henry Bates to Eduard Heinmann (sic), Mar. 28, 1935, Folder 51, Box 29, University of Michigan Law School Records.

101. Henry Bates to Charles Clark, Jan. 11, 1936, 1934–1936 Correspondence Binder, Box 8, Loewenstein Papers.

himself to American standards"¹⁰² and was "unable to live up to expectations,"¹⁰³ causing Michigan to cancel the course it had given Laun to teach.¹⁰⁴ After his initial stipend expired in 1935, Laun returned to Europe.¹⁰⁵ He would spend the rest of the decade unsuccessfully appealing for another chance in America.¹⁰⁶

Columbia's experience with Nussbaum and Michigan's with Laun provided American law schools with cautionary advisement. The engagements seemed to confirm suspicions that German scholars either would not or could not learn American ways, including the English language.¹⁰⁷ The experiences also chilled Michigan's and Columbia's enthusiasm for retaining any other foreign scholars, at least for a time. Substantial factions within the Michigan and Columbia faculties remained interested in comparative law throughout the 1930s.¹⁰⁸ Yet both schools grew more cautious when it came to foreign scholars. Columbia turned toward re-educating young émigrés in American law.¹⁰⁹ At Michigan, Bates came to believe that American scholars were better qualified than émigrés to teach even comparative law, since in his view the latter group lacked the necessary baseline understanding of Anglo-American law.¹¹⁰ Bates also became very sensitive to the moral obligations he saw as implicated in a refugee's appointment. In January 1936 he issued the following response to an inquiry from Loewenstein, by then in search of a new position:

I would be interested to meet you, but I ought to say frankly that the present prospect is that we shall not be able to make any additions to our staff. . . . I am sure you will realize why this is. An able scholar is brought to an American university in this way. He takes root; to some extent, his colleagues become attached to him and interested to have him stay; then

102. Karl Loewenstein to Felix Frankfurter, Jan. 27, 1936, 1934–1936 Correspondence Binder, Box 8, Loewenstein Papers.

103. Karl Loewenstein to Charles Clark, Dec. 31, 1935, Folder 231, Box 79, Records of the Yale Law School Dean.

104. *Ibid.*

105. Rudolf Laun to Edwin Borchard, Apr. 1, 1938, Folder 453, Box 40, Series II, Borchard Papers.

106. See, e.g., *id.*

107. Cf. Robert Sproul to Edwin Dickinson, June 7, 1937, Folder 19, Box 2, Records of the School of Jurisprudence, CU-48, University of California Archives (describing one German scholar as "very adaptable, which lots of Germans are not"); Duggan & Drury, *supra* n. 45, at 155–64 (reprinting American academics' criticisms of foreign scholars, including the charge that they were too haughty).

108. See, e.g., Smith, *supra* n. 39, at 78; Report of the Special Committee on Comparative Law, University of Michigan Law School (Dec. 11, 1936), University of Michigan Law School Records.

109. See, e.g., Edwin Borchard to To Whom It May Concern, Apr. 4, 1939, Folder 475, Box 42, Series II, Borchard Papers (describing the Columbia re-education of Sidney Jacoby); Young Smith to Leon Green, Oct. 22, 1943, Folder 7, Box 10, Green Papers (detailing re-education of Alexander Pekelis).

110. Henry Bates to James Landis, Jan. 20, 1939, Folder 51, Box 29, University of Michigan Law School Records.

the Foundation support is withdrawn and the University may be in no position to pay the salary from its own resources. The resulting situation is very trying and embarrassing to all concerned.¹¹¹

The Michigan Law School faculty as a whole sent out mixed signals to foreign scholars throughout the 1930s. In December 1936, a faculty committee recommended that "the professional curriculum should be developed through the systematic use, as may be feasible and expedient, of materials derived from foreign legal systems as a basis for comparison with Anglo-American law."¹¹² Toward this end, the committee also recommended "[t]hat one or more professorships of comparative law be established, to which foreign trained legal scholars may be appointed, initially on a year to year basis."¹¹³ After receiving this report, the full faculty resolved only to continue discussing what benefits would result from the presence of foreign-trained professors.¹¹⁴ The Law School later voted to award a teaching fellowship to Riesenfeld, who by then had been promoted to a research associate position at the University of California.¹¹⁵ But one week after so voting, the faculty engaged in a "thorough discussion as to the advisability of . . . making Mr. Riesenfeld such an offer."¹¹⁶ Later, the faculty voted to reverse itself and take back its decision to invite Riesenfeld to Ann Arbor.¹¹⁷

Riesenfeld, of course, was just one of several young émigré scholars who came to the United States in the early-to-middle 1930s. These individuals found it more difficult than their elders had to secure threshold spots within the American academic establishment. Conversely, they proved more capable than older refugees of adjusting to their changed circumstances. The two most prominent junior professors to come to America soon after the Nazi takeover were Max

111. Henry Bates to Karl Loewenstein, Jan. 24, 1936, 1934-36 Correspondence Binder, Box 8, Loewenstein Papers.

112. Report of the Special Committee on Comparative Law, *supra* n. 108.

113. *Ibid.*

114. University of Michigan Law School Faculty Minutes, Dec. 11, 1936, University of Michigan Archives. A few years later, a faculty committee appointed to review the Law School's curriculum recommended that each student be required to take a course in either international law, legal history, legal method, jurisprudence, comparative law, or contemporary legislation as part of their education. See Report of the Curriculum Committee, *supra* n. 35. The full faculty rejected this proposed requirement, voting that students should only be "urged" to take one of the listed courses. University of Michigan Law School Minutes, May 26, 1939, University of Michigan Archives.

115. University of Michigan Law School Faculty Minutes, Jan. 28, 1938, University of Michigan Archives.

116. University of Michigan Law School Faculty Minutes, Feb. 3, 1938, University of Michigan Archives.

117. University of Michigan Law School Faculty Minutes, Mar. 31, 1938, University of Michigan Archives. Riesenfeld would receive an appointment at the University of Minnesota instead.

Rheinstein and Friedrich Kessler. Rheinstein was thirty-four years old when he arrived in the United States in September 1933 on a one-year Rockefeller Foundation fellowship.¹¹⁸ He was a *privatdozent* at the University of Berlin and an assistant to Ernst Rabel, specializing in American contract and tort law.¹¹⁹ In 1932, his treatise on U.S. contract law had received glowing treatment in the *Harvard Law Review*.¹²⁰ Rheinstein came to the United States to study at Columbia and Harvard; at the end his term he was to return to Germany.¹²¹

Rheinstein took to his new environment quickly, impressing professors at Columbia Law School and William Draper Lewis of the American Law Institute with his aptitude. Lewis invited Rheinstein to participate in the Institute's working groups on the law of property, torts and trusts.¹²² Across the Atlantic, Rheinstein's position grew more precarious. Rheinstein was Jewish, but his military service in World War I had immunized him from dismissal under the Civil Service Law.¹²³ While in America, Rheinstein learned that the University of Berlin would not renew his appointment as *privatdozent*, and that his salary as Rabel's assistant would be cut when he returned.¹²⁴ These developments made Rheinstein interested in extending his stay in America.¹²⁵

With Nussbaum already on board, Columbia was unwilling to make additional space for Rheinstein.¹²⁶ Columbia professors tried to help their younger visitor find a position elsewhere. They directed much of their effort toward Dean Harry Bigelow at the University of Chicago Law School. Rheinstein's advocates framed their arguments in practical terms. Richard Powell wrote Bigelow, "While I should not care to be quoted on this, I think that [Rheinstein] would do a substantially better job for us than some of the persons who are now on our staff."¹²⁷ Llewellyn said that Rheinstein was "as good a bet as there is to be had. He is young enough to be resilient and adaptable; he also has the right kind of mind and personality for that purpose;

118. Max Rheinstein Fellowship Card, RF RG 10 F/S Recorder Cards, Room 103, Drawer 1, Rockefeller Foundation Archives, RAC.

119. Max Rheinstein, Curriculum Vitae, Folder 312, Box 22, Series 216S, RG 1.1, Rockefeller Foundation Archives, RAC.

120. A.H. Feller, "Die Struktur Des Vertraglichen Schulverhältnisses im Anglo-Amerikanischen Recht," 45 *Harv. L. Rev.* 1285 (1932) (book review).

121. Max Rheinstein Fellowship Card, *supra* n. 118.

122. William Draper Lewis to Emergency Committee in Aid of Displaced German Scholars, May 19, 1934, Rheinstein Folder, Box 30, Emergency Committee Records.

123. Max Rheinstein, Curriculum Vitae, *supra* n. 119.

124. Tracy Kittredge to Sydnor Walker, June 19, 1934, Folder 312, Box 22, Series 200, RG 1.1, Rockefeller Foundation Archives, RAC.

125. See Richard Powell to Harry Bigelow, Feb. 14, 1934, Folder 312, Box 22, Series 216S, RG 1.1, Rockefeller Foundation Archives, RAC.

126. See Karl Llewellyn to Harry Bigelow, Apr. 14, 1934, Folder 3, Box 6, University of Chicago - Appointments, 1925-1940 File, University of Chicago Archives (hereinafter "University of Chicago Appointments Records").

127. Richard Powell to Harry Bigelow, Feb. 14, 1934, *supra* n. 125.

his interest is truly comparative; (and) he already has a solid foundation in our own legal system.”¹²⁸ Professors directed similar arguments toward the Rockefeller Foundation and the Emergency Committee. Chamberlain advised that Rheinstein was “the one” German scholar who “is really sought after quite eagerly by people here, not out of any sense of compassion for his difficult position at home, or any hostility to the Nazi government and its ways, but because of the contribution which it is believed he can make to our private laws.”¹²⁹

As with the Yale Law School faculty, symbolic and political motives had not moved Bigelow to recruit a displaced scholar. If he was going to hire an émigré, that individual would have to be a competent instructor in American as well as foreign law.¹³⁰ The Columbia faculty’s letters were sufficiently convincing on this point that Bigelow requested a grant on Rheinstein’s behalf,¹³¹ and the relief agencies supplied a one-year stipend.¹³² Rheinstein’s position at Chicago meant he did not have to return to Germany, at least not right away. On the other hand, no promises were made of a permanent appointment. Announcing Rheinstein’s retention in his annual report for the 1933–1934 academic year, Bigelow characterized Rheinstein as merely a “temporary member” of the faculty, and noted that the Comparative Law and Civil Law courses the German would teach at Chicago were “not of an immediately utilitarian nature.”¹³³

Another young Rockefeller Fellow arrived at Yale Law School from Germany as the 1934–1935 academic year began. Before coming to America, Friedrich Kessler had been a reporter on American law at the Kaiser Wilhelm Institute of Foreign and International Private Law and a *privatdozent* at the Berlin Handelshochschule.¹³⁴ An “unblemished Aryan” himself,¹³⁵ in 1930 Kessler had married a Jewish

128. Karl Llewellyn to Harry Bigelow, Apr. 14, 1934, *supra* n. 126.

129. J.P. Chamberlain to Dr. Alfred E. Cohn, May 16, 1934, Rheinstein Folder, Box 30, Emergency Committee Records.

130. In October 1933, Bigelow listed the factors he considered important in evaluating a displaced scholar: (1) “The fields of law in which he has specialized”; (2) “The completeness of his common law training”; (3) “His interest in social and economic problems”; (4) “His ability as a teacher”; (5) “His adaptability and social characteristics”; (6) “His personal appearance”; and (7) “His command of English.” Harry Bigelow to Edwin Borchard, Oct. 9, 1933, *supra* n. 72.

131. Sydnor Walker to John Van Sickle, June 5, 1934, Folder 312, Box 22, Series 200, RG 1.1, Rockefeller Foundation Archives, RAC.

132. See Special Research Aid Fund – European Scholars, Oct. 3, 1934, Folder 312, Box 22, Series 216S, RG 1.1, Rockefeller Foundation Archives, RAC (announcing a Rockefeller Foundation grant of \$1,500).

133. The University of Chicago Law School, *The University of Chicago Law School: The Progress of the Law School, 1933–1934* 1 (1934).

134. Curriculum Vitae, Kessler Folder, Box 19, Emergency Committee Records.

135. Otto Kahn to Stephen Duggan, Oct. 19, 1933, Kessler Folder, Box 19, Emergency Committee Records.

woman.¹³⁶ His wife's ethnicity, Kessler thought, was the only possible explanation for why his once-promising career suddenly went awry. Although frequently nominated for a full professorship at a German university, he was never awarded such a post. Government pressure also induced a German publisher to withdraw an offer it had made Kessler to edit an important treatise.¹³⁷

Kessler resolved to leave Germany soon after Hitler's ascendancy. His areas of expertise and interest directed him toward the United States and Great Britain. He searched for a position in these countries throughout 1933, with no success.¹³⁸ Increasingly desperate to leave Germany, the next year Kessler accepted a one-year Rockefeller Foundation fellowship for study and research in the United States.¹³⁹ Kessler left Germany ahead of schedule to avoid a loyalty oath the government wanted to administer to him before his departure.¹⁴⁰ It was originally thought that Kessler, like Rheinstein before him, would spend his year at the Columbia and Harvard Law Schools. Soon after his arrival, however, Kessler met with Underhill Moore at Yale and agreed to collaborate with him on a comparative study of German and American banking laws, and to help Moore edit a book on banking law.¹⁴¹

As Rheinstein had at Columbia, Kessler put his best foot forward at Yale.¹⁴² And, again like Rheinstein, midway through his fellowship Kessler received disturbing news from Germany. In January 1935, he was informed that a new law now authorized the German Minister of Culture to dismiss *privatdozents* "in the interests of the university," and barred individuals married to non-Aryans from the positions created by the dismissals.¹⁴³ Although not dismissed himself, Kessler believed that this edict sounded the death knell for his academic career in Germany.¹⁴⁴ Reciting the letter's contents, Kessler told the Rockefeller Foundation and his new acquaintances at Yale of his predicament, adding that he hoped to remain in the United States if at all possible.¹⁴⁵

136. J.L. Pimsleur, "Friedrich Kessler," *S.F. Chron.*, Feb. 4, 1998, at 19.

137. Interview, Jack Radey with Friedrich Kessler, undated transcript, at 33 (on file with author) (hereinafter "Transcript") (courtesy the Kessler Family).

138. See Otto H. Kahn to Stephen Duggan, Oct. 19, 1933, *supra* n. 135.

139. Friedrich Kessler Fellowship Card, RF RG 10 F/S Recorder Cards, Room 103, Drawer 1, Rockefeller Foundation Archives, RAC.

140. Transcript, *supra* n. 137, at 34.

141. Friedrich Kessler Fellowship Card, *supra* n. 139.

142. See Charles Clark to James Angell, May 29, 1935, Folder 1252, Box 121, Angell Presidential Records.

143. Friedrich Kessler to Stacy May, Jan. 28, 1935, Kessler Folder, Box 19, Emergency Committee Records.

144. Friedrich Kessler to E.R. Murrow, Jan. 14, 1935, Kessler Folder, Box 19, Emergency Committee Records.

145. See Charles Clark to Stacy May, Jan. 19, 1935, Folder 4972, Box 418, Series 200, RG 1.1, Rockefeller Foundation Archives, RAC; Friedrich Kessler to Stacy May,

Most Yale professors responded positively. By retaining Kessler, the Law School could satisfy the vague obligation toward the German scholars sensed by Clark a year before. More important, Kessler had in just a few months already demonstrated that he could become a useful member of the faculty.¹⁴⁶ With only Arthur Corbin dissenting – a far greater show of enthusiasm than that exhibited vis-à-vis Levy one year before – in May 1935 the Law School's Board of Permanent Officers authorized Clark to negotiate with relief agencies to secure grants for Kessler.¹⁴⁷

It took some time to arrange the necessary funding. Kessler could still return to his previous position in Germany. The Rockefeller Foundation's German advisor, trying to staunch the flow of moderate intellectuals out of the country, strenuously argued that Kessler was not, technically speaking, a displaced scholar.¹⁴⁸ In addition, as they struggled to preserve their limited resources, relief organizations had begun to insist on promises that a host institution would consider permanently appointing a displaced scholar at the end of his or her subsidized term.¹⁴⁹ (The Emergency Committee and Rockefeller Foundation would often bend this rule in the late 1930s.) In authorizing Clark to negotiate with these agencies, Yale University President James Angell had directed him not to make any such promise.¹⁵⁰ Heeding the letter if not the spirit of Angell's command, in speaking with the Rockefeller Foundation Clark hinted at (but did not explicitly promise) a permanent position should a grant issue.¹⁵¹ As an additional sign of good faith, the Yale faculty named Kessler one of its 1935–1936 Visiting Sterling Lecturers, with an attached stipend of \$350.¹⁵² These efforts succeeded in placing Kessler at Yale for a three-year period, through the 1937–1938 session.¹⁵³

Feb. 22, 1935, Folder 4972, Box 418, Series 200, RG 1.1, Rockefeller Foundation Archives, RAC.

146. See Minutes of the Board of Permanent Officers, Yale Law School, May 29, 1935, Yale University Law School Records.

147. *Ibid.*

148. Tracy Kittredge to Stacy May, May 23, 1935, Folder 4972, Box 418, Series 200, RG 1.1, Rockefeller Foundation Archives, RAC.

149. Greenberg, *supra* n. 3, at 83.

150. James Angell to Charles Clark, May 31, 1935, Folder 1252, Box 121, Angell Presidential Records.

151. Charles Clark to Stacy May, Feb. 22, 1935, Folder 4972, Box 418, Series 200, RG 1.1, Rockefeller Foundation Archives, RAC.

152. Charles Clark to Friedrich Kessler, June 3, 1935, Folder 4972, Box 418, Series 200, RG 1.1, Rockefeller Foundation Archives, RAC.

153. Special Research Aid Fund – European Scholars, June 27, 1935, Folder 4972, Box 418, Series 200, RG 1.1, Rockefeller Foundation Archives, RAC (announcing the Rockefeller Foundation's \$3,750 contribution toward Kessler's salary through 1937–38). The Emergency Committee did not agree to a three-year stipend in advance, but promised to supply what aid it could on a year-by-year basis. See E.R. Murrow to Charles Clark, June 14, 1935, Kessler Folder, Box 19, Emergency Committee Records.

Even with the subsidy, Kessler's place at Yale was at first little more secure than Rheinstein's at Chicago. Corbin perceived that Yale was becoming "an asylum for the oppressed of less tolerant nations."¹⁵⁴ In October 1935, Clark wrote Burlingham that a "certain portion of our faculty is disturbed anyhow at the attempt to assimilate foreign scholars, and I must say that the present sophisticated student body does not take to them. . . . It really is difficult, therefore, to work many of them in and provide classes and audiences for them."¹⁵⁵ When Borchard recommended a foreign scholar for a Sterling Fellowship in early 1937, Clark's secretary wrote back, "The Dean's frank opinion . . . is that we have enough of this type on our hands now."¹⁵⁶ And even though Kessler was retained for the short term because of his unique experience with comparative commercial law,¹⁵⁷ Yale's tepid reaction to Levy just a year before had unmistakably demonstrated that expertise in foreign law alone would not support a refugee's permanent appointment.

As further evidence of this last point, Kessler could look to Yale's dealings with Loewenstein. One of the first displaced professors to arrive in the United States, Loewenstein believed that the "scientific reputation" of German scholarship had brought about his invitation to Yale.¹⁵⁸ This reputation aided him little once he came to America. Despite having been recruited to teach political science courses, Loewenstein considered himself a law professor, not a political scientist.¹⁵⁹ At the same time, Loewenstein was unfamiliar with the case-study method, and (like many other German public-law scholars) his areas of expertise were difficult to fit into the law school curriculum

154. Arthur Corbin to Members of the Governing Board of Yale Law School, Feb. 8, 1935, Folder 1252, Box 121, Angell Presidential Records.

155. Charles Clark to Charles C. Burlingham, Oct. 29, 1935, Folder 231, Box 79, Records of the Yale Law School Dean. In the fall of 1935, Stephen Kertesz – a Hungarian scholar, though not a displaced one – came to Yale Law School as a Rockefeller Fellow. Wesley Sturges to Dr. Joseph Willits, Oct. 6, 1948, Folder 4971, Box 419, Series 200, RG 1.1, Rockefeller Foundation Archives, RAC. Around the same time, the school provided office space to Richard Thurnwald, a German anthropologist known to the faculty through a prior Rockefeller Fellowship. Yale Law School Faculty Minutes, Oct. 3, 1935, Yale University Law School Records. In 1936, Hans von Hentig came to Yale to work with Professors Borchard and George Dession; he left in early 1937. See George Dession and Edwin Borchard to Dean Marion Rice Kirkwood, Stanford University Law School, Feb. 9, 1937, Folder 427, Box 37, Series II, Borchard Papers; Edwin Borchard to Hans von Hentig, March 8, 1937, Folder 429, Box 38, Series II, Borchard Papers.

156. Adele Hadley to Edwin Borchard, Jan. 16, 1937, Folder 426, Box 37, Series II, Borchard Papers.

157. See Charles Clark to James Angell, May 29, 1935, *supra* n. 142.

158. Karl Loewenstein to the Rockefeller Foundation, Jan. 10, 1934, *supra* n. 43.

159. See Karl Loewenstein to Julian Mack, Feb. 18, 1936, 1934–36 Correspondence Binder, Box 8, Loewenstein Papers (explaining that an appointment at Amherst College's Political Science Department "would remove me from the field of law in which I am most interested").

— even Yale's eclectic menu of courses.¹⁶⁰ Powerful faculty members at the Law School, already aggrieved by the modest curricular extensions adopted in the 1920s and 1930s, had no desire to see their institution devolve from an elite professional training ground into (in Corbin's words) a "second rate school of 'political science'."¹⁶¹ Even Arnold agreed that such a result, which "would be disapproved of by every one," could conceivably result from a concentration of "general and theoretical courses on administrative and constitutional law."¹⁶²

Loewenstein thus had an uphill battle to prove his worth to the law faculty. Soon after his arrival at Yale, he began to audit Borchard's classes.¹⁶³ He and Arnold developed a Comparative Judicial Procedure seminar.¹⁶⁴ These efforts made Loewenstein friends with several Yale Law School professors,¹⁶⁵ and caused him to be invited to faculty meetings.¹⁶⁶ Particularly once Kessler arrived, however, Yale did not seriously consider hiring Loewenstein.¹⁶⁷ After a long job search, Loewenstein — like many other displaced German public-law scholars — would find a permanent position only at an American college's political science department (at Amherst), not one of the country's law schools.¹⁶⁸

Kessler and Rheinstein managed to avoid Loewenstein's fate by developing diversified expertise extending beyond comparative law. Rheinstein taught Comparative Law at Chicago; his first justification for this course was the pragmatic rationale that comparative study would "help the students to understand their own law better and clearer."¹⁶⁹ Significantly, soon after his arrival Rheinstein also con-

160. Markus Lang develops a variation of this point, arguing that Loewenstein was caught in the middle of internecine warfare between legal realists and other members of the Yale Law School faculty. "Juristen unerwünscht," — *Jahrbuch Politisches Denken* (forthcoming 2002).

161. Arthur Corbin to Underhill Moore, undated memo (likely 1937), CH Folder, Box 20, Underhill Moore Papers (RG 356), Yale University Archives (hereinafter "Moore Papers"). See also Laura Kalman, *Legal Realism at Yale 1927–1960*, 138 (1986) (discussing the conflict between Corbin and Arnold).

162. Thurman Arnold to Arthur Corbin, Dec. 14, 1937, Law School Administration (Dean, Registrar, Etc.) Folder, Box 21, Moore Papers.

163. See Edwin Borchard to Karl Loewenstein, Jan. 17, 1934, Folder 365, Box 32, Series II, Borchard Papers.

164. Yale Law School Faculty Minutes, Apr. 26, 1934, Yale University Law School Records.

165. Charles Clark to Henry Bates, Jan. 8, 1936, Folder 231, Box 79, Records of the Yale Law School Dean.

166. Ashbel Gulliver to Karl Loewenstein, Sept. 26, 1934, Folder 4, Box 25, Loewenstein Papers.

167. See E.S. Furniss to Sydnor Walker, Apr. 17, 1935, Folder 4978, Box 419, Series 200 RG 1.1, Rockefeller Foundation Archives, RAC.

168. Karl Loewenstein to Stanley King, Mar. 3, 1936, 1934–1936 Correspondence Binder, Box 8, Loewenstein Papers.

169. Max Rheinstein, Outline of a Course in Comparative Civil Law 2 (undated memorandum, probably 1936), Max Rheinstein Folder, Box 5, University of Chicago Law School Records Addenda 95–87, University of Chicago Archives (hereinafter "University of Chicago Law School Records Addenda").

vened the Law School's Family Relations and Introduction to Law (the latter co-taught with Bigelow).¹⁷⁰ This flexibility impressed Bigelow, who spoke of Rheinstein's "cooperative and adaptable spirit."¹⁷¹ Bigelow nominated Rheinstein for membership in the Quadrangle Club¹⁷² and resolved to offer him a more secure position once finances permitted.¹⁷³ In making the case for this appointment to administrators, Bigelow wrote that Rheinstein "has very much more than a knowledge of continental law. His acquaintance with certain branches of the Common Law is wide and accurate."¹⁷⁴ Not long after Rheinstein's arrival, a substantial bequest allowed the University of Chicago to award him a professorship.¹⁷⁵ Viewing these events from just a few miles to the north, Northwestern's John Wigmore remarked to one foreign applicant for a teaching position that Rheinstein had earned his position only because he had "made himself a master of American Law."¹⁷⁶ Such mastery was essential, Wigmore wrote, because "[t]he fact is that the Faculties of Law are already pretty well crowded and that the exclusive subjects of instruction must be American subjects of law, and there are available plenty of American teachers."¹⁷⁷

Kessler's career path continued to track Rheinstein's. In only his second year in New Haven, Kessler co-taught Comparative Law with Ernest Lorenzen and Commercial Bank Credit with Moore.¹⁷⁸ Colleagues praised his teaching skills and his scholarship.¹⁷⁹ When Moore fell ill in 1936, Kessler's teaching responsibilities grew.¹⁸⁰ In

170. Max Rheinstein, Supplementary Report on Work done under the Max Pam Professorship from January 1, 1936 to June 1938 1 (1938) Max Rheinstein Folder, BHS, Law School, Records Addenda.

171. Harry Bigelow to Frederic Woodward, Mar. 27, 1935, Folder 3, Box 6, University of Chicago Appointments Records.

172. Harry Bigelow to Arthur Dempster, Dec. 14, 1934, Max Rheinstein Folder, Box 5, University of Chicago Law School Records Addenda.

173. Harry Bigelow to James Stifler, Apr. 9, 1935, Folder 3, Box 6, University of Chicago Appointments Records.

174. Harry Bigelow to Frederic Woodward, Mar. 27, 1935, *supra* n. 171.

175. John Whyte to James Stifler, May 21, 1936, Max Rheinstein Folder, Box 30, Emergency Committee Records. Relief agencies contributed toward Rheinstein's salary through 1936–1937, however. Special Research Aid Fund – European Scholars, Apr. 26, 1935, Folder 312, Box 22, Series 216S, RG 1.1, Rockefeller Foundation Archives, RAC (announcing \$3,000 grant for Rheinstein's salary through 1936–1937).

176. John Wigmore to Tullio Liebman, Sept. 28, 1938, Folder 5, Box 57, John Wigmore Papers, Northwestern University Archives (hereinafter "Wigmore Papers").

177. *Ibid.*

178. Ernest Lorenzen to John Whyte, Apr. 30, 1936, Kessler Folder, Box 19, Emergency Committee Records; Underhill Moore to Stephen Duggan, May 2, 1936, Kessler Folder, Box 19, Emergency Committee Records.

179. See, e.g., Roscoe Steffen to John Whyte, Apr. 30, 1936, Kessler Folder, Box 19, Emergency Committee Records; Underhill Moore to Harry Kalven, Sept. 24, 1937, CH Folder, Box 20, Moore Papers.

180. See Friedrich Kessler to Underhill Moore, Dec. 14, 1936, K Folder, Box 21, Moore Papers; Underhill Moore to Hessel Yntema, Feb. 10, 1940, XYZ Folder, Box 23, Moore Papers.

planning for the 1938–1939 year, Yale slated Kessler to teach, if necessary, Commercial Bank Credit, Maritime Law, Sales, Negotiable Instruments, and Comparative Law.¹⁸¹ Though not an exceptional course load for a junior faculty member of the era, the delegation of these duties to Kessler was rather remarkable in light of Clark's views regarding foreign scholars' usefulness.¹⁸² In Kessler's case, it was plain that he was an effective teacher. In 1937, 114 students in Kessler's Negotiable Instruments class presented the Yale Law School faculty with a petition commending his teaching and urging Yale to hire him permanently.¹⁸³ Soon thereafter, Yale named Kessler an assistant professor.¹⁸⁴ Kessler accepted the ultimate compliment not long thereafter – a competing job offer at a much higher salary.¹⁸⁵ Kessler accepted the University of Chicago Law School's proposal, and was on his way to a long and successful teaching career in America.

IV.

Kessler and Rheinstein represented the two most obvious success stories among displaced scholars. Their experiences were far from typical. Both of these men were uniquely skilled and, because of their prior experience with American law, distinctly advantaged. Even as Kessler and Rheinstein found their places in American academia, forces were at work that increasingly predisposed U.S. law professors against accepting foreign jurists, and particularly older scholars, as peers. This article has already discussed one of these developments, namely the travails of Nussbaum and Laun. Their struggles suggested that among the refugees, the younger scholars were the better bet to become useful contributors to American scholarship and the day-to-day work of operating a law school. As retaining a foreign jurist was perceived less and less as a costless, short-term favor, this teaching became increasingly important. Yet this was just one of several influences altering American attitudes toward the deposed scholars during the latter half of the 1930s.

Most important, American academia devoted great energy during this period to the formulation of an intellectual and, more fundamentally, cultural response to the crisis overseas. The reply eventually adopted by American law professors led away from the

181. Tentative List of Courses, 1938–39, Law School Administration (Dean, Registrar, Etc.) 1936–38 Folder, Box 21, Moore Papers.

182. See text accompanying note 63, *supra*.

183. Transcript, *supra* n. 137, at 35; Yale Law School Faculty Minutes, June 17, 1937, Yale University Law School Records.

184. Minutes of the Board of Permanent Officers, Yale Law School, Oct. 28, 1937, Yale University Law School Records; Friedrich Kessler to Betty Drury, Feb. 4, 1938, Folder 4972, Box 418, Series 200, RG 1.1, Rockefeller Foundation Archives, RAC.

185. Friedrich Kessler to Stacy May, June 22, 1938, Folder 4972, Box 418, Series 200, RG 1.1, Rockefeller Foundation Archives, RAC.

Continental example. In 1930, Smith had said, "the similarities between the civil and the common law systems . . . are more striking than their differences."¹⁸⁶ Smith had drawn this inference after observing "the many similarities in other phases of the culture of western Europe and of the United States."¹⁸⁷ But just a few years later, America and Germany seemed animated by very different principles. The Nazis' constricting grasp was twisting German higher education into a mouthpiece for their views.¹⁸⁸ Through a combination of law and lawlessness the Nazis were intensifying their persecution of minorities and dissidents. Smith's logic now suggested that the American and Continental legal systems, like their cultures, were quite different indeed. American law professors, meanwhile, strained to identify and support those aspects of their system that would ensure what was happening in Germany would not be repeated here.

A visceral negative response to all things German represented the bluntest, though also the least prevalent, manifestation of American legal academia's response to the foreign crisis. Landis spoke to such sentiments when he advised one foreign applicant for a teaching position in 1940 that, insofar as the difficulty involved with placing foreign scholars at U.S. schools was concerned, "Recent events in Europe indicate that this problem will become more serious than otherwise and that it will also be exaggerated by a sense of hostility towards any person whose nationality is German."¹⁸⁹

American law professors also sought to identify and cordon off democracy-enhancing legal philosophies. Motivated by a belief that although foreign philosophers had much to say, it was also true that "Americans already have developed theories and philosophies of law worthy of serious attention," *My Philosophy of Law: Credos of Sixteen American Scholars* was published in 1941.¹⁹⁰ Many American professors also put the imprimaturs of their institutions on denunciations of the Nazis, as when in fall 1938 the law faculties at schools such as Yale, Chicago, Michigan and the University of California — Berkeley unanimously joined a petition circulated by the University of Amsterdam implicitly protesting German oppression.¹⁹¹

186. Smith, *supra* n. 22, at 106.

187. *Id.* at 103.

188. See Max Rheinstein, "Law Faculties and Law Schools: A Comparison of Legal Education in the United States and Germany," 1938 *Wisc. L. Rev.* 1, 29 (1938).

189. James Landis to Maximilian Koessler, June 24, 1940, German Refugees — Applications H-K Folder, Box 4, Harvard Law School Dean's Subject Files.

190. Julius Rosenthal Foundation, *My Philosophy of Law* vii (1941).

191. Yale Law School Faculty Minutes, Dec. 1, 1938, Yale University Law School Records; University of Chicago Law School Faculty Minutes, Dec. 1, 1938, University of Chicago Archives; University of Michigan Law School Faculty Minutes, Dec. 2, 1938, University of Michigan Archives; Telegram from School of Jurisprudence, University of California — Berkeley, to Law Faculty, University of Amsterdam (undated, probably December 1938), Jurisprudence-1938 Folder, Box 451, Series 2, CU-5, Uni-

Part of establishing what democratic values and approaches were, of course, involved defining what they were not. In the mid- and late 1930s, American academics denounced strains of both legal realism and Continental philosophy they considered morally rudderless and conducive to totalitarianism.¹⁹² One contributor to *My Philosophy of Law*, Walter Kennedy of Fordham Law School, equated the realists' supposed approach with that of all German scholars:

I sometimes suspect that those who would remove all concepts and all ideals from the field of law, fail to think through the results and consequences of their goose-step philosophy. I wonder if they realize just where this logic leads when it is carried out to the last degree. This act-first-and-explain-later formula is certainly the dominant objective both in pragmatic and realist philosophies of law. It is likewise a dominant factor in the jurisprudence of the dictator nations. "Law," says a German jurist, "is that which is useful to the German nation." "Law," says another Nazi interpreter of the law, "is what Aryan men consider as law."¹⁹³

Likewise, when in 1940 the AALS Committee on Modern Legal Philosophy made plans to translate selected writings of certain European scholars (including Kelsen) into English, one committee member, James Kearney, strongly disagreed with the decision to translate some "dangerous works."¹⁹⁴ In a minority report read to the AALS's House of Delegates, he said, "In my opinion, it is definitely not the function of any committee of the Association of American Law Schools to make readily available and to disseminate philosophies of law that are affirmatively contrary to tr[aditional] American jurisprudence."¹⁹⁵ He continued, "It seems patently absurd that the Association of American Law Schools should foist such destructive

versity of California President's Office Correspondence and Papers, University of California – Berkeley Archives.

The Yale Law School faculty made a similar protest in 1940, in response to a speech by Columbia University President Nicholas Butler that was perceived as threatening academic liberties. The faculty prepared a resolution providing:

The community among scholars transcends separation of the universities in which they work for their common goal of advancement of knowledge. Members of one university faculty cannot be isolationist with respect to academic freedom for their colleagues in other faculties. . . . In times of stress especially, universities must safeguard the value of academic freedom not only to perform their function in our culture but to set an example of tolerance and freedom in a democracy.

Yale Law School Faculty Minutes, Oct. 17, 1940, Yale University Law School Records.

192. See, e.g., Lon Fuller, *The Law in Quest of Itself* 118–19 (2d ed. 1966); Edward A. Purcell, Jr., "American Jurisprudence between the Wars: Legal Realism and the Crisis of Democratic Theory," 75 *Am. Hist. Rev.* 424, 438–46 (1969).

193. Walter B. Kennedy, "Walter B. Kennedy," in *My Philosophy of Law*, supra n. 190, at 152.

194. 38 *Handbook of the Association of American Law Schools* 140 (1941).

195. *Id.* at 139–40.

philosophies of law upon the unsuspecting bar of the United States.”¹⁹⁶ Similar views also may have motivated some American professors’ resistance to increased instruction in civil law.¹⁹⁷

It seems likely that some displaced scholars were caught in the downdraft induced by the backlash against positivist and realist jurisprudence.¹⁹⁸ This was an overly facile reaction. Knowledgeable American professors who were philosophically at odds with German positivism nevertheless campaigned on the refugees’ behalf,¹⁹⁹ and some displaced scholars were powerful critics of both nihilistic realism and the Nazi regime.²⁰⁰ At the time, though, only sixteen of sixty-six schools surveyed by the AALS in 1933 even offered a jurisprudence course,²⁰¹ much less had a professor devoted solely to jurisprudence. In such an environment, the broadside charge that foreign scholars advocated, or at least were influenced by, legal theories dangerous to democracy was a powerful and persuasive accusation. At a minimum, the refugees and their advocates were forced into a defensive posture. In recommending Hans Kelsen for an appointment at the University of Illinois Law School in 1939, Wigmore was forced to volunteer that the Austrian was of a “philosophic temperament and in no sense a propagandist.”²⁰²

In a related manifestation of their desire to protect and celebrate the American approach, U.S. law professors rallied around the training of effective lawyer-citizens as their paramount goal and purpose.

196. *Id.* at 140.

197. A telling exchange took place in March 1940. In January of that year, the American Bar Association House of Delegates had approved a resolution providing that it was “most desirable for each subject in the law school curriculum to be coordinated by the respective instructors, so far as practicable, with cognate subjects in the modern civil law, so that in treating important common law principles and rules the cognate material in the modern civil law will be correlated and compared.” In March, the ABA’s Executive Secretary forwarded this resolution to University of Pennsylvania Law School’s Herbert Goodrich. Olive Ricker to Herbert Goodrich, Mar. 25, 1940, Faculty Matters, 1931–1942 Folder, Box 8, UPB 6.41 (Law School Dean’s Records), University of Pennsylvania Archives (hereinafter “University of Pennsylvania Law School Dean’s Records”). Goodrich curtly replied that the resolution was “about as crazy a thing as I ever heard.” Goodrich to Ricker, Mar. 28, 1940, Faculty Matters, 1931–1942 Folder, Box 8, University of Pennsylvania Law School Dean’s Records.

198. Cf. Robert Neuner to Ernest Lorenzen, Feb. 13, 1939, Neuner Folder, Box 26, Emergency Committee Records (acknowledging concerns among the Yale Law School faculty that he would be a “disturbing element”); James Landis to Maximilian Koessler, June 24, 1940, *supra* n. 189.

199. See, e.g., John Dickinson to Edwin Reedy, Aug. 5, 1940, Refugees 1939–1945 Folder, Box 13, University of Pennsylvania Law School Dean’s Records (urging that special consideration be given to finding Hans Kelsen a position in the United States).

200. See, e.g., Karl Loewenstein, “Legislative Control of Political Extremism in European Democracies II,” 38 *Colum. L. Rev.* 725, 774 (1938); Purcell, *supra* n. 192, at 438 (describing Edgar Bodenheimer’s critique of realism).

201. Report of the Committee on Curriculum, *supra* n. 18, at 148, 153.

202. John Wigmore to Albert Harno, Jan. 20, 1939, Folder 4, Box 57, Wigmore Papers.

As recently as the late 1920s, neither Yale Law School nor Columbia Law School, both of which critics charged were adrift in "a fog of 'legal science',"²⁰³ had identified professional training as its primary purpose.²⁰⁴ But by the mid-1930s drastic cuts in research budgets, the development of the federal government as a source of jobs for graduates, and the perceived threat to democratic institutions all caused law schools to reject certain "scientific" approaches toward legal study as either too technical or too abstract, and to adopt in their place Conant's university-wide goal of producing "well-rounded, intelligent and useful citizens."²⁰⁵ It became accepted that, as Sidney Post Simpson wrote in a 1938 article describing Harvard Law School's revised curriculum, "The public character of the lawyer's function and the duty of the university law school to communicate to its students a sense of responsibility and the ideals of what should be a profession of justice cannot be too much stressed."²⁰⁶

Other prominent U.S. law professors also began to speak to an unmet need to produce properly civic-minded Americans. Delivering the keynote speech at the 1940 AALS annual meeting, Simpson's colleague, Edmund Morgan, asked his peers, "How many of us have been entirely satisfied with training men to become good craftsmen and skilled technicians? Hasn't the time come when we, in common with other educators, should take new thought of our objectives?"²⁰⁷ He continued, "When so many of us see that what we have always taken for solid rock is crumbling like sand, is it not time for a re-examination of our premises? Must we not determine what we consider fundamental values in any really civilized society, and build thereon for the changing order?"²⁰⁸ Anticipating Morgan's questions, professors at the University of Chicago believed that within the law school, "American institutions of democracy need to be stated in definite terms as to their content, meaning, their expressions in action, the participation possibilities by individuals, the distortions and abuses of these principles, and the results thereof."²⁰⁹ At Northwestern, Green wrote the University's vice president in 1938 that, "To think of a law school, the study of law, a law school faculty worth its

203. Alfred Z. Reed, *Review of Legal Education in the United States and Canada* 13 (1930).

204. Alfred Z. Reed, *Legal Education 1925-1928* 11 (1930).

205. James B. Conant, "The Future of Our Higher Education," in James B. Conant & Frances T. Spaulding, *Education in a Classless Society* (1940), quoted in Greenberg, *supra* n. 3, at 111.

206. Sidney Post Simpson, "The New Curriculum of the Harvard Law School," 51 *Harv. L.R.* 965, 983 (1938).

207. Edmund Morgan, Address to the Annual Meeting, Association of American Law Schools (Dec. 27, 1940), in 38 *Handbook of the Association of American Law Schools* 14, 16 (1941).

208. *Ibid.*

209. George Fairweather to Robert Hutchins, Nov. 8, 1937, Folder 3, Box 113, University of Chicago President's Papers.

salt, and not to think of the government problems of today and the ones coming tomorrow is impossible. Also to think of a lawyer without thinking of courage, free speech and tolerance is impossible.”²¹⁰ A few years later, Yale Law School’s Myres McDougal and Harold Lasswell would both sum up these sentiments and take them one step further in a famous *Yale Law Journal* article. “The proper function of our law schools is,” they wrote, “in short, to contribute to the training of policy-makers for the ever more complete achievement of the democratic values that constitute the professed ends of American polity.”²¹¹

This sentiment more often manifested itself in internal memoranda, speeches and law-review articles than in substantive curricular changes. The preferred approach followed Simpson’s advice that “imparting of such moral education must proceed indirectly and interstitially but always pervasively in each law teacher’s instruction and in his relations with his students.”²¹² The University of Chicago went further than most other schools with its “New Plan” for the curriculum, “designed not only to prepare students for professional activities as advocates and counselors on legal matters, but also to prepare them for judicial, legislative and administrative positions.”²¹³ Even in the post-World War II era, critics would maintain that law schools were still not doing enough to train students for public service.²¹⁴ Aligning the law-school curriculum toward this goal was a difficult and delicate task, though. On the one hand, American law professors wanted to inculcate democratic values in their charges; on the other, these scholars had no desire turn the law-school experience into a lengthy civics lesson or, as Corbin stated, a second-rate education in political science.

And so instead of overhauling law schools’ curricula, American educators preferred to posit that legal education in their country already came close to its goal of producing properly directed counselors and required only marginal improvement. In making this argument, these scholars often compared the educations received by American and Continental law students. In such comparisons, the foreign programs always came up short.²¹⁵ As Landis wrote in 1940, “Additional

210. Leon Green to Northwestern University Advisory Committee (1938), Folder 3, Box 29, Green Papers.

211. “Legal Education and Public Policy: Professional Training in the Public Interest,” 52 *Yale L. J.* 203, 206 (1943). See also Kalman, *supra* n. 161, at 178–79; Neil Duxbury, *Patterns of American Jurisprudence* 176–82 (1995).

212. Simpson, *supra* n. 206, at 983.

213. The University of Chicago, *Announcements of the University of Chicago: The Law School for the Sessions of 1937–1938* 3 (1937).

214. See generally Esther Lucile Brown, *Law Schools and the Public Service* (1948) (developing this critique).

215. Cf. Karl Llewellyn, “On What is Wrong With So-Called Legal Education,” 35 *Colum. L. Rev.* 651, 657 (1935) (asserting that German legal education was “over-theoretical” and “second-rate, or third” compared to American schooling). Interest-

instruction in Jurisprudence, Roman Law or Comparative Law" – not coincidentally the three subjects most closely associated with refugee scholars – "will never make up for an incapacity to express oneself or for an inability to think with precision and direction."²¹⁶ Such charges built upon longstanding criticisms of German scholarship (and, to some extent, legal realism), attacks acknowledged and seconded by Riesenfeld in a 1937 *Michigan Law Review* article:

The whole trend of the continental law school education appears more academic and less practical, at least less technical, than that in American law schools. Good professors try to avoid everything that resembles the 'trade school spirit.' . . . This has the effect that not seldom the professor loses himself in theoretical speculations which are important only to him, and do not interest the student, and which are particularly boring because there is little contact between class and professor by reason of the lecture method. Thus the legal issues seem more abstract, and sometimes the students get the impression that mere theoretical philosophy is being taught to them, the real implications of which vanish from their eyes."²¹⁷

This type of criticism of Continental academia naturally worked to the displaced scholars' detriment. The practical tone and nationalistic bent of American legal education's new direction, meanwhile, meant a smaller role for foreign educators. Foreign law professors were generally deemed unfit to provide students with the "cultural education" law schools were now considered themselves responsible for providing.²¹⁸ For example, the late 1930s witnessed some growth in the number of jurisprudence courses offered by law schools.²¹⁹ But because of the indictment of Continental jurisprudence, foreign schol-

ingly, a value-directed education toward the purpose of training students for civic service mirrored the traditional goals of German legal education. See David S. Clark, "Tracing the Roots of American Legal Education: A Nineteenth-Century German Connection," in *51 Rabels Zeitschrift für Ausländisches und Internationales Privatrecht* 313, 321 (1987).

216. James Landis, "Law School," 37 *Official Register of Harvard University* (March 30, 1940) 224, 232.

217. "A Comparison of German and American Legal Education," 36 *Mich. L. Rev.* 31, 46 (1937). See also John Wigmore to Margaret Hordyk, Nov. 26, 1941, Folder 6, Box 57, Wigmore Papers (describing German style as "awkward and loosely abstract").

218. Albert J. Harno to the Law Alumni, University of Illinois, April, 1940, Folder 890, Box 214, Series III, RU 49, RG-A, Secretary's Office Records 1899-1953, Yale University Archives.

219. Only two of the sixty-six law schools surveyed by the AALS in 1933 included jurisprudence in the first-year curriculum. Report of the Committee on Curriculum, *supra* n. 18, at 18. Of the seventy-nine schools surveyed by Yale in 1940, ten included jurisprudence in their first-year curricula. Memorandum from the Yale Law School Curriculum Committee, *Changes in the Curriculum: A Survey of Other Schools*, *supra* n. 37, at 3.

ars were essentially shut out from the positions created by this curricular development. In 1936, John Wigmore wrote, "I have quite given up hope of finding any openings for any more of the foreign exiles — especially in the line of legal philosophy, there seems to be no chance at all."²²⁰ At Columbia, in 1938 University President Nicholas Butler and Smith conferred regarding the school's new Cardozo chair in jurisprudence. Smith wrote Butler, "we are not likely to find our man among the German or French scholars. . . . No man, in my opinion, could successfully do what Justice Cardozo had in mind, unless he was thoroughly familiar with Anglo-American Law."²²¹ Butler replied, "We have plenty of time to choose our new Professor of Jurisprudence and we must search the English-speaking world for the best possible man."²²²

V.

These trends were well-developed by the time a second, significantly larger "wave" of refugees sought entry into the American academic establishment. Forced not only from Germany but also Austria, Czechoslovakia, and then the rest of Europe,²²³ for many of these individuals a job offer from an American institution was literally a lifesaver. Under U.S. immigration law, a person coming to America to accept a teaching position typically was exempted from the immigration quota applicable to their country of residence.²²⁴ As the persecution of minorities intensified in Europe, these exemptions offered an escape route from increasingly dangerous places. For foreign jurists, however, job opportunities in America were scarce. In particular, older, well-established scholars — once the group most in demand among U.S. law schools — found it very difficult to find places in American academia, in part because they were closely associated with a German legal system and academic approach that, in Americans' eyes, had plainly failed.

220. John Wigmore to Isaac Husik, Nov. 21, 1936, Folder 2, Box 57, Wigmore Papers.

221. Columbia University Archives — Columbian Library, Central Files, Young Smith to Nicholas Butler, July 21, 1938.

222. Columbia University Archives — Columbian Library, Central Files, Nicholas Butler to Young Smith, July 23, 1938.

223. Greenberg, *supra* n. 1, at 72-73.

224. The law excluded from the quotas:

an immigrant who continuously for at least two years immediately preceding the time of his application for his admission to the United States has been, and seeks to enter the United States solely for the purpose of, carrying on the vocation of . . . professor of a college, academy, seminary, or university, and his wife, and his unmarried children under 18 years of age, if accompanying or following to join him.

Law of May 26, 1924, ch. 190, §4, 43 Stat. 155 (repealed 1952). See also Roger Daniels, *Coming to America* 298 (1990).

This second influx included several prominent European law professors. These jurists were among the most handicapped by recent developments in American legal academia. Hans Kelsen had been dismissed from his position in Germany under the Civil Service Law. Soon thereafter, he left Germany for appointments in Geneva and Prague.²²⁵ In 1938, German encroachment caused Kelsen to ask friends in the United States for help in finding him a teaching position at an American university.²²⁶ For more than a year, no doors opened for a man regarded by Wigmore and Pound as the leading jurisprudent of his generation.²²⁷ The University of Chicago Law School considered Kelsen, but after a series of faculty votes it agreed only to offer him a one-year appointment, with the prerequisite that the necessary funding come from outside sources.²²⁸ In the end, Kelsen was never brought to Chicago, perhaps in part because Kessler, who by fall 1938 was on the Law School's faculty, believed Kelsen was "now somewhat sterile and perhaps had outlived his usefulness."²²⁹

Eventually, after receiving a grant from the Rockefeller Foundation for the purpose, Harvard Law School invited Kelsen to Cambridge to deliver the 1940-1941 Holmes Lectures.²³⁰ Kelsen joined two other older refugee law professors at Harvard. These men, Eberhard Bruck and Georg Petschek, had come to Cambridge through the efforts of Harvard Corporation Secretary Jerome Greene and Harvard astronomer Harlow Shapley.²³¹ Though they maintained offices at the Law School's library, at the time of Kelsen's arrival neither Bruck nor Petschek was formally associated with or paid by the Law School.²³² This was keeping with Harvard's general policy toward refugees. As Greene wrote the Rockefeller Foundation in

225. 2 International Biographical Dictionary of Central European Emigrés 1933-1945 Part I: A-K, *supra* n. 54, at 612.

226. See, e.g., Hans Kelsen to Felix Frankfurter, Oct. 11, 1938, Folder 4089, Box 344, RG 1.1, Series 200, Rockefeller Foundation Archives, RAC.

227. Pound, *supra* n. 14, at 532; John Wigmore to Albert Harno, Jan. 20, 1939, *supra* n. 202.

228. The faculty rejected proposals that Kelsen be offered a two-year or three-year subsidized appointment. University of Chicago Law School Minutes, Jan. 19, 1939, University of Chicago Archives.

229. Edward Levi to Robert Redfield, May 26, 1938, Folder 8, Box 44, University of Chicago Appointments Records (paraphrasing Kessler).

230. James Landis to Joseph Willits, Aug. 29, 1940, Folder 4089, Box 344, RG 1.1, Series 200, Rockefeller Foundation Archives, RAC.

231. See Jerome Greene to James Landis, Mar. 1, 1939, German Refugees, Applications A-B Folder, Box 4, Harvard Law School Dean's Subject Files; Harlow Shapley, Memorandum Concerning the Men for Whom Asylum Fellowships Are Planned, Dec. 1, 1939, Bruck-Bunker Folder, Box 4, Emergency Committee Records.

232. Jerome Greene to James Landis, Mar. 1, 1939, *supra* n. 231; E.M. Morgan to Hon. Edmund J. Brandon, Apr. 17, 1942, German Refugees, Applications A-B Folder, Box 4, Harvard Law School Dean's Subject Files; Marion Tomlinson to May Phares, May 12, 1944, German Refugees - Applications N-P Folder, Box 4, Harvard Law School Dean's Subject Files.

1942, "In dealing with all the European exiles now at Harvard, we lay great stress on the fact that they are not career men and must not consider themselves such."²³³ This policy applied to Kelsen as well. After delivering the Holmes Lectures (and participating in seminars led by Pound and Manley Hudson), Kelsen stayed on an extra year in Cambridge as a research associate.²³⁴ At that point, Kelsen (who wanted to remain at Harvard) again had to search for a job. Fortunately, Kelsen soon found a new position in the University of California – Berkeley's Political Science Department.²³⁵ He received a permanent position there in 1945.²³⁶

Ernst Rabel also found it difficult to find an academic post in the United States. The founder and director of the Kaiser Wilhelm Institute of Foreign and International Private Law, Rabel had been Rheinstein's and Kessler's mentor in Berlin. Rabel's eminence allowed him to retain his position longer than most other non-Aryans, but he too was eventually removed from office. The University of Chicago Law School considered inviting Rabel to join its faculty in 1935,²³⁷ but three years later it was still debating the issue.²³⁸ Concerned about his fate, in fall 1938 Rabel sent a letter to many American law professors, asking for their help in finding him a position in the United States. The letter, which aside from the notoriety of its author was not very different from several dozen others received by Borchard, Landis, and other American professors, is excerpted in pertinent part below:

When I took heart to bother you with this rather sad picture of my life, I did not want by no means to become a burden for you and to suggest your taking troublesome steps on my behalf. I only wished to ask you whether you would kindly hold an outlook for opportunities which might present themselves and could offer me a certain support for the first time after having left my country. I would only be too glad about becoming useful again in any branch of the Law . . .²³⁹

233. Jerome Greene to Joseph Willits, Apr. 17, 1942, Folder 4091, Box 344, RG 1.1, Series 200, Rockefeller Foundation Archives, RAC.

234. Harvard Law School Faculty Minutes, Apr. 15, 1941, Harvard University Archives.

235. Hans Kelsen to Roger Evans, June 8, 1942, Folder 4091, Box 344, RG 1.1, Series 200, Rockefeller Foundation Archives, RAC.

236. *2 International Biographical Dictionary of Central European Emigrés 1933-1945 Part I: A-K*, supra n. 54, at 612.

237. Harry Bigelow, Memorandum of Conversation with President Robert Hutchins, Nov. 13, 1935, Folder 10, Box 44, University of Chicago Appointments Records.

238. See Edward Levi to Robert Redfield, May 23, 1938, Folder 8, Box 44, University of Chicago Appointments Records.

239. Ernst Rabel to "Dear Colleague" (sic), Nov. 21, 1938, Folder 466, Box 41, Series II, Borchard Papers.

Still, Rabel's friends could not find him a research or teaching post.²⁴⁰ After several months of networking, Lewis of the American Law Institute coordinated a successful effort to place Rabel at the University of Michigan Law School, where he would compose a treatise on the conflict of laws.²⁴¹ When Rabel exhausted his initial stipend in 1942, Michigan provided him with a monthly allowance while he finished his work.²⁴²

Yet another well-known refugee scholar had similar difficulty making the transition from European to American academic life. With the Rockefeller Foundation's and Emergency Committee's support, in 1939 Yale Law School appointed Robert Neuner to a three-year term.²⁴³ Neuner, a conflicts of law expert, had been dismissed from the University of Prague because of his political beliefs. Ernest Lorenzen almost single-handedly pushed the appointment through the faculty; afterglow from the positive experience with Kessler (recently departed for Chicago) made Yale receptive to the idea.²⁴⁴ The faculty hoped Neuner could eventually replace Lorenzen as the resident conflict of laws expert. Unfortunately, the relationship with Kessler caused Yale to underestimate the difficulties that came with transplanting a foreign scholar, especially an older one less familiar than Kessler had been with American law.²⁴⁵ For his part, Neuner underestimated Americans' burgeoning desire to differentiate their work from Continental scholarship.²⁴⁶

Yale was disappointed with its new recruit. The few students who attended Neuner's seminars offered unfavorable reviews. The

240. Edwin Borchard to Stephen Duggan, Feb. 10, 1939, Rabel Folder, Box 29, Emergency Committee Records.

241. University of Michigan Law School Faculty Minutes, Apr. 26, 1940, University of Michigan Archives; Max Rheinstein to Tracy Kittredge, Jan. 15, 1942, Rabel Folder, Box 29, Emergency Committee Records.

242. University of Michigan Law School Faculty Minutes, Feb. 6, 1942, University of Michigan Archives.

243. See Yale Law School Faculty Minutes, May 4, 1939, Yale University Law School Records.

244. See Yale Law School Faculty Minutes, Nov. 17, 1938, Yale University Law School Records; Yale Law School Faculty Minutes, Jan. 19, 1939, Yale University Law School Records; Minutes of the Board of Permanent Officers, Yale Law School, Mar. 27, 1939, Yale University Law School Records; Stacy May to Charles Seymour, Apr. 27, 1939, Folder 4979, Box 419, Series 200, RG 1.1, Rockefeller Foundation Archives, RAC; Betty Drury to Charles Clark, May 11, 1939, Folder 4979, Box 419, Series 200, Record Group 1.1, Rockefeller Foundation Archives, RAC.

245. See Charles Clark to Stacy May, Apr. 15, 1939, Folder 4979, Box 419, Series 200, RG 1.1, Rockefeller Foundation Archives, RAC ("Dr. Neuner cannot be considered a successor to Professor Kessler or as taking Professor Kessler's place, although the success which attended Professor Kessler's work at our School has favorably disposed our faculty toward an experiment of generally similar nature.")

246. See Robert Neuner to Ernest Lorenzen, Feb. 13, 1939, *supra* n. 198 ("I know from literature that Yale Law School is a center of studies in theory of law and I do not see why a continental scholar should not feel at home there as well as in any other place where problems of law are tackled seriously. That the theories in favour at Yale are rather different from the continental ones must not make any difference").

faculty concluded at the end of Neuner's three-year term that he "had been unable to adjust himself to the method of approach at this school."²⁴⁷ Specifically, echoing criticisms often lodged against Continental jurists by that time, the faculty concluded that Neuner had "either devoted himself to work on the highly abstract philosophical plane to which he had been accustomed, or to ineffectual attempts to analyze problems in terms of the functional approach."²⁴⁸ Neuner was not offered a permanent position after his subsidized term expired. With Yale Law School Professor Eugene Rostow's help, he obtained a job with the Federal Communication Commission's War Problems Division.²⁴⁹ Neuner soon left New Haven for Washington, D.C.; he died three years later.²⁵⁰ When he left, Neuner took Yale's enthusiasm for displaced scholars with him. Reflecting on the experience with Neuner, the Dean of Yale's Graduate School wrote new Yale Law School Dean Ashbel Gulliver, "we should not involve ourselves in such a situation again."²⁵¹

Neuner had received a better opportunity than most other refugee scholars. The story of the AALS's Special Committee on Refugee Scholars more accurately summed up the situation facing displaced law teachers in the late 1930s. In 1938, Landis arrived at the AALS's annual meeting with an ambitious plan to assist displaced scholars by identifying open teaching posts in America and creating a clearinghouse for these jobs. As discussed at the conference, a committee would uncover and publicize job openings, actively screen and recommend refugee candidates for the positions, and secure the financial aid necessary for placement.²⁵² Landis failed to follow through with his grand plans. Landis did write letters of introduction and recommendation on behalf of some foreign acquaintances,²⁵³ but by all indications he lost interest in his larger project soon after addressing the AALS conference. He never fleshed out the plan with Dean Smith and Yale's James Grafton Rogers, the two other professors appointed to the committee charged with developing the program.²⁵⁴ Smith and Rogers simply received the two-page report

247. Minutes of the Board of Permanent Officers, Yale Law School, Mar. 12, 1942, Yale University Law School Records.

248. *Ibid.*

249. See Ashbel Gulliver to Betty Drury, Nov. 20, 1942, Neuner Folder, Box 26, Emergency Committee Records.

250. Yale Law School Faculty Minutes, Dec. 6, 1945, Yale University Law School Records.

251. Edgar Furniss to Ashbel Gulliver, Aug. 21, 1942, Folder 385, Box 38, Series I, YRG 3-A, RU 92 (Yale University Provost's Office Records, 1919-1958), Yale University Archives.

252. 36 *Handbook of the Association of American Law Schools* 40 (1939).

253. See, e.g., Henry Bates to James Landis, Jan. 20, 1939, *supra* n. 110.

254. See Young Smith to James Landis, Nov. 15, 1939, German Refugees: American Committee for the Guidance of Professional Personnel - General Folder, Box 4, Harvard Law School Dean's Subject Files.

Landis drafted upon pressure to produce something before the next year's conference.²⁵⁵ By his own account, Landis based this report on little more than discussions with (unidentified) refugees and fellow law-school administrators, as well as a review of the many resumé's he had received from displaced scholars looking for teaching positions in the United States.²⁵⁶

Unsurprisingly, the report of the "Special Committee on Refugee Scholars" offered discouraging news to displaced jurists and their advocates. The report announced that although a few placements had been made, "the results along this line have been very scant." Fault was not assigned to American law schools. Instead according to the report the blame lay with two fatal shortcomings among the refugees. First, "these scholars, generally speaking, have equipment only in the Civil Law or in Roman Law." Second, "most of these scholars have not as yet been acclimated to the American academic atmosphere and may be somewhat deficient in the use of the English language."²⁵⁷ The report also cast doubt on the efficacy of the Rockefeller Foundation's and Emergency Committee's grantmaking efforts, concluding that they "look[] forward to a permanent commitment and in these days of dwindling budgets and decreasing enrollments schools are chary to increase their commitments." The report's sole positive recommendation was for schools to publicize any openings they might have for library staff, occasional lecturers, researchers, or teachers in the fields of comparative or Roman law.²⁵⁸

Word of Landis's original plan had inspired hope, perhaps unrealistically, in many displaced scholars.²⁵⁹ The final report listed far in the opposite direction. Much of what Landis ultimately wrote had a basis in fact. The elder representatives of the German tradition had not lived up to expectations. Most foreign applicants pitched themselves only as potential teachers of comparative law, international law, or jurisprudence.²⁶⁰ And many American professors now perceived foreign legal scholarship as being either dangerous or of marginal utility. On the other hand, experience with scholars such as Kessler and Rheinstein had shown that, with a few years of grant-subsidized training, some foreigners could become skilled instructors in American law. In criticizing the relief agencies' efforts, the report

255. Harold Shepherd to James Landis, Nov. 13, 1939, German Refugees: American Committee for the Guidance of Professional Personnel – General Folder, Box 4, Harvard Law School Dean's Subject Files.

256. Report of the Special Committee on Refugee Scholars, 37 *Handbook of the Association of American Law Schools* 235, 235 (1940).

257. *Ibid.*

258. *Id.* at 236.

259. See, e.g., Ernst Moll to James Landis, Aug. 7, 1939, German Refugees – Applications L–M Folder, Box 4, Harvard Law School Dean's Subject Files.

260. See, e.g., *id.*

gratuitously assailed one of the few mechanisms through which these individuals could rebut the presumptions they battled against.

A more successful relief program took shape at the same AALS conference where Landis announced his plan for aiding displaced jurists. Throughout the 1930s, U.S. law schools embraced opportunities to re-educate foreign students in American law. Law schools even provided some refugee students with scholarships.²⁶¹ A few of these pupils had been assistant professors or attorneys in Germany. Upon learning that there were no teaching jobs open to them in the United States, and that most states did not allow non-citizens to practice law,²⁶² they sought to train themselves in American law. At the 1938 AALS conference, American law schools met to develop a coordinated plan for the "rehabilitation" of displaced scholars and lawyers.²⁶³ Professors from the law schools at Harvard, Yale and elsewhere agreed on the need for such a program, which several months later materialized in the Committee for the Re-education of Refugee Lawyers.²⁶⁴

This Committee ultimately sponsored two "classes" of refugee students, totaling twenty-eight foreign lawyers, at twenty-one different law schools.²⁶⁵ Funding came from New York attorneys and the efforts of the host law schools.²⁶⁶ Institutions that had refused to accept Rockefeller Foundation or Emergency Committee grants for the purpose of hosting a refugee participated in the program. Significantly, the Committee did not focus upon a candidate's academic record in deciding whether to award a fellowship. Rather, as the University of Buffalo's David Riesman (the Committee's Secretary) explained, by the time of the Committee's efforts other factors had become accepted as more important in gauging a refugee's potential contribution to American law: "[W]e did not search for distinguished scholars . . . but rather for men of shrewd common sense and flexible vitality, with sufficient academic distinction to enable them to make

261. See, e.g., Leon Green to E. Lyman, Feb. 22, 1935, Folder 2, Box 27, Green Papers; Edwin Borchard to Thurman Arnold, Apr. 2, 1938, *supra* n. 88.

262. As of 1939, thirty-eight states and the District of Columbia made U.S. citizenship a prerequisite for admission to the bar. Note, "Refugees and the Professions," 53 *Harv. L. Rev.* 112, 115 (1939).

263. Anonymous Form Letter to Law School Deans (most likely authored by David Riesman), May 1939, German Refugees: American Committee for the Guidance of Professional Personnel – General Folder, Box 4, Harvard Law School Dean's Subject Files.

264. See Duggan & Drury, *supra* n. 45, at 90; C.J. Friedrich to Edmund Morgan, May 24, 1939, Folder 11, Box 11, Morgan Papers.

265. Duggan & Drury, *supra* n. 45, at 90; Committee for the Re-education of Refugee Lawyers, *Report of Committee for Re-education of Refugee Lawyers* 2 (May 18, 1944).

266. Committee for the Re-education of Refugee Lawyers, *supra* n. 265, at 1; See also E.H. Levi to Dr. V. Zuehlsoff, Dec. 18, 1939, Refugees, 1939–40 Folder, Box 8, University of Chicago Law School Records Addenda (soliciting funds for a refugee student at the University of Chicago).

a not-too-difficult adjustment to the study of Law in the United States.”²⁶⁷

After retraining, some of these scholars did seek to resume or initiate careers as law professors in the United States. Even though the Committee professed that it chose fellowship recipients on the basis of “what they could contribute to American law practice, and not as objects of charity or as prospective academicians,”²⁶⁸ once fellows had completed their reschooling, the Committee praised their “unusually wide backgrounds and extensive pedagogical experience” and added that “[l]aw schools anxious for ‘double-discipline’ teachers may find among this group men able to step into any of the courses in the usual curriculum.”²⁶⁹ Other American professors suggested that hiring re-educated scholars represented “part of our attempt to make democracy mean what it seems to mean.”²⁷⁰ These endorsements proved successful in placing some fellowship recipients in teaching positions.²⁷¹

There were few financial incentives to participate in the Committee’s fellowship program. Indeed, at sixty years’ remove it seems odd that law schools embraced the Committee’s efforts to the extent that they did. At the same time as they accepted foreign students, even engaging in laborious fundraising efforts to support them, schools were rejecting offers of *gratis* (by virtue of Emergency Committee and Rockefeller Foundation grants) service from foreign law professors whom, as Yale Law School’s experience with Neuner demonstrated, they had no real obligation to retain at the end of their subsidized terms. The difference, perhaps, owed to the fact that accepting displaced professors as peers sent a mixed message. It was a protest against Nazi abuses, but also suggested a connection to real and imagined Continental approaches and practices from which Americans of the time sought to distance themselves. By focusing upon “re-educating” refugees in American law, American schools could channel humanitarian impulses toward a program more squarely aligned with American legal education’s new direction. Retraining efforts, by baptizing foreign jurists in what John Langbein has called the “Cult of the Common Law,”²⁷² implicitly asserted the superiority and success of the American legal system.

267. David Riesman to Edwin Reedy, Sept. 15, 1940, Refugees, 1939–1945 Folder, Box 13, University of Pennsylvania Law School Dean’s Records.

268. Committee for the Re-education of Refugee Lawyers, *supra* n. 265, at 3.

269. Committee for the Re-Education of Refugee Lawyers, *Re-training Refugee Lawyers: II* 11 (1941)

270. Lloyd Garrison to David Riesman, Oct. 24, 1940, Folder 11, Box 11, Morgan Papers.

271. See Committee for the Re-education of Refugee Lawyers, *supra* n. 265, at 5–6.

272. Langbein, “The Influence of the German Emigrés on American Law: The Curious Case of Civil and Criminal Procedure,” in *Der Einfluss deutscher Emigranten auf die Rechtsentwicklung in den USA und in Deutschland*, *supra* n. 5, at 321, 329–31.

VI.

In 1940, the University of Indiana Law School's Jerome Hall wrote, "It is evident that the torch of legal scholarship has been handed to the United States – not as a temporary matter, but for an indefinite future."²⁷³ The "scientific reputation" of German universities was in shambles, and its proudest representatives had been reduced to supplicants. Relief agencies and American professors agreed that it had become next to impossible to find teaching positions for Continental jurists at U.S. law schools. In 1939, the director of the Emergency Committee had concluded, "The one field in which we have discovered there is practically no hope of assistance is that of law."²⁷⁴ At around the same time, Borchard wrote, "A German lawyer is almost useless here and must turn to something else. A few younger men specializing in international law have been accommodated in various places as research assistants and even instructors, but the older men are extremely hard to accommodate."²⁷⁵

These comments were to some extent hyperbole; even as they were written some law schools remained willing to host displaced scholars for limited terms,²⁷⁶ and organized attempts to retrain young émigrés were just getting underway. These views, however, sounded in a genuine sea change in American legal academia's relationship with Continental (and especially German) scholars and

273. Jerome Hall, "On Research in Law – A Challenge and a Proposal," 2 *La. L. Rev.* 479, 479 (1940).

274. Eunice Lisowski to Edwin Borchard, Feb. 15, 1939, Folder 474, Box 42, Series II, Borchard Papers (relaying Stephen Duggan's comments).

275. Edwin Borchard to Albert Coyle, Oct. 14, 1938, Folder 463, Box 41, Series II, Borchard Papers.

276. See text accompanying notes 225–251, *supra*. Several other examples could be cited. See, e.g., Herbert Goodrich to Hans Kirchberger, Oct. 10, 1939, Folder 1640, Box 13, University of Pennsylvania Law School – Secretary's Correspondence (notifying Kirchberger that he had been named a Research Fellow in Law at the University of Pennsylvania for an eight-month term). A 1940 Emergency Committee report listed the following law scholars as having received Committee support at one point or another over the past seven years (with the institution at which they served): Sigmund Cohn (University of Georgia); Ossip Flechtheim (International Institute of Social Research); Wolfgang Guenther (Catholic University); Heinrich Hoeniger (Fordham University); Richard Honig (University of Georgia); Erich Hula (University of Georgia); Kessler (Yale); Otto Kirchheimer (International Institute of Social Research); Guido Kisch (Jewish Institute of Religion); Heinrich Kronstein (Library of Congress); Laun (Michigan); Arthur Lenhoff (University of Buffalo); Loewenstein (Yale); Hans Morgenthau (University of Kansas City); Neuner (Yale); Nussbaum (Columbia); Rhein-stein (Chicago); and Hans Julius Wolff (Vanderbilt). Emergency Committee in Aid of Displaced Foreign Scholars, *The Emergency Committee in Aid of Displaced Foreign Scholars Report as of June 1, 1940* 11 (1940). Other scholars were also placed at American institutions. See, e.g., F.D.G. Ribble to James Landis, Dec. 9, 1939, German Refugees: Applications H–K Folder, Box 4, Harvard Law School Dean's Subject Files (recommending Gerhart Husserl, who had taught at the University of Virginia Law School from 1938–1940). But the Emergency Committee roster pales in comparison to the more than 100 names on a comprehensive list (published in 1936) of displaced jurists in search of permanent positions. Notgemeinschaft Deutscher Wissenschaftler im Ausland, *List of Displaced German Scholars* 44–50 (1936).

scholarship. Many American jurists of the 1920s characterized their work as a science, a term suggestive of universal commonalities and truths. The 1930s forcefully reminded Americans of the differences across legal systems, and among those who made their livings by explicating and refining them. American law professors took to emphasizing these differences, and their own unique relationship with and responsibilities to American legal system, as sources of professional meaning.

Refugee scholars, and especially older ones, continued to believe that American interest in "the common cause of the science of law" and the "scientific reputation" of Continental scholarship would bring them appointments and respect in the United States. By the late 1930s, this assessment incorporated two faulty assumptions: first, that American law professors still hoped to identify similarities across legal regimes; and second, that German scientism still possessed the appeal among law faculties that it had held in the late 1800s. But the demise of the rule of law in Germany had made American professors interested in differentiating their laws, institutions and methods from the Continental example. The resulting environment proved inhospitable to refugee jurists, and particularly to the scholars who were most closely associated with the perceived failures of the German legal system and seen as the least capable of learning American ways.

In such a climate, those émigrés who found significant places in American academia were generally young, flexible individuals already familiar with or capable of quickly mastering U.S. law, or persons who submitted to re-education at an American law school. In the postwar era, these survivors would become some of America's more influential law and political science professors. Their thoughts course through the pages of this journal, and wherever their fields are practiced today.