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THE CONTRIBUTIONS OF ROMAN LAW TO THE AMERICAN LEGAL SYSTEM

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THE DIGEST

The Law Journal of the National Italian-American Bar Association

Introduction: Why Roman Law?

JOSEPH N. GIAMBOI*

The practice of comparing is an instinctive human trait, closely linked with the human capacity to learn. Almost seventy years ago, Dean Roscoe Pound of the Harvard Law School wrote in his book, *The Interpretations of Legal History*, that "[a]ll interpretations go on analogies. We seek to understand one thing by comparing it with another. We construct a theory of process by comparing it with another."[1] Since the life of the law is so inextricably bound with human experience,[2] it should come as no surprise that much has been learned about the law by contrasting one legal system with another.

The study of comparative law serves a multitude of purposes, two of which are of immediate importance here. The first is that bringing two legal systems into relief manifests their nuisances, strengths and imperfections — this not only expands one's understanding of an unfamiliar legal system, but makes the system already known more discernible and more vibrant. Comparative law strips away veneer, revealing the foundational juridical principles from which the particular rules, regulations, procedures, traditions and institutions of a legal system have been forged. It jars and expands the legal imagination to create and mold fresh and innovative approaches to nagging problems, paving the way for needed legal reforms. Thus, as the British scholar Kahana Kagan once observed, "one who aspires thoroughly to understand and evaluate the principles of his own country's legal system can be greatly assisted in that aim by a comparison of it with legal systems developed by other people."[3]

The second purpose served by the study of comparative law arises when the two systems being contrasted follow in historical succession. Then, comparisons of the two systems lead to an appreciation of the influence and indebtedness of the later system to its predecessor. This is not simply a matter of maintaining historical accuracy, for much can be gleaned by studying the evolution of a legal principle in the context of the society in which it evolved — "just as the function of the lungs in a whale, a bird, a lion and a human, cannot be completely compared without first having an accurate understand-

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1. R. Pound, INTERPRETATIONS OF LEGAL HISTORY 151 (1923).

2. Justice Holmes, of course, coined the phrase that "the life of the law has not been logic: it has been experience." O. Holmes, THE COMMON LAW 1 (1881).

3. K. Kagan, THREE GREAT SYSTEMS OF JURISPRUDENCE 1 (1955).

ing of the body and life of each of these living beings as a whole."[4] Even the most ancient legal concepts tend to gain more meaning if studied in light of the indigenous spirit of the culture and civilization in which they arose. "We cannot be content with a simple examination of the statutes, constitutions, codes and decided cases" of a legal system, one commentator has, therefore, written, but "must study the history, the politics, the economics, the cultural background in literature and the arts, the religious beliefs and practices, the philosophies, if we are to reach sound conclusions as to what is and what is not common."[5]

Obtaining such an appreciation, one is destined to develop a more profound respect and reverence for the law. The survival of legal principles for hundreds, if not thousands of years, and their transplant, repeatedly, from one society to another in scattered regions of the world, endows those principles with a level of confidence, hardened in the crucible of human experience, that mere logic, no matter how sound and tantalizing, cannot easily bestow. In the words of Lord Marley, "[p]eople always understand their own speculative position the better, the more clearly they are acquainted with the other positions which have been taken in the same manner."[6] Thus, while it cannot be gainsaid that all "old law is good law," it is likewise beyond peradventure that much can be learned from those principles and theories which have stood the test of time.

The purposes which traditionally have been furthered by the study of comparative law are well served by this symposium which, in honor of the Quincentennial, is dedicated to the contributions of Roman law to the American legal system. The articles in this symposium clearly illustrate that much can be learned about our own modern jurisprudence by contrasting it with the *ancien regime* of the Romans. To those accustomed to think in terms of insularity — who regard the evolution of American legal theories as the sole and exclusive extension of British Common law principles — this survey will, indeed, come as a revelation. To those already well-versed in the profound debt owed by American jurisprudence to Roman law, this symposium will hopefully serve to deepen that appreciation.

But why publish this survey now, on the five hundredth anniversary of Columbus' historic voyage? At first blush, there would seem to be only a geographical relationship between the Quincentennial and Roman law — both with ties to the Italian peninsula. Yet, a closer examination reveals a strong historical precedent for coupling together these two subjects.

One of the trends which characterized the "old" world which Columbus forever linked with the "new" was a renewed interest in the study of Roman

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4. Wigmore, *Comparative Legal Institutions*, 6 TULANE L. REV. 15, 52 (1930).
5. Stone, *The End to be Served by Comparative Law*, 25 TULANE LAW REVIEW 332 (1951).
6. R. Pound, INTERPRETATIONS OF LEGAL HISTORY, *supra* note 1, preface at ix.

law. Although the Renaissance had not yet reached its apex — DaVinci, for example, was still a young man — Roman law had already experienced a revival, first in the medieval universities of Italy, and then all over Europe.[7] A favorite aphorism among lawyers was "*nullus bonus jurista nisi sit Bartolista*" — "there can be no good jurist unless he is a follower of Bartolus" — a reference to the fourteenth century Perugian professor of law, Bartolus Severi of Sassoferrato, whose work sparked a prolonged rebirth of the study of Roman law.[8] Under Bartolus' inspired influence, the Roman law of the *Corpus Juris Civilis* regained its preeminent status as the law of neutrality and social peace, spurring the development of legal institutions designed to promote the good of society as a whole, which, in turn, fostered the magnificent advancements made during the Age of Discovery in such areas as philosophy, art, science and religion.[9]

Significantly, the *Opinio Bartoli* had the force of law both in Spain and Portugal at the time of Columbus's voyage.[10] Thus, the "old" world which Columbus brought to the shores of the "new" world was undoubtedly one which viewed Roman law as something more than a legal philosophy — rather, a puissant political, social and cultural ideology. It is thus quite proper and fitting to revisit the nurturing role that Roman law has played in the development of American jurisprudence as part of the celebration of the Quincentennial. As Dean Roscoe Pound once wrote, the system of Roman law "gave us a picture of an ideal legal system with reference to which jurists in all lands could seek to put at least some corner of their legal world in the order of reason."[11] As you will see, this symposium paints a new, colorful picture of Roman law that has true and enduring meaning for American lawyers in this, the last decade of the Twentieth Century.

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7. *See* Reimann, *Roman Law as a Political Agenda*, 89 MICH. L. REV. 1679 (1991).

8. *See* Miceli, *Forum Juridicum: Bartolus of Sassoferrato*, 37 LA. L. REV. 1027 (1977). One indication of the importance of Bartolus is the fact that in 1959, on the six-hundredth anniversary of his death, 31 nations participated in the festivities at Perugia. *Id.*

9. *Id.* at 1030.

10. In Spain, his opinions were proclaimed the rule of law by John II in 1427 for Leon and in 1433 for Castilla. In Portugal, his opinions were incorporated in the Code of 1446 of Alphonse V, later confirmed by Emanuele I. *See* Miceli, *Forum Juridicum*, *supra* note 8, at 1029 n.8.

11. R. Pound, INTERPRETATIONS OF LEGAL HISTORY 26 (1923).

ADDRESS

The Relationship Between the Executive Branch and the Supreme Court in Our Constitutional Tradition*

KENNETH W. STARR**

This is a vibrant time for the student of constitutional law and comparative judicial structures. As we speak, the Constitutional Court of the new Russian Federation is focusing on a highly provocative and important question — whether a decree by President Yeltsin effectively dismantling the Communist Party is within his lawful powers. Recent decisions by other courts, including the German Constitutional Court and the Canadian Supreme Court, have prompted global attention. Even in Great Britain, that which was once thought impossible has now occurred. Notwithstanding Lord Coke's dictum in *Dr. Bonham's Case*[1] concerning judicial power, Parliamentary supremacy has long triumphed; only in the last few years has the House of Lords agreed that Parliamentary legislation is invalid, rendered thus by supervening requirements of the Treaty of Rome as interpreted by the European Court.[2]

In the United States, of course, judicial review has been a familiar part of our constitutional traditions. And that power has been exercised especially in this Century in what can fairly be described as a muscular way. This has spawned one of the great, enduring debates about the appropriate role of an unelected judiciary in a democratic society.

My brief remarks today will treat only tangentially these great, enduring questions of the modern judiciary's role in a constitutional democracy. Recognizing your intimate familiarity with that debate, it behooves me to speak, rather more specifically, to the relationship in a system of separated powers between and among the three Branches, most particularly the relationship

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* This address was delivered at a luncheon held on September 22, 1992, honoring the visiting members of the Italian Constitutional Court. The luncheon was sponsored by the National Italian American Bar Association and the National Italian American Foundation.

** Solicitor General of the United States

1. In *Bonham's Case*, as is well-known, Lord Coke opined: "[W]hen an Act of Parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will control it, and adjudge such an Act to be void." 8 Co. Rep. 113b, 77 Eng. Rep. 646 (C.P. 1610). For two very learned commentaries on this case, *see* Plucknett, *Bonham's Case and Judicial Review*, 40 HARV. L. REV. 30 (1926), and Pound, *Common Law and Legislation*, 21 HARV. L. REV. 383, 392 (1908).

2. 44 HALBURY'S LAW OF ENGLAND para. 831 (4th ed. 1992)

between the Executive Branch and the Judiciary, and especially the Supreme Court of the United States.

Let us begin with a brief historical note. The founding of the American Republic represented a triumph of the vision of a balanced government, divided functionally into the three great subject matters which we see in operation daily. The Legislative Branch was naturally seen as the most representative, highly responsive to the electorate (illustrated most powerfully by the election every two years of the entire House of Representatives). By virtue of the Incompatibility Clause,[3] we separated ourselves from Parliamentary systems, and have continued to resist academic suggestions to create a form of Congressional Government. Not only can no member of the Congress serve in the Executive Branch, but the Executive was seen by Alexander Hamilton, one of the authors of the highly influential *Federalist Papers*, as being an energetic institution.[4] Good government meant, Hamilton opined, energy in the Executive. Finally, it was contemplated that within the context of specific, concrete disputes — called cases or controversies — the independent judiciary would determine the constitutionality of specific laws or Executive actions drawn into question. This was not an abstract jurisdiction to resolve constitutional questions as referred to the Court by other courts or by the other Branches of government. Indeed, not only was there required to be a live, concrete dispute between two parties, but the courts were to strive mightily to avoid passing on constitutional questions, such as by engaging in the sort of narrow, or some might say, creative interpretation that has been characteristic of the German Constitutional Court.

The role of the Executive Branch in this process may seem to the informed visitor as somewhat awkward. The Executive is, of course, the enforcer of the will of others, but it is also an implementer when given delegated power to act in a legislative manner in the form of binding regulations (which, of course, is a very familiar part of government in the modern administrative state). The Executive also has particular, generative powers, enumerated in Article II, and some of those powers are quite broad in their sweep, such as the President serving as the Commander in Chief.[5] Other powers are viewed as inherent, such as the President's serving as the chief architect of the Nation's foreign policy.[6]

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3. U.S. CONST., art. I, § 6, cl. 2. *See also Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 216-17 (1974).

4. Hamilton prophesied that the individual executive would promote an "energetic" government by promoting the virtues of "[d]ecision, activity, secrecy, and dispatch," without sacrificing "due responsibility." THE FEDERALIST NO. 70 424 (A. Hamilton). *See also id.* at 425-31; THE FEDERALIST NO. 71 432-33 (A. Hamilton).

5. U.S. CONST., art. II, § 2.

6. *See Chicago & Southern Air Lines v. Waterman S.S. Corp.*, 333 U.S. 103 (1948). *See also Neal-Cooper Grain Co. v. Kissinger*, 385 F. Supp. 769 (D.C.D.C. 1974).

More specifically for the purpose of these reflections, the Executive Branch has also been actively involved in the development of constitutional law specifically and the emergence of a distinctly American constitutional culture more generally. The Attorney General of the United States enjoys authority to pass on important legal questions outside the context of specific litigation. And, in light of prudential doctrines that the federal courts follow, such as not gainsaying Presidential actions in theaters of war, those legal opinions may be decisive of the issue. Or an Attorney General opinion may guide a President away from a particular course of action, and thereby avoid what might otherwise have resulted in litigation.

But the more familiar function of the Executive Branch in the evolution of constitutional law is our active, adversarial role as parties in litigation raising constitutional questions. In short, we are most frequently seen as litigants raising, or defending against, constitutionally based arguments. In that respect, the Executive has opted in favor of specialization, as reflected in the role of the Office where I am privileged to serve, the Office of the Solicitor General.

Another brief note of history. At the outset of the American Republic, there was no Justice Ministry (or Department, as we call it). There was only the Attorney General of the United States, who served as a legal advisor to the President and as a member of his Cabinet. The Attorney General was a solitary figure, presiding over no law department. If need be, the Attorney General would serve as a courtroom lawyer, but in the happy, quiet days of our early Republic, that was unusual. Indeed, this Nation's first Attorney General, the former Governor of Virginia, Edmund Randolph, made only one appearance in the Supreme Court during his tenure as Attorney General. That was to argue a private case, the historic case of *Chisholm v. Georgia*,[7] which Mr. Randolph won on behalf of his private client.

But with the growth of the federal government, especially in the wake of the great Civil War in the 1860s, there was a greater need for central management, control and coordination of the government's legal functions, both as a general matter and in litigation specifically. And that was the role the Office of Solicitor General was destined to play. Created in 1870, the Office was designed to be a law office, with an officer of the newly created Department of Justice who would engage in the courtroom lawyering function, not only in the Supreme Court of the United States, but in other courts as well.

The Office has continued for the past 122 years, remaining a small law office with individuals who specialize in practice before the Supreme Court. Our principal role is to serve as the Government's advocate in the United States Supreme Court. That is to say, by statute and regulation the Office is

7. 2 Dall. 419 (1793).

charged with making determinations on behalf of the government as to what cases will be brought by the government to the Supreme Court for its possible review.[8] And, as you know, that is a limited function, since the Court enjoys in the main complete discretion over its docket and can pick and choose from among approximately 5,000 matters those cases that the Court deems sufficiently weighty and important to hear.

The federal government is, of course, the principal litigant in federal courts, both as to criminal justice issues and civil questions. More pertinently, it is involved in constitutional questions, not only in separation of powers issues, but general constitutional questions, more than any other institution or litigant. In that respect, it is not only the perspective or prerogative of the Executive Branch we are carrying out. In our duty of assisting the President of the United States in faithfully executing the laws, we are also charged with defending the constitutionality of acts of Congress, even if those measures do not create a federal agency program. For example, two years ago, the Supreme Court faced an important issue in First Amendment law — namely, whether the federal government could, consistent with the First Amendment, forbid the burning of the American flag.[9] It was our duty to apply and defend that law. So too, in the coming Term of Court, the Supreme Court will face a challenge to Senate procedures used in connection with the unpleasant task of impeaching federal judges and removing them from office.[10] Our duty is to defend the Senate's prerogatives in that respect, since the case was brought against the United States and we, as officers of the Department of Justice, are charged with representing the United States.

Our role is essentially that of advocates before an independent, coordinate branch of government. Speaking of my late predecessor, Judge Wade McCree, retired Chief Justice Warren Burger said that one of Judge McCree's strengths as Solicitor General was that he never forgot that he was the government's advocate in the Supreme Court, and not the Supreme Court's advocate in the federal government. But the Office, while clearly, unmistakably that of an advocate, is also a potential resource for the Court on which the Court can call for advice on the limited issue of whether a case, in our judgment, is of sufficient importance to warrant the granting of plenary review (or certiorari).

This procedure is quite simple: in a pending case, before deciding whether to grant certiorari, the Court invites the Solicitor General to express the views of the United States. When that occurs, we once again serve a centralizing function, obtaining the views of various federal agencies that may have

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8. The duties of the Solicitor General are summarized at 28 C.F.R. § 0.20 (1992).

9. *United States v. Eichman*, 496 U.S. 310 (1990).

10. *See Nixon v. United States*, 938 F.2d 239 (D.C. Cir. 1991), *cert. granted*, 112 S.Ct. 1158 (1992). *See also Hastings v. United States*, 887 F.2d 332 (D.C. Cir. 1989).

expertise and views on the subject and then coming to our own views as to what the legal position of the government should be and then advising the Court as well whether the case appears to us to be an appropriate and important one for the Court to review.

That process illustrates both the limited channeling function of the Solicitor General's Office and the vastness of the Executive Branch. To speak of one case already decided, *Cruzan v. Missouri Department of Health*,[11] a case that came to be known in the popular mind as the "right to die case," the question was whether the family of a young woman who had been gravely injured in an automobile accident could require the health care provider to terminate her nourishment and hydration by virtue of her languishing in a persistent vegetative state with no hope of recovery. This was a new question for the Court, and came to the Supreme Court from the state supreme court of one of our midwestern States.

When the Court granted certiorari, we consulted with our colleagues in the Executive Branch, including colleagues at the Department of Justice, as to what our position should be in that case. With the assistance of the Civil Division of the Department of Justice, we heard from the Department of Veterans Affairs and various military services, as well as the Department of Health and Human Services, all of which were quite keenly interested in the issue. And we then formulated our position in consultation with our colleagues and clients throughout the Executive Branch and subsequently filed an *amicus curiae* brief in the Court and participated in the oral argument itself.

I would like to think we do not abuse our welcome, and to the contrary that we are able to help the Court by providing our analysis based upon the deliberative process that I have described. But whether our participation is efficacious or not, the fact remains that we are there a lot — of the first four cases to be argued on the first Monday of the October 1993 Term, members of our Office will be at the podium in three. Of the seventeen cases on the October calendar, we are participating in 12. Of the 17 cases scheduled for argument in November, we are participating — again — in 12 (although not arguing in all of those cases).

But the fact remains that we are there as advocates in the Court. We are representatives of a different Branch, in a system of divided power. And in that simple concept — a government which is balanced through the separation of powers the better to serve the interests of human liberty at the hands of government — lies the basic genius of the American constitutional experiment.

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11. 497 U.S. 261 (1990).

PREFATORY REMARKS

The Contributions of Roman Law to American Civil Procedure

ARTHUR J. GAJARSA*

Cicero, the celebrated Roman lawyer and statesman, once said that "[t]here shall not be one law at Rome, and another at Athens, one now and another hereafter; but the one eternal and immutable law shall sway all nations for all time and be the common law and master of all."[1] This passage is sometimes quoted by legal historians recounting the debt of modern jurisprudence to Roman law in areas such as criminal law, torts and contracts.[2] But, one hunting for the most "eternal and immutable" contribution of Roman law to modern jurisprudence might well find it unexpectedly not in the substantive law, but rather in the areas of civil procedure and evidence. The procedural and evidentiary rules that were developed during the more than seven hundred years between the dawning of the Republic and the end of the reign of Justinian, represent, in fact, one of the most enduring legacies of Roman law and one of that system's greatest contributions to the American legal system.

The influence of Roman procedure on the American adjudicatory process can first be appreciated in terms of a shared philosophy. Former Attorney General Griffin Bell, a strong proponent of judicial access, once observed that substantive rights "ring hollow if there is no forum available in fact for their vindication."[3] The creators of the Roman legal system similarly recognized that "substantive law is but the creature of procedure,"[4] and that legal rights, no matter how well defined, would be little more than empty promises if there were not a judicial process and forum through which to enforce them. Their view of civil procedure could perhaps be best summarized in the Latin phrase "*juris affectus in executione consistit*" — "the effectiveness of

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1. "Nec erit alia lex Romae, ali Athenis, alia nunc, alia posthac; sed et omnes gentes, et omni tempore, una lex et sempiterna et immutabilis continebit, unusque erit communis quasi magister et imperator omnium deus." Cicero, DE REPUBLICA iii, 22.

2. *See, e.g.*, Re, *The Contributions of Roman Law to the American Legal System*, 2 NIABA L. J. 29 (1992).

3. THE POUND CONFERENCE: PERSPECTIVES ON JUSTICE IN THE FUTURE 300 (A.L. Levin & R. Wheeler eds. 1979).

4. II Sherman, ROMAN LAW IN THE MODERN WORLD § 836 (1937).

law lies in its execution." Guided by such principles, the Roman legal officials developed several successive and increasingly more refined systems of procedure and evidentiary rules through which civil disputes could be resolved fairly and efficiently.

The impact of these rules reverberated far beyond the legal areas of the Imperial Courts, producing salutary benefits throughout Roman society. The Roman procedures which governed the conduct of civil litigation, indeed, were the bedrock upon which was built the social discipline and legal order that became the twin pillars of Roman civilization. Almost as important, the Roman state produced these benefits while preserving in the individual — and not the state — the primary responsibility for pursuing and pressing civil claims and rights. The Roman civil adjudicatory process thus was not a totalitarian one, in which the state assumed the role of a protector, but rather one founded on individual rights, in which the state provided only as much procedure as was needed to support the enforcement of those rights. Hence, the Roman legal system incorporated a legal culture much as our own — governed by laws and prescribed rights while, at the same time, "afford[ing] the private individual himself more or less freedom of action."[5]

Perhaps an example will serve to illustrate the impact that the Roman system of civil procedure had on Roman society. Prior to the evolution of Roman civil procedure in the later years of the Republic, private redress, under which an injured party was free to indulge in revenge, led to constant disturbances and violence in the community. The Roman civil procedures became the means "by which justice between man and man [was] peacefully accomplished."[6] The coverage and puissance of this judicial process, which far surpassed that of earlier civilizations, justified the all but elimination of self-redress by making it no longer tenable for a Roman citizen to defend his unlawful, and sometimes violent, conduct based on the palliative that it was necessary to enforce lawful rights.[7] *Self-redress* thus was replaced by *judicial redress*, elevating the role of the state as the peaceful arbiter of disputes among citizens and contributing to the overall respect for law and order which formed the heart of Roman civilization.[8]

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5. L. Wenger, INSTITUTES OF THE ROMAN LAW OF CIVIL PROCEDURE 12 (1940).

6. II Sherman, *supra* note 4, at § 835.

7. The genesis of this development may be traced to the Emperor Marcus Aurelius, who once decreed that "[t]here is violence whenever a person claims what he thinks is owing to him otherwise than through a judge." *See* H.F. Jolowicz, ROMAN FOUNDATIONS OF MODERN LAW 82-83 (1957); II Sherman, *supra* note 4, at § 836. The Emperor emphasized this prescription by decreeing that claims unlawfully enforced should be forfeited. *Id.*

8. Commenting on the importance of this development in Roman law, one legal historian has observed that —

> always and everywhere it means a mighty advancement of culture if the state prevents the club law of the individual. For two reasons calm deliberation must fundamentally reject

What has been said captures already the quite remarkable contributions to the American legal system made by the Roman law of procedure. Yet, the Roman system of civil procedure and our own share much more than a legal philosophy. No doubt because of their common respect for law and process, the English Common Law system, and eventually the American legal system, borrowed many of the critical aspects of the Roman systems of civil procedure and evidence. Let me now turn briefly to some of the Roman innovations that have been incorporated into the American adjudicatory process.

As in the American legal system,[9] under the Code of Justinian, a civil action was begun by the plaintiff filing a verified complaint (*libellus* or *intentio*).[10] The complaint and a summons were served on the defendant, invoking the state's power to compel the defendant to respond to the complaint. Significantly, the Roman process recognized that there should be some reasonable limitations on the summons power founded on the respect for privacy.[11] The Institutes of Justinian thus instructed that —

> The beginning of every action is controlled by the part of the praetor's edict providing for summons to court. That is of course always the first step, getting the defendant before the person who will decide the case. The praetor there gives an assurance of respect for parents and patrons, and ascendants and descendants of patrons and patronesses.[12]

Blackstone, indeed, noted that the Romans limitations on the issuance of summonses were the genesis of the limitations engrafted on the English Common Law of summons, best summarized in the familiar phrase that "every man's house is his castle."[13]

The next step in a Roman civil proceeding was to reach a joinder of issues (*litis contestatio*), which was accomplished through the filing of an answer to the complaint or other defensive pleadings. The defensive pleadings often took the form of an "exception" (*exceptio*), some of which were peremptory and intended to lead to dismissal, while others were dilatory and merely af-

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> self-realization of rights: first, because nobody is qualified to be judge in his own cause; and then, because otherwise the weak could not prevail against the strong, even if he were a hundred times in the right.

L. Wenger, *supra* note 5 at § 2, page 8.

9. *See* F.R.C.P., Rule 3 ("A civil action is commenced by filing a complaint with the court.")

10. In the times of the Republic, the function of putting together a complaint that was based upon a recognized formula of the law fell to the Praetor. This practice was less employed during the Empire, for it was believed that the power of the Praetor was akin to that of a legislator and inconsistent with the allocation of powers established by the constitution of the Empire. *See* B. Nicholas, ROMAN LAW 26 (1962).

11. *See* JUSTINIAN'S DIGEST 2, 4, 18-21.

12. JUSTINIAN'S INSTITUTES 4.16 (Cornell Univ. Press 1986).

13. *See* Blackstone, COMMENTARIES, vol. iii, p. 279, vol. iv, p. 283. *See also* II Sherman, *supra* note 4, at § 854.

forded delay for a time.[14] Many of these exceptions are incorporated into modern pleading practice, such as the counterclaim (*compensatio*), a concept which Blackstone freely admits was borrowed by the English Common Law system from Roman law.[15] Other still familiar exceptions took the form of affirmative defenses, which were originally designed to serve "the realization of a civil right that is opposed to another, in itself stronger civil right, and is to check the latter in its effectiveness."[16]

Roman law has also exerted a major influence on the development of modern American trial practice, particularly in terms of the admissibility of evidence. Although the Roman law system undoubtedly passed through a stage in which proof by ordeal was utilized, the traditional means of proof employed in the Imperial courts was through the presentation of witnesses and documents at a trial before an *iudex* (judge).[17] The testimony of witnesses was subject to many of the qualifications commonly employed in the courtrooms of this nation: evidence was required to be relevant and not cumulative; hearsay evidence was generally excluded; and the testimony of witnesses was limited to those facts which were within their personal knowledge and generally could not include opinions.[18] Many of these advancements have mistakenly been attributed to the English Common law system.[19]

Finally, Roman law is also the source of modern American legal rules concerning the burden of proof, often a critical question in resolving law-

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14. *See* L. Wenger, INSTITUTES OF THE ROMAN LAW OF CIVIL PROCEDURE, *supra* note 5, at § 14.

15. Blackstone, COMMENTARIES, vol. iii, pp. 304-05. Evidence of the Roman influence on early American pleading practices may be found in admiralty cases such as *The C.B. Sanford*, 22 Fed. Rep. 863 (1885). In the federal system, the rules governing counterclaims are contained in Rule 13 of the Federal Rules of Civil Procedure.

16. L. Wenger, INSTITUTES OF THE ROMAN LAW OF CIVIL PROCEDURE, *supra* note 5, at § 14 at 157. *Compare* F.R.C.P. Rule 12 (defenses and objections).

17. H.F. Jalowicz, ROMAN FOUNDATIONS OF MODERN LAW, *supra* note 7, at 100.

18. CODE OF JUSTINIAN 4, 7, 16-17, 19, 21. *Compare* F.R.E. Rule 602 (Lack of Personal Knowledge); F.R.E. Rule 701 (Opinion Testimony by Lay Witnesses); F.R.E. Rule 802 (Hearsay Rule). These Roman rules of evidence largely originated in Justinian's day, when courts were afforded much less discretion than they had been afforded in the time of the Republic. *See* H.F. Jalowicz, ROMAN FOUNDATIONS OF MODERN LAW, *supra* note 7, at 102; B. Nicholas, ROMAN LAW, *supra* note 9, at 25. Evidence of this later development may be found in Justinian's Institutes. *See* JUSTINIAN'S INSTITUTES, *supra* note 12, at 4.17 ("Above all [a judge] must be sure not to depart from the statutes, imperial pronouncements, and custom.")

19. For example, modern commentators often erroneously suggest that the hearsay rule arose in conjunction with the English jury system. It should be noted that while Roman civil procedure did not employ a jury, the English jury system, nonetheless, has some roots in the Roman criminal procedure of the late Republic and early Empire. *See* II Sherman, ROMAN LAW IN THE MODERN WORLD, *supra* note 4, at § 858 n.64, §§ 880-81. The Roman system also incorporated a parole evidence rule, which, like its American counterpart, prohibited the introduction of oral testimony regarding a document unless the document was lost, and which rendered inadmissible evidence designed to alter or contradict a trustworthy document. *See* CODE OF JUSTINIAN 4, 20, 1 ("Contra scriptum testimonium, non scriptum testimoniu, non prefertur").

suits. As noted by one historian, "[i]t was a fundamental Roman rule as to the production of evidence that the burden of proof rests on him who alleges or asserts a fact."[20] Thus, the plaintiff was required to prove the truth of the assertions contained in the *libellus* or *intentio*, while the defendant would have to prove the allegations contained in the *exceptio*.[21] Similar rules, of course, exist to this day in the American legal system.[22] Presumptions also played a major role in the conduct of proof, falling into the now familiar categories of *presumptiones iuris et de iure* (conclusive), *iuris* (rebuttable) and *hominis* or *facti* (inferences left to the court's discretion).[23]

These represent but a few of the contributions of the Roman law of procedure and evidence. It is not my intent here to undertake a comprehensive description of these contributions, but rather only to highlight, in the most general terms, the importance of these contributions and to dispel any notion that the American civil procedural system owes a debt only to the English Common Law. In ascribing much importance to the Roman contributions to the American systems of civil procedure and evidence, I stand in good company. No lesser light than Roscoe Pound, the former dean of the Harvard Law School, once characterized Roman civil procedure as "one of the most significant features of the evolution of social control" and "an important part of the history of civilization."[24] These words, which were written in 1940, still ring true today as we commemorate in this issue of *The Digest* the contributions of Roman law to the American legal system, the greatest of which is our basic principle of a government of laws, and not men.

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20. II Sherman, ROMAN LAW IN THE MODERN WORLD, *supra* note 4, at § 860.
21. *See* H.F. Jolowicz, ROMAN FOUNDATIONS OF MODERN LAW, *supra* note 7, at 101, 104.
22. *See, e.g., Ward Cove Packing, Inc. v. Atonio*, 490 U.S. 642 (1989).
23. *See* H.F. Jolowicz, ROMAN FOUNDATIONS OF MODERN LAW, *supra* note 7, at 102 n.6.
24. L. Wenger, INSTITUTES OF THE ROMAN LAW OF CIVIL PROCEDURE, *supra* note 5, at xi (Introduction by Dean Roscoe Pound).

The Contributions of Roman Law to International Law

ELIZABETH F. DEFEIS*

Roman law has had a significant impact on the development of international law. That development continues in the modern era. To promote respect for the principles of international law, the United Nations has proclaimed this decade the "Decade of International Law."[1] International law and international norms have become increasingly prominent, not only in the world arena, but also in the United States' domestic law and foreign policy. The havoc wreaked by World War II, and the atrocities and human rights violations that accompanied the war, underscored the need for international cooperation to ensure that such violations would never occur again and served as a catalyst for the acceptance by sovereign nations of an international organization that would be charged with keeping the peace and furthering fundamental freedoms and human rights.[2] That organization — the United Nations — will soon mark its fiftieth birthday, having assumed over the last half century an increasingly pivotal role in peace making, peace keeping, and promoting human rights.[3]

In the United States, the primacy of international law and treaties has been recognized from the beginning of the republic. The United States Constitution of 1787 affirmed that "treaties . . . shall be the supreme law of the land" and gave the Congress the authority "to define and punish . . . offenses

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1. By its Resolution 44/23, the General Assembly declared the period 1990-1999 as the "United Nations Decade of International Law." The main purposes of the Decade, as stated in paragraph 2 of the resolution, are:

> (a) To promote acceptance of and respect for the principles of international law;
> (b) To promote means and methods for the peaceful settlement of disputes between States, including resort to and full respect for the International Court of Justice;
> (c) To encourage the progressive development of international law and its codification; and
> (d) To encourage the teaching, study, dissemination and wider appreciation of international law.

2. J. Humphrey, *The International Law of Human Rights in the Middle Twentieth Century, in* THE PRESENT STATE OF INTERNATIONAL LAW AND OTHER ESSAYS, INTERNATIONAL LAW ASSOCIATION JOURNAL 75 (1973).

3. B. Urquhart, A LIFE IN PEACE AND WAR (1987); U.N. Dept. of Pub. Information, THE BLUE HELMETS: A REVIEW OF UNITED NATIONS PEACEKEEPING (1985). *See also* Nanda, *Nuclear Weapons and the Rights to Peace Under International Law*, 9 BROOKLYN J. INT'L L. 283, 289 (1983), in which Professor Veda Nanda finds that the right to peace has been established as a fundamental, collective human right.

against the law of nations."[4] In one of the earliest cases to come before the United States Supreme Court, Chief Justice John Marshall applied international law to resolve a pending dispute[5] and in 1900, the Court stated that "[i]nternational law is part of our law and must be ascertained and administered by the courts of justice of appropriate jurisdiction."[6] Despite prior arguments about the binding nature of international law, today its legitimacy, both as a component of United States law and as a system that regulates conduct between nations, is accepted by diplomats and scholars alike.[7] And yet, while Roman law is recognized to be "one of the greatest factors in the creation of modern civilization,"[8] the seminal contribution of Roman law to the development of international law has gone largely unacknowledged.

The concept of natural law upon which the international legal system is based was first introduced by the Greeks,[9] flourished among the Stoic thinkers of the Hellenistic age, and emerged as an explicit philosophical theory with the Roman emperor Justinian. Cicero summarized the Stoic philosophy in *The Commonwealth* and *The Laws* as follows: "Natural law is congruent with the reason by which the universe is governed, knowable by human reason and amenable to emulation in the conduct of human affairs. It forms the foundation for all positive law and applies to everyone at all times in all places."[10] It may be ascribed to a universal movement of the human mind and spirit which aspires to the notion of an eternal and immutable justice.[11] Lawmakers are therefore guided by the principles of natural law; laws not in conformity with the natural law, although legally binding, are not binding in conscience.[12]

The law of the Roman republic recognized two sources: *jus civile* and *jus gentium*. *Jus civile* was the law particularly derived by Rome and was appli-

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4. U.S. CONSTITUTION, art. VI; *Id.* at art. I, sec. 8.

5. *The Schooner Exchange v. McFadden*, 11 U.S. (7 Cranch) 116 (1812).

6. *The Paquete Habana*, 175 U.S. 677 (1900).

7. For accounts of how international law came to be incorporated into the law of the United States, *see*, Sprout, *Theories as to the Applicability of International Law in the Federal Courts of the United States*, 26 AM. J. INT'L L. 280 (1932); Henkin, *International Law as Law in the United States*, 82 MICH. L. REV. 1555 (1984).

8. Re, *The Roman Contribution to the Common Law*, 2 NIABA L. J. 23, 34 (1992). Professor Re quotes Dr. James Bryce, Regis Professor of Roman law at Oxford, as once having said:

> The legal concept set forth [in Roman Law] are those upon which all subsequent law has been based; and nearly all of them find their place in our own system which they have largely contributed to mould.

Id. at 37.

9. A.P. d'Entreves, NATURAL LAW 14 (1970).

10. D. Nelson, THE PRIORITY OF PRUDENCE 5 (Penn. State U. Press 1992).

11. *Id.*

12. Stoics had a universal vision of the good and the need to conform in behavior to a common standard derived from human nature. *See* M. Crowe, THE CHANGING PROFILE OF NATURAL LAW 33-36 (1977); Finnis, NATURAL LAW AND NATURAL RIGHTS (1980).

cable to relations among the Roman subjects. Its influence on the development of the common law and the law of property and contracts is widely celebrated.[13] *Jus gentium*, on the other hand, was composed of comprehensive principles of law governing relations between Roman citizens and foreigners considered so intrinsically reasonable and universally applicable that all rational people recognized and applied them. *Jus gentium* was, therefore, initially a system of law, or more appropriately of equity, evoked to supplement *jus civile*. It contained many principles of general equity and natural law similar to "general principles of law recognized by civilized nations," which is one of the sources of international law recognized in Article 38 of the Statute of the International Court of Justice.[14] In its further development, *jus gentium* evolved into a philosophical doctrine known as *jus naturale*, a prescriptive doctrine which dictated how a person should act by his or her nature as a social and rational being.[15]

The significance of the Roman contribution to international law is not the creation of a legal system governing relations among sovereign states because the Roman Empire was composed of hundreds of different races and tribes and encompassed almost the entire civilized world. Thus, Roman law did not directly govern relations between sovereign equals and did not include the concept of an international legal system. Rather, its contribution to international law is the development of *jus gentium*, or principles of universal application, and its further development of *jus naturale*.

With the disintegration of the Roman Empire, nation states such as England and France and hundreds of smaller kingdoms, dukedoms and principalities emerged. Thus a system of law to regulate relations among the new states became necessary and, in defining these relations, reliance was placed predominantly upon Roman law and Canon law.

The natural law philosophy flourished in the middle ages through the scholarly discourses of great theologians such as Francisco Suarez (1548-1617), the Spanish Jesuit scholar and contemporary writer on *jus gentium*,[16] and St. Thomas Aquinas (1226-1274), who taught that all human laws are derived from God and are reflected in the law of nature, a body of permanent principles grounded in the Divine Order.[17]

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13. *See* Re, *The Roman Contributions to the Common Law*, *supra* note 8, at 71. *See generally*, H. Lawson, THE ROMAN LAW READER 55-141 (1969); B. Cohen, JEWISH AND ROMAN LAW 26-27 (1966); R. Sohm, THE INSTITUTES: A TEXT-BOOK OF THE HISTORY AND SYSTEM OF ROMAN PRIVATE LAW 69 (J. Leslie Trans. 2d ed. 1901).

14. Statute of the International Court of Justice, June 16, 1945, art. 38(1)(c), 59 Stat. 1055, 1060, T.S. No. 933.

15. Cohen, JEWISH AND ROMAN LAW, *supra* note 14, at 27. *Jus naturale* is recognized as the universal and unchanging moral law observed by all nations. *Id.*

16. Suarez's TREATIES ON LAW AND GOD THE LEGISLATOR was published in 1612.

17. A.P. d'Entreves, *supra* note 11, at 168.

In Europe, in the sixteenth century, Roman law was held in great respect and was universally applied unless local rules of law stated otherwise.[18] In Germany, for example, it was "received" as law and Roman law replaced local customary law and was applied as the binding law of the land. Elements of Roman law were similarly incorporated into Dutch law between the thirteenth and sixteenth centuries. Everywhere, in fact, Roman law was regarded as *ratio scripta* — written reason — a system of common heritage of every country which was a triumph of human reason. Moreover, because of its close association with the Canon Law of the Roman Catholic Church, Roman law had great influence in the medieval world.[19]

The Classical law of nations evolved from the body of doctrine developed in Europe between 1500 and 1800 by an eminent school of international jurists who were guided by the philosophy of natural law.[20] Although there are various and quite divergent conceptions of natural law, it is undisputed that the concept of natural law was central to the development of international law. The founder of modern international law is generally acknowledged to be Hugo Grotius (1583-1645), a Dutch philosopher, jurist, theologian and diplomat, who based his system for governing relations among sovereign states on a rationalistic conception of natural law. While acknowledging the primacy of natural law, Grotius derived the principles of the law of nature from universal reason rather than divine authority.[21]

Hugo Grotius and his successors developed a system for governing relations among nations that was based on a theory of natural law and was analogous to the Roman law governing relations between individuals and between the individual and the state. Similar to the Roman law system, it was founded on the principle that there is a determinable law of nature which can be ascertained and must be applied. This system of international law is derived from the common consent of nations and is the foundation of *jus gentium*, which acquires its obligatory force from the principle *pacta sunt*

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18. J.L. Brierly, THE LAW OF NATIONS 19-20 (6th ed.). Roman law grew in importance in Europe following the French Revolution. For Henry Summer Maine, "one of the most singular phenomena" of his day, dating from the French Revolution, was the "gradual approach of Continental Europe to a uniformity of municipal law," which led him to conclude that "Roman Law," or Civil Law, was "fast becoming the *lingua franca* of Universal Jurisprudence." H. Maine, *Roman Law and Legal Education, in* VILLAGE COMMUNITIES IN THE EAST AND WEST 330, 361 (1876).

19. J.L. Brierly, *supra* note 18, at 19-20.

20. *See generally*, Weinreb, *The Natural Law Tradition: Comments on Finnes*, 36 J. LEGAL ED. 501 (1986).

21. *See* H. Grotius, *Dejure Belliac Pacis Libri Tres* (Carnegie ed., F. Kelsey Trans. 1925). *See also* P. Haggenmacher, GROTIUS ET LA DOCTRINE DE LA GUERRE JUSTE 626 (1983). For a comprehensive assessment of the natural law origins of international law, *see*, Beres, *Justice and Real Politik: International Law and the Prevention of Genocide*, 33 AM. J. JURIS. 123 (1988).

servanda.[22] Today, the doctrine of *jus gentium* is defined as "that law which natural reason has established among all men and is equally observed among all nations, and is called the law of nations, as being the law which all nations use."[23]

Two of the most important principles of international law in Grotius' system find their counterpart in Roman law. The principle that restitution must be made for a harm done is based upon an abhorrence for unjust enrichment, the general equitable maxim which was so eloquently expressed in Roman law. The second, that promises must be kept (*pacta sunt servanda*), was the basis of the Roman law system, as expressed in both the *jus civilium* and the *jus gentium*. Thus, international jurists turned to Roman law for the rules of their system whenever the relations between ruling monarchs seemed to be analogous to those of private persons. For example, rights over territory when governments and the territorial notions of feudalism prevailed, resembled the rights of a private individual over property in the Roman law. As a result, the international rules relating to territory are still in their essentials the Roman rules of property.[24]

Treaties as a source of law can be traced to the Roman law tradition. The laws of *jus gentium* were applied to cases dealing with conflicts between the tribal families of the republic, *paterfamilias*. The relationship between one *paterfamalia* and another was comparable to the relationship among modern states as regulated by international law. The primary source of laws governing relations between the *paterfamilias* were treaties, and, in the absence of treaties, the parties relied on reasoned principles commonly accepted in the republic.[25]

Just as the movement in the domestic law of the United States is towards increasing codification, so international law has become increasingly codified in the form of treaties, both multilateral and bilateral. These treaties, such as the Law of the Sea and the several Human Rights Conventions have been drafted under the sponsorship of the United Nations and have been ratified and accepted by an increasing number of nations.

Finally, the concept of sovereignty, a fundamental principle of international law, was also recognized in Roman law within the construct of *paterfamilias*. While the public law governed the public authorities and subjected the individual to the power of the state, absolute power was exercised within

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22. E. Jimenez de Arechaga, *The Grotian Heritage and the Concept of a Just World Order, in* INTERNATIONAL LAW AND THE GROTIAN HERITAGE, T.M.C. Asser. Institute, The Hague (1985).

23. BLACK'S LAW DICTIONARY 159 (1988).

24. Lawson, *supra* note 14, at 169.

25. A *paterfamilia* was composed of "a male citizen with no living male ancestors, together with all his descendants in the male line, such as others that had been artificially assimilated to them, by adoption or otherwise, and also his slaves." Lawson, *supra* note 14, at 45. *See also id.* at 46.

the *paterfamilia* by the patriarch over members of the family. Thus, members of the *paterfamilia* were obliged to follow a separate code of justice to govern relations within the family and were a separate sovereign authority.[26] This concept of sovereignty is one of the primary principles of international law and, indeed, the United Nations Charter reaffirms this principle as being founded upon the sovereign equality of all member states.[27]

Summarizing these matters, Sir Henry Maine, in his classic treatise, *The Ancient Law*, assessed the impact of Roman law on the development of international law as follows:

> After all the efforts which have been made to evolve the code of nature from the necessary characteristics of the natural state, so much of the result is just what it would have been if men had been satisfied to adopt the dicta of the Roman lawyers without questioning or reviewing them. Setting aside the Conventional or Treaty Law of Nations, it is surprising how large a part of the system is made up of pure Roman law.[28]

Modern international law owes a great debt to Roman law and was developed at a time when Roman law was a prominent influence among the leading jurists of the day. As we celebrate the Decade of International Law proclaimed by the United Nations, we should also celebrate the contribution of Roman law to this great system.

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26. Sherman, *Roman Law as an Organizing Instrument*, 46 B.U.L. REV. 183, 183-84 (1966).
27. U.N. Charter, art. 2, 59 Stat. 1031, T.S. 993, 3 Bevens 1153.
28. Sir Henry Maine, THE ANCIENT LAW 56-7 (Everyman ed.).

Book Review: The *Institutes* of Justinian

REVIEWED BY FRANK C. RAZZANO*

Like many Americans, I was absorbed in the Fall of 1991 by two news events: the Senate confirmation hearings on Clarence Thomas' nomination to the Supreme Court and the disintegration of the Soviet empire. With respect to the first news item, it was the Senate's questioning about "natural law," rather than sexual harassment, which caught my attention. The second news item was fascinating to me, not because it signaled the West's victory over communism, but because it thrust Eastern Europe into an entirely novel economic, political and legal environment. A society which had existed for almost a century without any notions of private property, contract law or legal procedure was now embarking down the path towards a modern Western legal system.

What were the origins of that legal system, I asked. Where had our ideas of private property and contracts come from? How old were our concepts of partnership, agency, bailment, inheritance, and quasi-contractual obligations? Was the idea of settling disputes in court the product of English jurisprudence or more ancient? And, what role had "natural law" played in these legal developments?

Before the Senate hearings became bogged down over Justice Thomas' relationship with Anita Hill, the more liberal members of the Senate Judiciary Committee grilled the nominee about several of his articles and speeches which referred, approvingly, to the concept of "natural law." These liberal Senators seized on this concept as a supposed codeword signaling a pro-life, anti-choice view on abortion, and they vigorously pursued Justice Thomas on this topic in an effort to elicit his views on abortion. In the course of their questioning, these Senators betrayed a strong bias against "natural law," suggesting, at very least, that it was an irrational and inappropriate fulcrum on which to balance a judicial philosophy. The media and the press took up this drum beat and questioned whether Justice Thomas was a reactionary frozen in an antiquated 18th or 19th century mindset, rather than a progressive thinker attuned to the legal sensitivities of the late Twentieth Century. As a result of these hearings, I was curious to ascertain the real meaning and origin of "natural law" and to determine whether those origins had anything to do with the abortion controversy.

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Being a student of history, I remembered that "natural law" had a rather long and venerable history, one which certainly suggested that it had a meaning separate and apart from the liberal-conservative agenda on abortion. Indeed, I knew that "natural law" was one of the principles which guided the Founding Fathers in drafting the two defining and most hallowed documents of our democracy: the Declaration of Independence and the Constitution. The Founding Fathers obviously held "natural law" in much higher regard than the liberal Senators on the Senate Judiciary Committee, and I decided to find out why. However, I did not know where our Founding Fathers discovered their notion of "natural law" and why they deemed this concept so important.

My thoughts regarding natural law and the future of Eastern Europe led me to the same place — the codification of Roman law 1,500 years ago in Constantinople during the reign of the Emperor Justinian. By the reign of Justinian (527-565 B.C.), Roman law could be found in two principal sources: the enactments of the Roman emperors and the writings of the Roman jurists.[1] In 528 B.C., the Emperor Justinian set out to organize and codify both branches of Roman law in an effort to create a more coherent legal system. First, he commissioned a group of jurists and administrators to collect and reconcile imperial legislation, an effort which resulted in the *Codex*. Next, he appointed a separate commission to produce an anthology of the works of the Roman classical jurists, which became known as the *Digest*. These two works — the *Codex* and the *Digest* — became the basic sourcebooks for all Roman law.

The commission which wrote the *Digest* also was responsible for writing the *Institutes*, which was intended to be an elementary textbook for law students in all parts of the Empire. The *Institutes*, which was the ancient equivalent of a modern-day hornbook, organized the law around certain immutable principles and employed a scientific methodology for analyzing that law. It is in this work that we find the origins of the modern Western legal concepts of property, contracts, bailments, partnerships, agency, fiduciaries and sureties. The explanation of these concepts, and even the actual terms used to define them, are so current and familiar as to make most modern American lawyers feel right at home in the Roman legal system. (Indeed, the similarities are so striking that modern law students might do well to use the *Institutes* as a study tool.)

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1. As noted elsewhere in this symposium, Roman jurists were not the equivalent of modern American and British judges. Instead, they were scholars, who advised on the law, often providing Roman judges with advice on the legal standards to be applied to the facts that the judges found. *See* Krauss, *The Changing Influence of Roman Law: Ideals and Reality in Nineteenth Century America*, 2 NIABA L. J. 77 (1992).

The *Institutes* contain not only the origins of our modern Western legal system, but also those of "natural law." The *Institutes* begins with a discussion of "natural law" and provide some insights into why it became the controlling philosophy of Roman law. The *Institutes* makes clear, *ab initio*, that Roman law was designed, to the extent possible, to be in harmony with the natural order. While our modern-day American Senators may hold up "natural law" for scorn as a code word for a conservative political agenda, the Romans viewed "natural law" as a paradigm worthy of human emulation. This insight formed the basis for a legal system that lasted a thousand years and that gave birth not only to our own legal system, but those of most modern-day European countries.

The *Institutes* defined "natural law" as the law shared by all creatures, which is established by Divine providence and remains fixed and immutable. It is the law which is common to all things; the observable standards by which nature governs itself; and the self-evident rights and obligations by which all things are governed. The Romans believed that this law was easily discerned — one need only look carefully at the world to observe these natural laws in action — laws which were not peculiar to man, but governed all creatures. For example, the *Institutes* viewed marriage as one of the many products of "natural law," for it is derived from the union of males and females which can be observed in nature even in the lower forms of animals.

According to the *Institutes*, man-made law or civil law constitutes the rules which a state enacts for the benefit of its own members. Unlike "natural law," these laws frequently change with either the consent of the governed or the enactment of statutes, sometimes leading to the development of legal precepts that are in conflict with the natural order. For instance, while the *Institutes* announced that one aspect of natural law was that all men are born free, it further recognized that force or man-made laws could prevent men from exercising that freedom. Slavery, which subjected one man to another's dominion, thus was an institution contrary to the natural order and thus contrary to "natural law."

The *Institutes* divided Roman law into three conceptual areas: the law of persons, things and actions. Book One of the *Institutes* deals with the law of persons; Books Two and Three deals with the law of things (*i.e.*, property, inheritance, and contracts); and Book Four deals with forms of action or procedure. This division is not very far removed from the way modern law school courses of study are divided. Each book of the *Institutes* was meant to be a primer and it is equally clear that the philosophical underpinnings of each of those primers was "natural law."

Book One, the law of persons, began with the basic precept of Roman law: all Romans were "to live honestly, to injure no one, and to give every man his due." The simplicity and compassion underlying this canon is almost

breathtaking, summing up in one brief phrase all that modern legislators and jurists have endeavored to achieve through endless legislation and innumerable judicial opinions. This simple directive reveals the essence of the Roman concept of "natural law"—the belief that nature is good and wholesome. How this rather modest and wonderful principle was distorted by the members of the Senate Judiciary Committee into a perceived obstacle to a woman's individual rights seems odd.

The balance of Book One deals with the distinction between free men and slaves, the power of the *pater familia* over his children and grandchildren, marriage, adoptions, guardianships, and curators. With the exception of the role of the *pater familia*, each of these legal concepts is well-known to modern American lawyers. The *Institutes* instructs that each of these concepts are man-made devices, developed by the Roman people from custom and usage as a means for governing society, rather than as a product of "natural law." For example, the power of the *pater familia* over his sons and grandchildren is a uniquely Roman concept which is not followed in nature or in other nations.[2]

The Romans compared and contrasted each of these legal principles against nature's order to determine whether they were in conformity therewith. If a law was at variance with the natural order, Roman jurists carefully examined the reasons for the disparity. Thus, Roman law was not a mere collection of enactments, but a legal system based upon a philosophy grounded in the natural order. If a law deviated from that order, then the Romans wished to ensure that it advanced the primary societal goal: "to live honestly, to injure no one and to give every man his due."

Book Two of the *Institutes* deals with the law of things. The Roman sense of property is less rigid than that of Anglo-American jurisprudence. While Anglo-American property jurisprudence begins with the feudal concept of the absolute sovereignty of the lord, Roman property law again begins with an analysis of "natural law." Thus, it looks to the natural order of things in determining property rights rather than to the relationship between a lord and his vassals.

Under the feudal system, the lord was master of all persons and things within his realm. However, Roman law, with its "natural law" orientation, did not view property in this manner. It did not view property rights as a mere incident of the lord's title, but rather focused on the natural order of title. For example, unlike the Anglo-Saxon system, Roman law did not grant to a landholder rights in all wild animals found upon his property. Instead, Roman law began with the assumption that all wild animals were free because they are so in nature. Because nature created all wild animals free, if a

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2. For a discussion of this point, see R. Pound, THE SPIRIT OF THE COMMON LAW 26 (1921).

man caught a wild animal on another's property, the animal belonged to that person, not the owner of the land. This was because the *Institutes* concluded that "natural reason admits title to the first occupant." Although the owner may have sued the hunter for trespass upon his property, the animal belonged to the hunter, not the owner of the land. This result would have mystified the medieval architects of English property law who were trained in the feudal system of property rights. Similarly, Roman law required that in order to transfer property to another, it must be delivered, since "natural law" itself prescribes delivery as the mode by which corporeal things are acquired.

The balance of Book Two of the *Institutes* deals with gifts, wills, inheritance and legacies — concepts which the modern American lawyer, again, would readily recognize. For example, the discussion of gifts contains a chapter dealing with gifts in contemplation of death, while another chapter sets forth the rule that a son may not be disinherited by a testator's will unless he is specifically mentioned. Both legal principles survive to this day in the legal jurisprudence of every American State.

Book Three of the *Institutes* deals with contracts, sales, bailments, partnerships, agency and quasi-contractual obligations, to name but a few subjects. Again, the most striking aspect of this portion of the *Institutes* is the similarity between American and Roman contract law. While there are differences, in these chapters the modern reader feels comfortable with the basic Roman legal concepts. Indeed, it is readily apparent that the system which the Romans developed is the foundation of our own law governing contractual relationships. And because the Roman law of contracts developed from the observations of nature, we can again witness the critical role played by "natural law" in the development of our own jurisprudence.

Book Four of Justinian's *Institutes* deals with the law of actions, *i.e.*, procedure. An action is defined as the right to sue before a judge for what is due to you. This fourth book outlines the various causes of action that were available to the average Roman citizens for injuries visited upon him or her by another.[3] Again, Roman law looked to the natural order of things in determining what causes of action exist in favor of an individual. For example, theft and robbery were against the law of nature and, as such, were recognized causes of action. Consequently, an individual had a cause of action for theft of goods or wrongful damage or injury to his person or property.

A reading of the *Institutes* makes clear that the Roman legal system is a "distant mirror" of our own; indeed, it is closer to our own than that of our erstwhile Communist brethren. The horde of American lawyers which has

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3. *See* Harris, *Roman Civil Liability: The Precursor to Anglo-American Tort Law*, 2 NIABA L. J. 107 (1992).

invaded the countries of the former Soviet Union report that the Communist legal system was so alien to the Western system of law as to make it virtually impossible to do business there because there are no common frames of reference. The countries of the former Soviet Union existed in a system with no conception of private property, agreements, inheritance, partnerships, fiduciary relationships, sureties, etc. It was a system built upon a political theory which rejected the legal and societal values of Western Civilization. As a consequence, for almost eighty years, Russia and the countries of the former Soviet Union existed in a legal vacuum.

Yet, in contrast to Eastern Europe, if we were transported back two thousand years to Rome or Constantinople, we would be quite at home. Although the Romans are far removed in time, culture and language, there continues to be striking similarity between our legal systems. If we wished to establish a contractual relationship, or buy and sell property in ancient Rome, we would have little difficulty negotiating the basic terms since each party would have common reference points.

In conclusion, within the *Institutes* of Justinian, we find the very source of our modern Western legal concepts. As the countries of the former Soviet Union begin to reenter the modern world and reestablish modern Western legal concepts after an eighty-year hiatus, perhaps they would do well to begin by reading the *Institutes*. The *Institutes* will introduce them to the philosophical source of Western legal thought, "natural law," which has nothing to do with the abortion issue. Rather it is the foundation upon which the Romans developed a highly sophisticated legal system, which later gave birth to that of the Western world. Indeed, it is "natural law" which gave rise to the basic precept upon which ancient Rome was based, and, upon which the former Soviet Union, hopefully, will base its laws: "to live honestly, to injury no one, and to give every man his due."

ARTICLES

The Roman Contribution to the Common Law†

EDWARD D. RE*

Professor Re's thoughtful piece on the Roman contributions to the common law, which was first published by the Fordham Law Review in 1961, represents a milestone in the modern study of legal history. This article revitalized a subject that had laid dormant for many years, exposing whole new generations of lawyers to the profound jurisprudential principles of Roman law which heavily influenced the development of the English common law. This article was the primary inspiration for dedicating the Quincentennial issue of The Digest to the subject of the contributions of Roman law to the American legal system.

*"Si cet ouvrage a du succès, je le devrai beaucoup à la majesté de mon sujet."***

I. PROLOGUE: THE ROMAN LEGAL HERITAGE AND THE LAW OF ENGLAND

In a discussion of any phase of legal history, the difficulty of finding a point of beginning seems obvious. "Such is the unity of all history that any one who endeavours to tell a piece of it must feel that his first sentence tears a seamless web."[1]

This frustrating difficulty has been experienced particularly by those who have attempted to unravel the complex skein of English legal history. Plucknett, for example, in a remarkable one-volume work modestly entitled *A Concise History of the Common Law*, refers to the dependence or indebtedness of later civilizations upon those that preceded in the following way:

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** "If this work be successful, it shall be due chiefly to the majesty of the subject." Montesquieu, De L'Esprit des Lois ii (Nouvelle édition, Paris, Imprimerie E. Capiomont et V. Renault). (Author's translation.)

1. 1 Pollock & Maitland, The History of English Law 1 (2d ed. 1893) [hereinafter cited as Pollock & Maitland]. In 1882 Stubbs commenced his essay on The History of the Canon Law in England, in 1 Select Essays in Anglo-American Legal History 248 (1907), by saying: "It requires no small amount of moral courage to approach a subject of legal history without being either a lawyer or a philosopher." Without commenting for the philosopher, it may be added that it requires no lesser an amount of moral courage for a lawyer!

> The age which saw the first beginnings of English history witnessed also the decline of Roman law which had run a course of a thousand years, making priceless contributions to civilization. But behind the Roman system were others still more ancient— Greek, Semitic, Assyrian, Egyptian— all with long histories of absorbing interest.[2]

For our purposes, however, it would seem practical that the inquiry begin with the Roman occupation of the British Isles.

It is not the burden of this article to extol the virtues of the Roman legal system, or its judicial precepts and institutions. This has already been done by skilled hands. Nevertheless, since the Roman legal system had "undoubtedly wider historical significance than the common law" even if only because of "circumstances," some passing reference will be made to the prestige enjoyed by the Roman law and how it must have influenced the minds of future generations familiar with its panorama of legal rights and duties.[3] It has been said that far more important than the reception of Roman "rules" of law by the English law "was the influence of the Roman law on the English way of looking at the law, on English jurisprudence and on English law writing."[4]

Clearly, no attempt will be made to trace the Roman law to its sources to determine its indebtedness to prior legal systems and cultures. Nor will the corpus juris of Rome or Roman legal institutions be compared with the common law of England. By and large all of this has been admirably treated by eminent scholars of unquestioned authority.[5]

Rather, what is to be attempted concerns the extent to which the Roman law played a part in the growth and development of the common law of England. Hence, the subject has been entitled *The Roman Contribution to the Common Law*. To the extent that the common law of England supplied the legal fabric for the United States of America, the title might very well have been *The Roman Contribution to Anglo-American Law*.

It is clear to the legal historian that the Roman law was not "received" in England to the degree and in the manner that it was "received" on the Continent. Nevertheless, it is gross error to deny its influence and pervasive impact upon the growing body of English law, particularly during its formative period. Whereas on the Continent the Roman law was utilized to meet the needs of changing social conditions, it is demonstrable that English law bor-

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2. Plucknett, A Concise History of the Common Law 3 (5th ed. 1956).

3. See Yntema, Roman Law and Its Influence on Western Civilization, 35 Cornell L.Q. 77, 79 (1949).

4. Smith, Elements of Law, in Studying Law 171, 341 (Vanderbilt 2d ed. 1955).

5. See Buckland & McNair, Roman Law and Common Law (2d ed. Lawson 1952); Burdick, The Principles of Roman Law (1938); Sherman, Roman Law in the Modern World (2d ed. 1922).

rowed "foreign law" to meet the increasing needs of a developing great nation.

Professor Munroe Smith of the Columbia Law School told his students that in England "equity jurisprudence and legislation served to help bridge the gaps in the law, which, on the Continent, were filled by Roman law."[6]

Hence, while we may not speak strictly of a "reception" or "acceptance" of Roman law in England, this is not to imply that "Roman law had no influence on English law."[7] The very same scholar who refers to English "equity" as a reason why Roman law was not "received" in England, goes on to say: "in equity there was, of course, more borrowing than elsewhere."[8] Professor Yntema, perhaps wishfully, has also noted that, despite certain differences, the two people whose laws we are discussing possess certain national traits in common.[9]

In presenting the indebtedness of the common law to the Roman law, some remarks concerning the place of Roman law in the general stream of culture are inevitable.

II. THE STUDY OF ROMAN LAW: THE LANGUAGE, DOCTRINES AND PHILOSOPHY OF LAW

As a threshold inquiry one may very well ask, "Why discuss Roman law at all, and particularly at this late date?"

In this connection, the reader ought to pause for a moment to grasp the full impact of John Maxcy Zane's introductory sentences in his famous essay on *The Five Ages of the Bench and Bar of England*. He wrote:

> It is a singular fact that but two races in the history of the world have shown what may be called a genius for law. The systems of jurisprudence, which owe their development to those two races, the Roman and the Norman, now occupy the whole of the civilized world.[10]

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6. Smith, Elements of Law, in Studying Law 171, 339 (Vanderbilt 2d ed. 1955).

7. Id. at 340.

8. Id. at 341.

9. E.g., "reverence for authority and tradition, hostility to exotic individualism, insistence on useful occupation, on Victorian modesty, on frugality, and above all, loyalty, again and again demonstrated in steadfast resistance to the public enemy, in unshaken fidelity to their native land and its institutions, and in persevering courage under the severest trials." Yntema, supra note 3, at 77.

10. 1 Select Essays in Anglo-American Legal History 625 (1907). See books recommended by d'Entrèves in his Natural Law; An Introduction to Legal Philosophy 16, 32 (1951). Professor d'Entrèves, of Oxford and formerly of the University of Turin, says: "Historical and critical study of Roman law has developed in the last hundred years, and particularly in Germany and in Italy, into an immense literature which cannot be referred to in detail. To the English reader the most inspiring approach to Roman Law jurisprudence may perhaps still be provided by Gibbon's Decline and Fall, Chapter xliv." Id. at 32. The Reverend H. H. Milman in his edition of Gibbon says that "this important chapter [on Roman law] is received as the text-book on Civil Law in some of the

To this may be added the words of Dr. James T. Shotwell, found in his most recent masterful work entitled *The Long Way to Freedom*:

> Down to our own day the daring achievements of Athenian democracy have remained an inspiration for the thoughtful and studious rather than a model for practical application in world affairs. On the other hand, the Roman experience in government was the largest single influence upon the minds of those who, throughout the long centuries of European history, created the state system of today.[11]

Fully appreciative of the Roman contribution to government— and man's struggle for freedom—Dr. Shotwell notes that Rome's most lasting contribution was the Roman law:

> The permanent contribution of Rome to the Western world was not this prodigious structure of empire, however lasting its impression on the minds of statesmen and peoples of succeeding centuries, but the development of a vast and splendid system of law. The history of this great juristic creation runs parallel with that of Rome itself from the days of kingship of the little city state to those of the Emperor Justinian when the barbarians were already ruling in the West and the last citadel of the ancient world was Constantinople.[12]

Is the subject important or useful? Two witnesses will be called to testify on the cultural and practical value of the subject. The first will be a distinguished Englishman, a reader in Roman law in the Inns of Court, who states:

> The reasons which justify [the study of Roman law], particularly for students who breathe a Common Law atmosphere, are principally these:—
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> 1. Roman Law is one of the great things which have happened in the world. It is part of a liberal education to know something about it.

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foreign universities." 4 Gibbon, The History of the Decline and Fall of the Roman Empire 298 (Milman ed. 1852). Gibbon opens that chapter thus: "The vain titles of the victories of Justinian are crumbled into dust. But the name of the legislator is inscribed on a fair and everlasting monument. Under his reign, and by his care, the civil jurisprudence was digested in the immortal works of the Code, the Pandects, and the Institutes: the public reason of the Romans has been silently or studiously transfused into the domestic institutions of Europe, and the laws of Justinian still command the respect or obedience of independent nations." Id. at 298-99. He also observes that "the laws of a nation form the most instructive portion of its history . . . ." Id. at 300.

11. Shotwell, The Long Way to Freedom 107-08 (1960).

12. Id. at 117. James Brown Scott expressed this thought as follows: "Great empire builders as the Romans were, they were still greater architects of law. And when their empire crumbled and disappeared, the firmly knit structure of their legal system withstood the barbarian avalanche which threatened to sweep away the civilization of the ancient world." 1 Scott, Law, the State, and the International Community 241 (1939). "Roman Law as a civilizing influence . . . . The Romans in their law reflected and embodied much of the best that man had been able to devise as the result of thousands of years of experience in social living raised to the level of civilized living." Kinnane, A First Book on Anglo-American Law § 77, at 202-03 (2d ed. 1952).

2. Roman Law is an introduction to the study of the Science of Law, or, as we call it, Jurisprudence. For many centuries the Science of Law *was* Roman Law. If in modern times it has widened its outlook and improved its methods its debt to Roman Law remains unquestioned.
3. Roman Law is a key to the terminology and, to a great extent, to the substance of foreign systems.
4. Roman Law enlarges the mind. Burke has well said that "the science of law does more to strengthen the mind than to liberlise it . . . ."[13]

Its liberalizing influence, however, is not to be overlooked or underestimated.

The second, an American, is Dr. Phineas Sherman, a keen scholar and researcher in Roman law who, writing about forty years ago, had this to say:

> The revival in the United States of the study of the Civil Law has already assumed ample proportions which are yearly increasing, and its full fruition with many far-reaching consequences is but a question of time. The greatest contribution of this revival to American law will be a powerful influence operating for the betterment of the private law of the United States, purging it of its present dross of redundancy, prolixity, inconsistency, and lack of uniformity, and crystallizing it into the compact form of a codification.[14]

The foregoing opinion as to the historical and continuing contribution of Roman law is shared by many scholars who declare that the contribution of Roman law to world culture is second only to the advent of Christianity.[15] "In the opinion of Buckland, one of the greatest Romanists of our time, next to Christianity, it 'was the greatest factor in the creation of modern civilization, and it is the greatest intellectual legacy of Rome.' "[16]

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13. Lee, Elements of Roman Law viii (4th ed. 1956). French law students are given the reasons for the study of Roman law under the following headings: "practical," "juridical technique," "historical and philosophical." Nouvelle Collection Foignet, Manuel Elémentaire de Droit Romain 5-7 (Treizième ed. 1947). (Author's translation.)

14. Sherman, Preface to First Edition, in 1 Roman Law in the Modern World at v (2d ed. 1922). Professor Yntema summarizes the significance of Roman law as follows: 1. It is the "fundamental body of legal doctrine" which is the "common element in the individual legal systems of much of Continental Europe, and its colonies;" 2. The "even wider dissemination . . . of systematic legal conceptions and principles not merely in the civil law systems but also in the Anglo-American common law;" 3. The "extension of this stock of conceptions by virtue of its acceptance in the system of international law developed by Hugo Grotius and his successors;" 4. "The language of Roman law has become a lingua franca of universal jurisprudence." Yntema, supra note 3, at 88.

15. Yntema, Foreword to Lawson, A Common Lawyer Looks at the Civil Law at vii, xvi (1955). Professor Yntema also tells us that "without knowledge of the Roman sources, it is difficult to appreciate readily or accurately the conceptions used not only in the modern civil law, but also in international law, jurisprudence, and even in substantial degree in the law of England." Id. at xv. See discussion of Professor Lawson's book in Northrop, The Complexity of Legal and Ethical Experience, 216-29 (1959); Re, Book Review, 30 St. John's L. Rev. 144 (1955).

16. Yntema, supra note 3, at 79.

"Indeed it was the Roman Empire," states Bryce, "and the Church taken together which first created the idea of a law common to all subjects and (later) to all Christians, a law embodying rights enforceable in the courts of every civilized country."[17]

Most scholars would probably readily concede the existence of this contribution since it is not difficult to see that many of the beautiful phrases of natural law philosophers embodied the eternal principles of justice of the corpus juris of Rome. The role of the Roman law as a universal law embodying principles of natural law applicable for all time is also generally admitted.[18]

Dr. Sherman indicates that the American Declaration of Independence, a monumental declaration that may be regarded as the crowning achievement of eighteenth century philosophy, "enshrines many a tenet of Roman jurists who confessed the alliance of philosophy with law."[19]

The inspiring statement that "by natural law all men are equal" is the inspiration of the great Ulpian as is the noble definition that "justice is the constant and perpetual will to allot to every man his due." Although all students of the common law know the Latin maxim *volenti non fit injuria*, few know that it also, in addition to countless others, represents the survival in modern law of the genius that was Ulpian. In portraying Papinian and Ulpian, Professor John Henry Wigmore, in his instructive and most enjoyable *A Panorama of the World's Legal Systems*, reminds the reader that "for us, these two bear also this sentimental distinction, that (with Paulus) they once dispensed justice in the island of Britain, as Roman magistrates in a Roman basilica."[20]

In mentioning Papinian one cannot refrain from saying that he has been referred to as the greatest name in Roman law. In fact, Justinian calls him "The Illustrious." For it was he who enjoyed the unique distinction that, among the five principal jurisconsults, where they were divided in opinion, his opinion should prevail. But Wigmore points out that his "truest fame should be that he died a martyr to his professional honesty." When the ruthless Caracalla caused the assassination of his own brother, who shared the throne with him, and directed Papinian, then his attorney general, to write a legal opinion in justification, Papinian replied with these immortal words: "I do not find it so easy to justify such a deed as you did to commit it." For this rebuke, Caracalla had Papinian put to death.[21]

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17. 2 Bryce, Studies in History and Jurisprudence 571 (1901).

18. See Smith, A General View of European Legal History 1, 4-5 (1927).

19. 1 Sherman, Roman Law in the Modern World 61 (2d ed. 1922).

20. Wigmore, A Panorama of the World's Legal Systems 428 (1936).

21. Ibid. See also Howe, Studies in the Civil Law 82-83 (2d ed. 1905). " 'That it was easier to commit than to justify a parricide', was the glorious reply of Papinian; who did not hesitate between

But other glowing tributes have not been registered without restraint and reservation. Sir William Blackstone, in his opening Vinerian lecture at Oxford, on the 25th of October, 1758, commended the study of the civil law. He indicated that both on the Continent of Europe and "in the northern parts of our own island . . . it is difficult to meet with a person of liberal education, who is destitute of a competent knowledge in that science which is to be the guardian of his natural rights and the rule of his civil conduct."[22]

After stating that the imperial laws of Rome had not been "totally neglected even in the English nation," and that it was not his intent "to derogate from the study of civil law, considered . . . as a collection of written reason,"[23] he hastens to add:

> But we must not carry our veneration so far as to sacrifice our Alfred and Edward to the names of Theodosius and Justinian; we must not prefer the edict of the praetor, or the rescript of the Roman emperor to our own immemorial customs, or the sanctions of an English parliament . . . .[24]

This is not to be taken to mean, however, that English scholars and jurists have not admired and appreciated the grandeur and beauty of the Roman law. It is on the question of the "reception" or the influence of the Roman law upon the common law that scholars have differed widely. Perhaps Professor Burdick is correct when he states that the various answers depend "in some instances, upon the prejudices or the sympathies of the different writers."[25] He suggests that some of the conclusions are affected by the "great conservatism of some English writers, also pride in the alleged indigenous laws of their own country, and prejudice, perhaps, against foreign influence . . . ."[26] Professor Burdick may perhaps have offered the real explanation of Blackstone's "courteous diplomacy" toward the civil or Roman law. He submits that Blackstone's views were influenced by his political and ecclesiastical environment.

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the loss of life and that of honor." 1 Gibbon, The History of the Decline and Fall of the Roman Empire 159 (Milman ed. 1852).

22. 1 Blackstone, Commentaries *4.

23. Id. at *5.

24. Ibid.

25. Burdick, The Principles of Roman Law 56 (1938).

26. Ibid. In his introduction to the initial volume of the American Journal of Comparative Law, Dean Roscoe Pound wrote: "The Anglo-American is averse to authorities in a foreign tongue." 1 Am .J. Comp. L. 3 (1952). See Professor Yntema's remarks concerning the animating purposes of that journal, 1 Am. J. Comp. L. 11 (1952). In that volume can be found a survey of comparative law teaching in the American law schools. Re, Comparative Law Courses in the Law School Curriculum, 1 Am. J. Comp. L. 233 (1952). "It is submitted that it is perhaps not premature to say that we are entering upon an era comparable to the twelfth century revival in learning. It cannot be doubted that the wealth of comparative law literature that has very recently appeared indicates that we have perhaps really given up our 'parochial attitude' toward foreign institutions." Re, Book Review, 30 St. John's L. Rev. 144, 149 (1955).

This attitude of "insularity" and religious prejudice has not gone unnoticed. Dr. Sherman, who refers to the use of Roman law "to supply the defects of the common law," adds: "[b]ut its use and reception were not always acknowledged by the courts. And this habit and practice gradually increased proportionately with the rise and increase of English prejudice against whatever bore the name 'Roman.' "[27]

The hostility against "foreign laws" was especially aimed at the canon law—"that ecclesiastical offshoot of Roman law"[28]—and soon both came to be regarded with suspicion as "instruments to enslave the English people to popes and emperors."[29] Mr. Ben W. Palmer, writing in the *American Bar Association Journal*, describes this attitude, with remarkable conservatism, as "a certain insular patriotism which may have affected English legal historians."[30]

One more word will be said about this aspect of the subject. It will be remembered that Blackstone attributed the continued teaching of the civil law in the English universities to the influence of "the popish clergy." Blackstone also repeated the fanciful story, perhaps current in his day, that a copy of Justinian's *Digest* was accidentally discovered at the siege of Amalfi in 1135, and this caused a revival of the Roman law. From this story, which is regarded as apocryphal by modern scholars,[31] Blackstone would have the reader believe that up to that time, Roman law had been all but forgotten.[32] This is clearly erroneous, since Roman law was taught at the University of Bologna long before the legendary discovery of the manuscript at Amalfi.

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27. Sherman, The Romanization of English Law, 23 Yale L.J. 318, 328 (1914).

28. Ibid.

29. Ibid. Wigmore, in A Panorama of the World's Legal Systems, following chapter XV on the "Romanesque Legal System," lists certain excellent works under the heading, "General References." To the listing of Dr. Sherman's two-volume work, Roman Law in the Modern World, Wigmore adds: "[T]his author's excessive claims for the wide influence of Roman and Romanesque law must be discounted." It is interesting to compare Wigmore's caveat about Sherman's "excessive claims" with the map of the Roman Empire in chapter VII, "The Roman Legal System," and the "World Map of the Romanesque system." Wigmore, A Panorama of the World's Legal Systems 1040, 1046 (1936). In reading the works of those who make "claims" and those who deny them, one is reminded of the French literary critics Charles-Augustin Sainte-Beuve and Hippolyte Taine—particularly of Taine's "trois forces primordiales dans l'histoire: race, milieu, moment" in L'Introduction à l'Histoire de la Littérature Anglaise. One is also reminded of Whitehead's statement that "the ideals cherished in the souls of men enter into the character of their actions." Whitehead, Adventures of Ideas 49 (1955).

30. Palmer, An Imperishable System: What the World Owes to Roman Law, 45 A.B.A.J. 1149, 1151 (1959). Mr. Alburn, also writing in the American Bar Association Journal, said that "Englishmen are loath to concede any great influence of Roman law upon English law . . . ." Alburn, Corpus Juris Civilis: A Historical Romance, 45 A.B.A.J. 462, 642 (1959).

31. 1 Pollock & Maitland 23. It has been said that "we may all admit the great ability of Blackstone as a lawyer and a lecturer, but it is manifest that history was not his forte." Howe, Studies in the Civil Law 112 (2d ed. 1905).

32. Burdick, The Principles of Roman Law 57, 165 (1938).

Blackstone, however, was accepting or espousing a theory that fit neatly in the then current impression that, since the canon law had drawn upon the Roman law, and since the Roman Catholic clergy was familiar with it, Roman law was "in some occult or insidious way, being used to propagate popish doctrines."[33] Professor Burdick concludes thus: "The very term 'Roman' Law seemed to connect it with the Church of Rome, and probably many zealous adherents of the English church believed they were prompting a righteous cause by discouraging the spread, or even the retention, of Civil Law doctrines."[34]

In this connection, William Wirt Howe, lecturing at Yale in 1894, observed that those who entertained these prejudices "perhaps forgot that the classical jurists who made the civil law what it was never heard of any pope . . . but were merely poor pagans looking for that justice which is the uniform and enduring endeavor to render to every man that which is his due . . . ."[35] Of course, Howe was paraphrasing Ulpian's definition of justice as enshrined in the *Institutes*.[36]

The reference to Blackstone and the attitudes of the time do not mean that English scholars have not come to appreciate the grandeur of the Roman law. Dr. James Bryce, who for almost a quarter of a century was Regius Professor of Roman Law at Oxford, had this to say in his valedictory address at that great English University:

> In . . . [the Roman Law] one may find something of value upon almost every principle and general legal doctrine with which a jurist has to deal. The legal conceptions set forth are those upon which all subsequent law has been based; and nearly all of them find their place in our own system, which they have largely contributed to mould . . . . No rules could better conform to the three canons of good law, that it should be definite, self-consistent, and delicately adapted to the practical needs of society. No study can be better fitted to put a fine edge upon the mind, or to form in it the habit of clear logical thinking.[37]

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33. Id. at 57.
34. Ibid.
35. Howe, Studies in the Civil Law 112-13 (2d ed. 1905).
36. Institutes 1.1.1. To this may be added what the Institutes call the three main principles of justice: "To live honestly, to hurt no one, and to give everyone his due." (Author's translation.) (Juris praecepta sunt haec: honeste vivere, alterum non laedere, suum cuique tribuere.) Institutes 1.1.3. See note 126 infra.
37. 2 Bryce, Studies in History and Jurisprudence 894 (1901).

III. BRITAIN AS A ROMAN PROVINCE: ULPIAN, PAPINIAN AND PAUL

In 53 B.C., Julius Caesar landed in Britain. In 43 A.D., the systematic conquest of Britain was begun by Agricola, and for the next three and a half centuries Britain was a Roman province.

This occupation cannot be minimized, because it is clear that Britain was an imperial province of the first order. At one time it had a garrison of about 30,000 Roman soldiers and was regarded as an important Roman governorship.[38]

Likewise, it is well to remember that, centuries later, the Roman legions were withdrawn from Britain because they were needed to defend the Italian peninsula against the invasions from the north. They were not ousted from the island. As Mommsen puts it: "[I]t was not Britain that gave up Rome, but Rome that gave up Britain."[39]

What was the nature of this occupation and what influence did it have upon the legal development of the island?

Certain physical facts stand out in bold relief. South of the "Roman Wall," a stone rampart still largely in existence in Northumberland, many townships were planned on the Roman pattern. The largest of these, and of purely Roman foundation, was Londinium. Many others could be mentioned. Suffice it to say that Agricola did much to Romanize the province. He started schools for the sons of the nobles, encouraged the erection of temples, baths and forums, and we are told he even popularized the adoption of the "toga" in lieu of the native breeches. Although there is less certainty as to the extent to which the Latin language was adopted, the following quotation is both relevant and interesting:

> It was certainly used in all official documents, in the law courts, and among the more educated classes; but there is also sufficient evidence to show that ordinary workmen knew a smattering at least, for on tiles and bricks have been found such scrawlings as *satis* ("enough") and *puellam* ("the girl"), and even the entertaining inscription *"Austalis dibus XIII vagatur sibi cotidim,"* which means "Augustalis has been off on his own every day for a fortnight."[40]

This period may very well be entitled the obscure age of English legal history. Some light on the general nature of the occupation has been shed by Haverfield, but he too tends to minimize the importance of the occupation and its influence. He states:

> From the standpoints alike of the ancient Roman statesman and of the modern Roman historian the military posts and their garrisons formed the

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38. 1 Mommsen, The Provinces of the Roman Empire 190 (Dickson transl. 1886).
39. Id. at 194.
40. Robinson, A History of Rome from 753 B.C. to 410 A.D., at 338 (2d ed. 1941).

> dominant element in Britain. But they have left little permanent mark on the civilisation and character of the island. The ruins of their forts and fortresses are on our hill-sides. But, Roman as they were, their garrisons did little to spread Roman culture here. Outside their walls, each of them had a small or large settlement of womenfolk, traders, perhaps also of time-expired soldiers wishful to end their days where they had served. But hardly any of these settlements grew up into towns. York may form an exception . . . .[41]

Haverfield goes on to say that the "departure of the Romans" from the island did not mean any departure of Romans or other persons. Rather, "it meant that the central government in Italy now ceased to send out the usual governors and other high officials and to organise the supply of troops. No one went: some persons failed to come."[42] The reader is nevertheless told that towns were abandoned, Roman speech and boundaries vanished, and only the massive foundations of the roads survived.[43]

History tells us that the Roman legions were not evacuated until 410 A.D. Since Britain was under Roman rule for such a long period of time, how could she have completely escaped the influence of Roman law? Those that have urged that the feudal system was of Roman origin, and that the craft guilds were the descendants of the *collegia opificum* and that the English village community was derived from the Roman villa, have met with the severest attack.[44] Selden, for example, declared that when the Roman left Britain, his law likewise departed.[45] After stating Selden's opinion on the matter, Dr. Winfield comments:

> No reasonable man can resist the conclusion that it must have had some effect while he was there. Lawyers like Papinian, Ulpian and Paul, would leave their influence on anyone with whom they came in touch, and Papinian was at one time prefect of York, and may possibly have had Paul and Ulpian as his assessors there. Nor is it credible that Rome, of all empires, should have ruled any dominion for three and a half centuries without making her subjects familiar with some of the principles of law that backed her government.[46]

Winfield adds, however, that "satisfactory evidence" has not yet been produced showing "any very appreciable or lasting transmission of the Roman

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41. Haverfield, Roman Britain, in 1 The Cambridge Medieval History 367, 370 (1936).

42. Haverfield, supra note 41, at 379. "The Roman veterans were encouraged to colonize in Britain; they married British women; and they received grants of land which they probably held under condition of military service,—a system in which Mr. Gibbon perceives 'the first rudiments of the feudal tenures.' " Howe, Studies in the Civil Law 113 (2d ed. 1905).

43. Plucknett, A Concise History of the Common Law 7 (5th ed. 1956).

44. See Winfield, The Chief Sources of English Legal History 54 (1925).

45. Selden, Dissertation ad Fletam, ch. IV (1685 ed.)

46. Winfield, The Chief Sources of English Legal History 55 (1925).

law to the rulers who succeeded the Romans."[47] It is, of course, perfectly safe to say that if one seeks proof comparable to the "massive foundations of roads," it is not likely to be found. Nonetheless, Winfield enumerates three "exceptions." One exception deals with the land law. Citing Vinogradoff,[48] he states that grants of land to private individuals, unclogged by the native "folkwright," can be linked up to Roman conceptions of ownership. The second exception relates to the law of wills, which may have had a Roman origin by way of the ecclesiastical law. Citing Scrutton,[49] the other exception concerned Teutonic procedure which might have been affected by the presence of the bishops in the shire-moots. The shire-moot, also known as the scire-gemote or shire-mot, comes from the Saxon *scyre* or county. It was a court or an assembly. Specifically, it was the principal Saxon county court and it was held twice a year before the aldermen of the shire.

Mommsen tells us that the Roman law "made rapid strides in Britain during the second and third centuries A.D., as is attested by the writings of the Roman jurists Javolenus and Ulpian, who discussed cases arising in Britain."[50] Reference must again be made to Papinian. He was chief justice at York with Ulpian and Paulus as his associate justices. Commenting upon this galaxy of talent, Dr. Sherman, writing in 1914, states that it was "as if the United States Supreme Court were to hold sessions in Alaska."[51]

IV. THE ADVENT OF CHRISTIANITY: THE EARLY KINGS AND A NEW OUTLOOK

The introduction of Christianity into Britain had far-reaching effects both upon the people and the law of the land. Since Constantine had adopted Christianity as the state religion in 325 A.D., this introduction had started in the later years of the Roman occupation of Britain. Assuming, however, that after the Romans left, the Britons had to be converted anew, this "reconversion" took place within a comparatively short time. The important date in this "reconversion" is 596 A.D., the date of the arrival of St. Augustine, who established contact between the English tribesmen and the Roman Church.

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47. Ibid.

48. Vinogradoff, Roman Law in Mediaeval Europe 26 (1909).

49. Scrutton, The Influence of the Roman Law on the Law of England 65 (1885). This work by Thomas Edward Scrutton was the Yorke Prize Essay of the University of Cambridge for the year 1884. The essay bore the motto "Tu regere imperio populos, Romane, memento" from Book VI of Virgil's Aeneid. The "exception" referred to by Winfield reads as follows: "The introduction of written instruments as evidence of the transfer of property, and the adoption of wills, are certainly due to ecclesiastical and probably to Roman influences; and the presence of the bishops in the shiremoots may have affected Teutonic procedure, but the traces of such an influence are very slight," Scrutton, op. cit. supra, at 65.

50. 1 Mommsen, The Provinces of the Roman Empire 194 (Dickson transl. 1886).

51. Sherman, The Romanization of English Law, 23 Yale L.J. 318 (1914).

St. Augustine, with forty missionary Benedictine monks, in 596 A.D. arrived at Canterbury (hence known as St. Augustine of Canterbury as distinguished from the great St. Augustine of Hippo, in Africa), where he built a monastery and established his episcopal seat. The most famous of St. Augustine's converts to Christianity was Ethelbert, King of Kent. Ethelbert welcomed St. Augustine and his missionaries and willingly gave them permission to preach everywhere in his kingdom.

St. Augustine was sent to Britain by St. Gregory, or Pope Gregory the Great, as he is also called. The fact that the leadership of the Church was under St. Gregory at the time when Augustine was spreading the teachings of Christianity in Britain is of especial significance. Gregory had dedicated himself to the task of establishing the spiritual supremacy of the Church over all of Europe. It has been written that he "was a Roman of the Romans, nurtured on traditions of Rome's imperial greatness, cherishing the memories of pacification and justice, of control and protection."[52]

It is well established that Gregory knew the *Digest* of Justinian.[53] Likewise, it is well established that Ethelbert of Kent soon revealed Roman influences because at about 600 A.D., on "St. Augustine's day," he compiled or codified the laws of his kingdom in "Roman style" or in "Roman fashion."[54] The latter phrases are translations of the Latin *juxta exempla Romanorum*, found in Bede's *Ecclesiastical History of England*, written about 735. Hence, Ethelbert committed his laws to writing "according to the example of the Romans" or "according to the Roman mode,"[55] significantly at about 600 A.D. It is therefore almost a certainty that Augustine and his missionaries, sent to Britain by Gregory, must have brought to the attention of Ethelbert the "exploits of Justinian, then dead scarcely forty years."[56]

The presence of the clergy on the island was significant in bringing a knowledge of government to the inefficient tribal organizations. The missionaries who came from well-organized states on the Continent brought with them ideas and notions of public administration. From them, the lead-

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52. Hutton, Gregory the Great, in 2 The Cambridge Medieval History 236, 251 (1926).

53. See 1 Pollock & Maitland 11, citing 1 Conrat, Geschichte der Quellen des römishen Rechts im fuüheren Mittelalter 8 (1889). For a specific example of the early Church father who knew Roman law, see Lardone, Roman Law in the Works of St. Augustine, 21 Geo. L.J. 435 (1933). In his discussion of St. Augustine of Hippo, Fr. Lardone concludes: "1. St. Augustine knew Roman Law .... 4. Reading Augustine's writings we realize how Roman Law acquaintance is very useful to understand the Fathers who make free use of legal expressions and conceptions ...." Id. at 455-56.

54. 1 Pollock & Maitland 11, citing Bede's Ecclesiastical History of England.

55. See Burdick, Principles of Roman Law 62 (1938); Jenks, A Short History of English Law 4 (1912); Sherman, The Romanization of English Law, 23 Yale L.J. 318, 319 (1914).

56. Sherman, *supra* note 51, at 319. St. Bede the Venerable (673-735) was a Benedictine monk at the monastery of Jarrow in Northumberland. It was there that he wrote his famous work and trained some 600 scholars.

ers of the island, for example, learned the Roman method of taxation which divided the land into units ("hides") of equal assessment instead of equal area.[57] At the same time this new class, the clergy, made necessary a new body of law for their protection. This gave impetus to the development of the law of status or, as it is known today, the law of persons.

During this pre-Norman period of English legal history, the Roman law was the law of the *Romani*, and in Britain, the *Romani* were the clergy. In such an era of personal laws, the Roman law was a living law as long as there were *Romani*. Although this led to a "vulgarizing" of Roman law, it is equally true that it continued the diffusion and dissemination of Roman law and Roman law concepts. Pollock and Maitland say that "the German and Roman law were making advances toward each other. If the one was becoming civilized, the other had been badly barbarized or rather vulgarized."[58] This Roman law was "vulgar" in the same sense that the Latin or Romance that was spoken by the people was "vulgar" when compared with classical Latin. Nevertheless, this "low" Roman law was the source of many of the doctrines and concepts that prevailed. It is to this that modern conveyancing owes its origin, and it is stated categorically that the "Anglo-Saxon 'land book' is of Italian origin."[59] To all this must be added that "through the fostering care of the Christian clergy, whose personal law was the Roman law,"[60] a knowledge of the Roman law was kept alive in Britain from the seventh to the eleventh century. It is no longer doubted that during these centuries Roman law was taught and studied in the Cathedral School at York.[61]

Committing the laws to writing, first accomplished by Ethelbert, set a precedent to be followed by several of the later kings. The first law book of Wessex was compiled by order of King Ina about 700 A.D. In 827 the kingdoms of the Angles and the Saxons united under Egbert and became Angleland—England. Alfred, who has been called "the Great" by English historians by reason of his literary attainments and because he drove out the Danes, reigned from 871 to 901. In his youth he visited Rome and endeavored to import to England the learning of the Continent. He promulgated a code known as *The Laws of King Alfred*, wherein he gathered such laws in Ina and Ethelbert that to him seemed good.[62] The next great king is Canute, who ruled in Denmark and also in England from 1016 to 1035. He, too, had

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57. 2 Holdsworth, A History of English Law 64-66 (3d ed. 1927) [hereinafter cited as Holdsworth]; Plucknett, A Concise History of the Common Law 8 (5th ed. 1956).

58. 1 Pollock & Maitland 15; see 2 Holdsworth 133.

59. Ibid.

60. Sherman, supra note 51, at 319.

61. Ibid.

62. Thorpe, Ancient Laws and Institutes of England 20, 27 (1840).

visited Rome and enacted comprehensive statutes, earning for him the honor of being called "the greatest legislator of the eleventh century."[63]

The Anglo-Saxon dynasty was restored with Edward the Confessor, who was crowned King on Easter Sunday, 1042. Edward, who had spent about thirty years of his life in exile on the Continent, was destined to continue Roman influence in Britain. Because of the spread of Norman influence during his reign, this period, just preceding the Norman conquest, has been dubbed "a sort of peaceful Norman conquest."[64] Since the early Norman kings, in order to obtain favor with the people, swore to keep the laws of Edward the Confessor, his laws form an important basis of the later English law.[65] In 1066, Edward died without issue and was succeeded to the throne by his wife's brother, Harold. This succession was disputed by William, Duke of Normandy, who defeated Harold at the Battle of Hastings on October 14, 1066, thus becoming in the pages of history William the Conqueror, King of England.

The legislative activity of this pre-Norman period by codifications, or generally by setting laws to writing, is a significant result of the contact with Rome and those familiar with its legal system. It is the fruition of the wish to follow "the example of the Romans" that laws can be made by the issue of commands.[66] "Statute appears as the civilized form of law."[67]

Discussing the sources of English law in the twelfth century, immediately after the Norman conquest, Pollock and Maitland ask: "Who shall say that there is not in it an Italian element?"[68] The references to the "Roman style" in the codifications long before the conquest indicate that the question, or rather observation, should not be limited to the twelfth century.

Although the foregoing sketch suggests the continuity of Roman influences, in particular through the presence of the Roman clergy, it does not represent the truly important contribution of Christianity to the island. What Christianity really brought concerned the moral ideas that were destined to revolutionize all of English law. In the words of Plucknett: "Christianity had inherited from Judaism an outlook upon moral questions which was strictly individualistic. The salvation of each separate soul was dependent upon the actions of the individual."[69]

Surely such an approach differed radically from the custom of the English tribes which looked to the family group rather than to the individual. As the

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63. 1 Pollock & Maitland 20.
64. Plucknett, A Concise History of the Common Law 10 (5th ed. 1956).
65. 1 Pollock & Maitland 88, 95-96; Sherman, supra note 51, at 320.
66. 1 Pollock & Maitland 12.
67. Ibid.
68. Id. at 78.
69. Plucknett, op. cit. supra note 64, at 8-9.

people embraced Christianity, notions of individual moral responsibility replaced those of group responsibility. Just as did the Church, the law soon came to judge the act according to the intention of the person who committed it.

The foregoing Christian outlook of the morality and legality of human conduct assumes tremendous importance, for it goes to the very heart of English equity, which acted "in personam"—upon the conscience of the defendant. Although the Court of Chancery that administered "equity" was not an ecclesiastical court, its presiding officer was for a long time always an ecclesiastic. He was the King's Chancellor—the keeper of the royal conscience. It is not seriously disputed that he knew both the canon law and the Roman law. Through him "it was only natural that the doctrines and methods of the civil law should find entrance largely into this branch of the English system."[70] Separate treatment will be given to the Court of Chancery, which has been called "Roman to the backbone."[71]

V. THE NORMAN CONQUEST: WILLIAM AND LANFRANC

The most important immediate consequence of the Norman conquest was the introduction into Britain of an orderly system of law and government. William, apparently a gifted administrator, had developed a sound financial organization called the "Camera," or chamber.[72] After nearly twenty years of preparatory work, he accomplished the remarkable feat of successfully invading England by crossing the English channel. His victory over Harold at the Battle of Hastings and the date, 1066, are matters of common knowledge. However, even those who know of the contribution of William in systematizing the administration of the island may not know of the role played by Lanfranc, the lawyer from Pavia, most often described as "the Conqueror's right-hand man."[73] This distinguished scholar, who in 1070 became Archbishop of Canterbury, was William's "prime minister and chief adviser."[74] Not only was he a great prelate and theologian, but he was also an accomplished lawyer who had studied and taught Roman law at Pavia, in his

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70. Hadley, Introduction to Roman Law 47 (1880). See 2 Bryce, Studies in History and Jurisprudence 599-600 (1901); Burdick, The Principles of Roman Law 77-80 (1938).

71. Scrutton, The Influence of the Roman Law on the Law of England 2 (1885). Scrutton adds: "English Equity, however, invented and administered by clerical chancellors, derived much of its form and matter from Roman sources. I have neither the time nor the knowledge to enable me to give at all an adequate account of this Roman element, but the question has been discussed by Spence [Equitable Jurisdiction of the Court of Chancery (1946)], and I avail myself of his results." Id. at 155.

72. A recent scholarly Italian work, after referring to the contribution of Edward the Confessor, states that "infiltrations of Latin culture were not lacking." Calasso, Medio Evo del Diritto 618 (1954).

73. 1 Pollock & Maitland 77.

74. Burdick, The Principles of Roman Law 65 (1938).

native Italy. He was one of the "masters" of the "Longobardistic-Frankish" school of lawyers and was always remembered "with respect" by the great jurists for his knowledge of the law.[75] By training and experience he was uniquely suited for the role of "prime minister."

Lanfranc arrived at Normandy and opened a secular school at Avranches. While in Normandy he became a monk and taught at the Abbey at Bec.[76] Although there is some doubt, it is probable that, in addition to grammar and rhetoric, he also taught Roman law both at Avranches and at Bec.[77] The probability is strengthened by the fact that he was remembered in Normandy as a discoverer of Roman law.[78]

By virtue of the special confidence reposed in Lanfranc by William, his influence upon the law at this most crucial period of English legal history cannot be overemphasized. Admittedly he knew Lombard law, Roman law and the canon law. When he was Archbishop "the *decreta* and *canones* were ever in his mouth."[79] In addition he dramatically proved that he had also mastered the English law. In the one great lawsuit of William's reign—to recover the See of Canterbury from a usurper—the cause was personally conducted by Lanfranc. William brought Aethelric, an ancient churchman steeped in the Saxon laws and lore, to the trial to evaluate Lanfranc's presentation. His training in the Italo-German legal customs, learned in Lombardy, was of tremendous value. The skillful Pavian prepared himself well and at the trial he "discoursed brilliantly on sac and soc, toll and team, infangthief and utfangthief," and thus won the lawsuit. The case was reopened in his absence and an adverse judgment was entered. At a retrial, Lanfranc was once again victorious. After this we are told that no one dared challenge him in legal matters.[80]

Most recently, Lanfranc has been described as William's "eminent collaborator, above all in the legislative field."[81] It is in the light of his remarkable background, the august position that he occupied, and the historical impor-

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75. Calasso, Medio Evo del Diritto 307, 618 (1954). See references to the great quantity of literature on Lanfranc in Latin, English, French, German and Italian in Wigmore, Lanfranc, The Prime Minister of William the Conqueror: Was He Once an Italian Professor of Law? (A Study in Historical Evidence), 58 L.Q. Rev. 61, 78-81 (1942).

76. Calasso, op. cit. supra note 75, at 618.

77. Ibid. 1 Pollock & Maitland 78.

78. See sources cited in 1 Pollock & Maitland 78.

79. Ibid.

80. See 1 Pollock & Maitland 77-78, 93; Zane, The Five Ages of the Bench and Bar of England, in Studying Law 41, 45 (Vanderbilt 2d ed. 1955), also reprinted in 1 Select Essays in Anglo-American Legal History 625, 628-29 (1907); Zane, The Story of Law 240 (Washburn ed. 1927).

81. Calasso, Medio Evo del Diritto 618 (1954). It is also said that the "Domesday Survey, which enumerated all the lands in England, and ascertained the status of each subject . . . was probably superintended by this great lawyer [Lanfranc]." Zane, The Five Ages of the Bench and Bar of England, in 1 Select Essays in Anglo-American Legal History 625, 628-29 (1907).

tance of the period, that the reader can best appreciate Pollock and Maitland's rhetorical question about the source of English law. They note that the "very existence of Lanfranc . . . must complicate the problem of anyone who would trace to its sources the English law of the twelfth century."[82] Then follows:

> The Norman Conquest takes place just at a moment when in the general history of law in Europe new forces are coming into play. Roman law is being studied, for men are mastering the Institutes at Pavia and will soon be expounding the Digest at Bologna; Canon law is being evolved, and both claim a cosmopolitan dominion.[83]

Lanfranc's role in the development of the common law assumes new dimensions if it is remembered that, by his very presence and influence, he prepared the soil for the reception of the legal and intellectual revival that was beginning in northern Italy. And the revival of the Roman law was not limited to the universities.

In 1038, Conrad II, King of Germany, who in 1027 had been crowned emperor by the Pope at Rome, decreed that Roman law should once again be the territorial law of the City of Rome. In 1076 the *Digest* was cited in the judgment of a Tuscan court. Very soon, possibly before 1100, Irnerius, "the bright lamp of law," as he was called, began teaching Roman law at Bologna.[84] To him, "a simple teacher of liberal arts," is attributed the teaching of law at Bologna as an "autonomous" science, and "at the same time the study of [Justinian's *Code* and *Digest*] from genuine and complete texts . . . ."[85] These he regarded as repositories of legal science and "written reason."

Irnerius, and the masters that followed him, set in motion a wave of Roman law influence that was to be felt in all of the former Roman provinces. It was truly a Renaissance, in the etymological sense of the word. This was to be a Roman conquest more lasting and enduring than any prior conquest by the sword.

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82. 1 Pollock & Maitland 78.

83. Ibid.

84. See Wigmore, A Panorama of the World's Legal Systems 983-84 (1936).

85. Calasso, Medio Evo del Diritto 368 (1954). Irnerius is described as the "founder" of the law school of Bologna. Id. at 522. Although the University of Bologna is said to have been founded in 1088, Bologna, as a "studium" of arts, was already famous by the year 1000. "In Italy [the] Renaissance found its expression most conspicuously in a revival of the study of the Roman law, which started from Bologna . . . ." 1 Rashdall, The Universities of Europe in the Middle Ages 17 (Powicke & Emden ed. 1936). Although some say Ravenna, Pavia was probably "the main centre of legal studies in Italy before the rise of Bologna . . . ." Id. at 106. Irnerius was therefore not "the first teacher of the Roman law in medieval Italy." Id. at 101, 107. See also Maffei, Alessandro d'Alessandro: Giurisconsulto Umanista, 1461-1523 (1956); Maffei, Gli Inizi dell'Umanesimo Giuridico (1956), and a review of these two books in Breen, Renaissance Humanism and the Roman Law, 38 Ore. L. Rev. 289 (1959).

VI. POST-NORMAN DEVELOPMENT: THE EARLY ARCHBISHOPS, VACARIUS AND THE LEGISTS

Lanfranc and the Abbey at Bec had a direct and profound influence upon England for generations to come. Lanfranc was followed as Archbishop of Canterbury by St. Anselm (1033-1109), who had also been a monk and teacher at the Abbey at Bec. St. Anselm was a Piedmontese who, because of his writings, is considered the father of Scholasticism. He is well known in English history for his quarrels with Rufus and Henry II, having thereby precipitated the Investiture contest in England. Under Anselm, not only do we see the independence which soon would cause Chancellors to assume jurisdiction and give relief in causes when the ordinary courts would not, but also an inceptive special prominence of the clergy in all matters legal—whether canonical, civil or Anglo-Saxon.

Anselm was succeeded as Archbishop by Theobald, in whose household was trained Thomas à Becket, who was to be Chancellor, Archbishop and martyr. In 1145 [1143?], Theobald brought to England, Vacarius, a celebrated "civilian glossator" from Mantua who taught Roman law at Bologna.[86]

The importance of Vacarius upon the subject can be gleaned from the introductory sentences of Scrutton in his Yorke Prize Essay. Scrutton's dichotomy is indeed a glowing tribute to the influence of Vacarius upon the law of England. He states:

> Any discussion of the influence exercised in England by the Roman Law will naturally fall into two divisions separated by the arrival in the year 1143 of Vacarius on our shores in the train of Archbishop Theobald, and his lectures on Roman Law at Oxford in and after 1149; for these events, which in European history form part of the current of Roman influence which sprang from the enthusiastic studies of the Law School at Bologna in the 12th century, begin a new era in the history of English law and of its connexion with the legal system of Rome.[87]

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86. Ambrosino, 2 Glossatore Vacario Polemista Antiereticale (nota bibliografica), in Rivista Italiana per le Scienze Giuridiche 415-20 (1950); Calasso, Medio Evo del Diritto 618 (1954).

87. Scrutton, The Influence of the Roman Law on the Law of England 1 (1885). Scrutton proceeds to say: "We have then in our survey to deal with two great periods." Ibid. The period before Vacarius "is one of custom, not of written law; of vagueness rather than of precision; and it will afford no matter for surprise if in the legal obscurity of those early centuries we find very little ground for confident assertion in matters peculiarly difficult. With our second period we find more light. From the teaching of Vacarius in 1149, we pass at once to authoritative text books by masters of law." Id. at 1-2. "In the train of the Archbishop of Canterbury, an Italian named Vacarius, learned in the Justinianean Law which the newly-born Law School of Bologna was teaching with a young convert's zeal, had landed on English shores; and from his lips Oxford and England heard the laws of Rome." Id. at 66.

In addition to teaching at the Archbishop's household, Vacarius founded the law school at Oxford, thus becoming the first law professor in England. A very successful teacher, "students looked up to him as their *magister* and reverently received his glosses."[88] Students, both rich and poor, flocked to hear him teach the Roman laws, and because those who were poor could not buy parchment copies of Justinian's *Code* and *Digest*, he made a summary of them. This book, called *A Summary of Law for Poor Students*, written about 1149, is a condensed version of the *Code* richly illustrated by extracts from the *Digest*. We are told that because of Vacarius' *Liber Pauperum*, the law students at Oxford were "for a long time" called "pauperists."[89]

The spread of the study of civil law aroused the opposition of King Stephen, who disliked Theobald. This opposition, however, was ineffectual and soon vanished,[90] and from Stephen's reign the teaching of both Roman law and canon law attained ever-increasing prominence. Names will not be given other than Thomas of Marlborough, abbot at Evesham who taught law at Oxford, and perhaps Exeter, who brought to his monastery a collection of books *utriusque iuris*.[91] Clearly, any investigation of the legists and canonists of this period would reveal that a school of Roman and canon law was flourishing at Oxford.[92] At the same time, one cannot ignore that "the Italians had been first in the field and easily maintained their pre-eminence. During the rest of the Middle Ages hardly a man acquires the highest fame as legist or decretist who is not Italian, if not by birth, at least by education."[93] Nor were these civilians to preside solely in the classroom. They were practicing lawyers and skilled pleaders whose forensic powers of persuasion in the halls of justice equalled their academic mastery of the law. This is clearly to be inferred from Pollock and Maitland's statement: "All the great cases, the

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88. Burdick, The Principles of Roman Law 67 (1938); 1 Pollock & Maitland 118. Discussing the "assured position" enjoyed by the study of Roman law at Oxford, Bryce states that "one of the earliest notices of the University is to be found in the sentence 'Magister Vacarius in Oxenefordia legem (sc. Romanam) docuit.'" 2 Bryce, Studies in History and Jurisprudence 889 (1901).

89. Ortolan, The History of Roman Law 422 (2d ed. Cutler 1896). It is said that Vacarius taught at Oxford as early as 1149. It is certain that he was in England as late as 1198. Although there is some question as to the time when Vacarius taught at Oxford, it is sufficiently established "that he did teach at Oxford." 3 Rashdall, The Universities of Europe in the Middle Ages 21 (Powicke & Emden ed. 1936). Professor Francis de Zulueta, Reader in Roman Law and Regius Professor of Civil Law at Oxford, and who wrote the Liber Pauperum of Magister Vacarius, died on January 16, 1958. The April 1959 issue of the Tulane Law Review, containing splendid articles on the Roman law, is dedicated to Professor de Zulueta as follows: "Recognizing Louisiana's civil law tradition and its debt to Roman law, the Tulane Law Review respectfully dedicates this issue to the memory of the late Professor Francis de Zulueta." 33 Tul. L. Rev. 451 (1959).

90. Hunter, Roman Law 109 (3d ed. 1897).

91. 1 Pollock & Maitland 120. Marlborough, at the advice of Pope Innocent III and Cardinal Ugolino (who became Gregory IX), went to Bologna and attended the lectures of Azo. Id. at 121-22.

92. 3 Rashdall, The Universities of Europe in the Middle Ages 7 (Powicke & Emden ed. 1936).

93. 1 Pollock & Maitland 120.

causes célèbres, went to Rome, and the English litigant, if prudent and wealthy, secured the services of the best Italian advocates."[94]

Curiously enough, the prestige and success of the civilian was so great that for a while the Church was concerned over the teaching of secular jurisprudence. The remarkable success of the teaching of Roman law and some of the opposition that it engendered is indicated by the following quotation from Jenks' *A Short History of English Law*:

> Every ambitious youth studied eagerly the *Corpus Juris*; a knowledge of its contents gave him a sense of power almost intoxicating in its keenness. So fierce was the heat which radiated from this new enthusiasm, that the more conservative forces took alarm. In the year 1219, Pope Honorius III forbade the teaching of Roman law in the schools of Paris, then, and for long after, under clerical sway. The pious Henry of England, in 1234, issued a similar ordinance concerning the schools of London (*i.e.* of St. Paul's). A still more effective antidote to the teaching of Vacarius at Oxford, was the later settlement of the professors of the Common Law in the Inns of Court, between the Palace of Westminster and the cathedral. Soon the cleric, sheltered beneath the coif which concealed his tonsure, was pleading and judging causes in the new royal courts of the Common Law. But we may be sure, even if we had no evidence, that he did not entirely forget the law which he had learned at Oxford or Cambridge, that, when the customs of the realm, faithfully searched, gave no answer to a new problem, he fell back on the Digest and the Code.[95]

Because of this intense preoccupation with Roman law which resulted in a diminished interest in theological studies, it appeared necessary to protect the teaching of theology from the incursions of the Roman law. The Church thereby seemed to assist national conservatism.[96]

Regardless of the reasons or sources of the tribulations, the learned legal historians find it necessary to admit: "This did not destroy the study of the Roman books. Oxford and Cambridge gave degrees as well in the civil as in the canon law."[97]

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94. Id. at 121.

95. Jenks, A Short History of English Law 20 (2d ed. rev. 1922). "Do not think that I am exaggerating the attitude of repulsion in which the pure theologian and the pure moralist stood to the ecclesiastical lawyer who was making money out of the practice of the Courts Christian . . . . Roger Bacon declares that the study of the civil law, attracting the clever men among the clergy, threw the study of theology into a second place, and secularised the clerical character, making the priest as much a layman as the common lawyer . . . ." Stubbs, The History of the Canon Law in England, in 1 Select Essays in Anglo-American Legal History 248, 269 (1907). Professor Munroe Smith is of the same opinion as Jenks on the question of the borrowing by the judges who were ecclesiastics trained on the Continent. Smith, Elements of Law, in Studying Law 171, 340-41 (Vanderbilt 2d ed. 1955).

96. 1 Pollock & Maitland 123.

97. Ibid. See 3 Rashdall, The Universities of Europe in the Middle Ages 156-57 (Powicke & Emden ed. 1936).

The minimizing of the influence of Roman law during this period falls short of the objectivity required of the historian. Obviously the legal fabric of the government and its institutions were not such as to permit the direct reception of Roman law by the King's courts! The question is rather one of transmission, infusion and influence, and from this standpoint, the period in question has been called "the Roman epoch of English law."[98] How can it be doubted that the civilian legists as practitioners would plead the law they knew, even if only as persuasive authority as a body of "written reason." The habits of lawyers lend greater credence to the explanation of Amos, and others, that during this period and later, Roman law authorities "were habitually cited in the common law courts, and relied upon by legal writers, not as illustrative and secondary testimonies as at present, but as primary and as practically conclusive."[99] A specific example is found in the law reports of the fifth year of the reign of Edward II, who reigned from 1307 to 1327. According to the report, the *Digest* of Justinian, Book 50, Title 17, Fragment 14, was directly cited to prove that where no time is set for the performance of a promise, immediate performance can be demanded.[100]

Furthermore, it is futile to attempt to depreciate Roman law influence by highlighting the roles of the ecclesiastical courts and the canon law. The latter were manifestly avenues for the indirect reception of the Roman law. Elsewhere Pollock and Maitland pay tribute to the canon law as being a "wonderful system,"[101] and acknowledge that in the twelfth century the relationship between the Roman and the canon law was "very close." They must add, of course, that "the canon law had borrowed its form, its language, its spirit, and many a maxim from the civil law."[102]

On the question of the influence of the Roman law upon the common law, is not the avenue of transmission inconsequential? What does it matter whether the channel was the canonical system or the ecclesiastical courts? Various means at different times played a part in swelling the stream.

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98. See Hunter, Roman Law 109 (3d ed. 1897).

99. Amos, The History and Principles of Civil Law 450 (1883).

100. Ibid. Sherman, The Romanization of English Law, 23 Yale L.J. 318, 323 (1914). See examples of the citation of the Digest, and a "fragment of Ulpian," in Pollock, A First Book of Jurisprudence 349-52 (1929). In Action v. Blundell, 12 Mees. & W. 324, 353, 152 Eng. Rep. 1223, 1234-35 (Ex. 1843), where the Digest was cited, Tindal, C.J., stated: "The Roman Law forms no rule, binding in itself upon the subjects of these realms; but, in deciding a case upon principle, where no direct authority can be cited from our books, it affords no small evidence of the soundness of the conclusion at which we have arrived, if it proves to be supported by that law, the fruit of the researches of the most learned men, the collective wisdom of ages, and the groundwork of the municipal law of most of the countries in Europe. The authority of one at least of the learned Roman lawyers appears decisive upon the point in favour of the defendants."

101. 1 Pollock & Maitland 114.

102. Id. at 116.

It is perhaps fitting to conclude this particular topic with the thought and words of Jenks:

> It is idle to suppose that such knowledge [of the Roman law] was not used; especially in the solution of those problems for which the ancient customs made no provision. But the point to be remembered is, that the influence of Roman Law became in England secret, and, as it were, illicit.[103]

VII. THE FORMATIVE LEGAL LITERATURE: GLANVILL, BRACTON, AND MAGNA CARTA

Surely, much more can be said about Vacarius and the influence that he must have exerted upon the minds of the intellectually curious of his time. Suffice it to say that it was a pupil of Vacarius, Ranulf de Glanvill (1130-1190), an ecclesiastic, to whom is attributed the writing of the most ancient work extant on the common law of England. This Latin text, written between 1187 and 1189, is called *A Treatise on the Laws and Customs of England composed in the time of King Henry the Second while the honourable Ranulf Glanvill held the helm of justice*. Glanvill, who enjoyed the complete confidence and respect of Henry II, who himself might have been a pupil of Vacarius,[104] became Chief Justiciar of England in 1180. Whether this first classic text on the common law was actually written by Glanvill, or merely under his supervision by his nephew and secretary, Walter Huber, a learned civil lawyer, who in turn was to become Chief Justiciar and Archbishop of Canterbury, is not important. What does matter is that it must have been written with the approval of Glanvill and Henry, and that the writer knew both Roman and canon law. Perhaps he "had read the Institutes" and "his ideas of what a law-book should be had been derived from some one of the many small manuals of romano-canonical procedure that were becoming current."[105] Although Glanvill "was no partisan of Rome," the book, *Tractatus de Legibus et Consuetudinibus Regni Angliae*,[106] shows Roman influence commencing with the title and its preface, which cites from the *Institutes*.[107]

The work, which is predominantly procedural, is of the greatest importance because it established the method of legal writing for centuries to come. It is also significant that it takes for granted that the reader is familiar with

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103. Jenks, A Short History of English Law 20 (2d ed. rev. 1922).

104. Stubbs, The History of the Canon Law in England, in 1 Select Essays in Anglo-American Legal History 248, 259 (1907).

105. 1 Pollock & Maitland 165.

106. Zane, supra note 81, at 636. See Beames, A Translation of Glanvill (1900); Woodbine, Glanvill: De Legibus et Consuetudinibus Regni Angliae (1932).

107. See Stubbs, supra note 104, at 260.

Roman law. Even though Glanvill refers to Roman law as a "foreign law," he draws upon it, particularly in his treatment of agreements and contracts.

The most notable legal contributions of the reign of Henry II—the centralization of the judicial structure, the introduction of the "inquest" or "recognition," and the "writ"—are treated in Glanvill's treatise. Since it consists of a commentary upon the writs and the forms of action, it has the earmarks of a modern manual on procedure and practice. Glanvill's borrowing of the canon law rules on the competence of witnesses, which he adopted as challenges to jurors, has fortified the belief of scholars that the jury system is of Roman origin. Although there was formerly some doubt, the verdict of scholars is now clear that trial by jury, which dates from the inquest of "recognitors" or jurors of Henry II, is not of Anglo-Saxon but of Frankish or Continental origin.[108] Likewise Henry II's assize of novel disseisin, so important in English legal development, was borrowed from the canon law, which developed the procedure from the Roman actions. Pollock and Maitland remind us that "the most famous words of Magna Carta will enshrine the formula of the novel disseisin."[109]

However cursory, a discussion of Glanvill's work and its influence may close with a reminder that it was not only the very first, a form or model to be followed, but that it was for many years the standard textbook on the law of England.

Notwithstanding the lasting contributions of Henry II, and even up to the reign of Henry III, who reigned from 1216 to 1272, it could hardly be said that there was in England a "common law." Curiously enough, the words themselves represent a borrowing since they are a translation of the *ius commune* of the canon and Roman law. Although the words were well known to the canonists, they were not yet of frequent usage. The words *ius commune* soon were, quite naturally, borrowed from the canon law that had borrowed them from the Roman law as can be easily seen, for example, from the *Code* of Theodosius.[110]

The person who gave the greatest impetus to the early development of the common law of England was Henry de Bracton, an ecclesiastic and a royal judge, who for two years, from 1265 to 1267, was Chief Justiciar of England

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108. See 1 Pollock & Maitland 138-42, "[T]hey come to 'recognize,' to declare, the truth: their duty is, not indicia facere, but recognoscere veritatem." Id. at 140. "Such is now the prevailing opinion, and it has triumphed in this country over the natural disinclination of Englishmen to admit that this 'palladium of our liberties' is in its origin not English but Frankish, not popular but royal." Id. at 141-42. See Sherman, supra note 100, at 324.

109. 1 Pollock & Maitland 146. The reference is to chapter 35 of the Charter: "Nullus liber homo . . . dissaisietur de libero tenemento suo . . . nisi per legale indicium parium suorun vel [et] per legem terrae."

110. E.G., "Judaei romano et communi iure viventes," Code Theod. 2.1.10; "vivant iure communi," Code Theod. 16.5.23.

under Henry III. His book, *Tractatus de Legibus et Consuetudinibus Angliae*, has earned such unparalleled tributes as "the crown and flower of English medieval jurisprudence,"[111] "the finest production of the golden age of the common law,"[112] and the "great ornament" of the reign of Henry III.[113] Bracton's work, written in Latin between 1250 and 1258, does more than merely bring up to date the work of Glanvill. Although it bears practically the same title as Glanvill's book, this is not only a book of procedure, but an expository text and commentary; compared to Glanvill's this is a "voluminous work."[114] By his clarity of style and comprehensiveness of treatment, Bracton contributed immeasurably to the development of the English legal system and the arts of legal writing and advocacy. Specifically, in addition to the treatment of the original writs, Bracton introduced complete transcripts of the pleadings of selected cases. The selection of particular cases and his comments upon them, whether favorable or critical, give his work a very modern air—almost that of a forerunner of the case-method approach to the study of law with the use of "case-books" as teaching materials. Although he exercised the widest latitude in choosing cases and selected them to illustrate what the law ought to be, still his attempt was to set forth the most approved practice of the King's courts. Bracton's book, which cites no less than 494 cases, was very successful, and became the basis of the legal literature of Edward I. In view of the number of epitomes that were made of the work, it may fairly be regarded as the book that gave impetus to the preparation of the Year Books.[115]

In any discussion of the Roman contribution to the common law, Bracton must hold a unique place of honor worthy of special treatment. The "broad cosmopolitan learning"[116] and use of "foreign materials," *i.e.*, the Roman law, which made possible the very format, style and comprehensive treatment for which English law is in Bracton's debt,[117] have made him the

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111. 1 Pollock & Maitland 206.

112. Zane, supra note 81, at 643.

113. 2 Reeves, History of the English Law 357 (Finlason ed. 1880).

114. Ibid. See Zane, supra note 81, at 644-45. See also the introduction of Sir Travers Twiss in his edition of Henrici De Bracton de Legibus et Consuetudinibus Angliae (1878).

115. See Brunner, The Sources of English Law, in 2 Select Essays in Anglo-American Legal History 7, 35-36 (1908); Plucknett, A Concise History of the Common Law 358-61 (5th ed. 1956).

116. Plucknett, op. cit. supra note 115, at 261.

117. "Still Bracton's debt—and therefore our debt—to the civilians is inestimably great. But for them, his book would have been impossible . . . ." 1 Pollock & Maitland 208. See Woodbine, The Roman Element in Bracton's De Adquirendo Rerum Dominio, 31 Yale L.J. 827, 847 (1922). "[B]elieving that Bracton was trying to do something other than merely to reproduce the Roman doctrines and technical terms, believing that he was trying to write a systematic and complete exposition of English law (without in any way attempting to change that law), we can not but regard his use of Roman material in De Adquirendo Rerum Dominio as both intelligent and skillful." Sir Paul Vinogradoff, commenting on Professor Woodbine's conclusion, writes: "I am glad to find that Professor Woodbine sides with me in his general appreciation of Bracton's Romanesque

source of great controversy. Some historians regard his Romanism so great that they would deny him a place in a discussion of English legal literature. Perhaps the most forceful critic is Sir Henry Maine, who refers to "the plagiarisms of Bracton"[118] and, with seeming contempt and scorn, writes:

> That an English writer of the time of Henry III should have been able to put off on his countrymen as a compendium of pure English law a treatise of which the entire form and a third of the contents were directly borrowed from the Corpus Juris, and that he should have ventured on this experiment in a country where the systematic study of the Roman law was formally proscribed, will always be among the most hopeless enigmas in the history of jurisprudence . . . .[119]

Even those who attempt either to disparage or minimize the Romanism in Bracton must admit that without it the work would have been of a far different and inferior calibre. Reeves, for example, who declares that the Roman law passages "would perhaps not fill three whole pages of his book . . . ,"[120] must, in fairness, also state:

> The excellence of Bracton's style must be attributed to his acquaintance with the writings of the Roman lawyers and canonists, from whom likewise he adopted greater helps than the language in which they wrote. Many of those pithy sentences which have been handed down from him, as rules and maxims of our law, are to be found in the volumes of the imperial and pontifical jurisprudence.[121]

Clearly, therefore, in an effort to give English law "form and beauty," Bracton "did not refuse such helps as could be derived from other sources to improve and augment it."[122] Attempts to minimize his knowledge of Roman law, by showing inaccuracies, have met with the reply that his knowledge must be tested not by the *Digest*, but by the Romanized customs of the Continent.[123]

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learning. Instead of marking Bracton down on account of his real or supposed blunders and misunderstandings, he points out that in most cases Bracton's peculiarities of rendering and interpretation of Roman doctrines are traceable to the definite plan of using, as it were, Roman bricks for the construction of an English edifice." Vinogradoff, The Roman Elements in Bracton's Treatise, 32 Yale L.J. 751 (1923).

118. Maine, Ancient Law 82 (9th ed. 1883). Sir William Markby wrote that because of the "admixture" of Roman law, Bracton was "repudiated" by the judges. Markby, Elements of Law 57 (6th ed. 1905).

119. Maine, supra note 118, at 82. See comment on this question in 2 Holdsworth 267.

120. 2 Reeves, History of the English Law 360 (Finlason ed. 1880).

121. Id. at 359.

122. Id. at 360.

123. See Scrutton, Roman Law Influence in Chancery, Church Courts, Admiralty and the Law Merchant, in 1 Select Essays in Anglo-American Legal History 208, 209 (1907), where he discusses Sir Edward Coke's Institutes and says: "Coke cites very largely from Bracton, and some of the passages are those directly derived from Roman sources." Vinogradoff, Roman Law in Mediaeval Europe 88-105 (1909).

Sir William Holdsworth, who has given a rather detailed account of the Romanism in Bracton,[124] offers the following penetrating evaluation:

> What, then, was the debt of Bracton and English law to the Roman law? . . . We cannot say that all Bracton's law is English in substance, that the influence of Roman law is merely formal. No doubt there is a body of thoroughly English rules; and Bracton differs at very many points from the Roman texts. But it is clear that he has used Roman terms, Roman maxims, and Roman doctrines to construct upon native foundations a reasonable system out of comparatively meagre authorities. Even when he is dealing with purely English portions of his Treatise, and discoursing upon the assizes, the writs of entry, or the writ of right, Roman illustrations and phrases naturally recur to him. And it is clear that his study of Roman law has led him to discuss problems which, when he wrote, were very far from any actual case argued in the royal courts. Thus he deals with accessio, specificatio, and confusio; and "where," says Maitland, "in all our countless volumes of reports shall we find any decisions about some questions that Azo has suggested to Bracton?" Similarly he deals with many questions relating to obligation and contract, fraud and negligence, about which the common law had as yet no rules. In dealing with these matters he necessarily uses Roman terms and borrows Roman rules. It is, as we shall see, because his Treatises have given to English law at least one authority upon many matters which were outside the routine of the practising lawyer of the thirteenth century that his influence upon the history of English law has been so great. That his Treatise deals with such matters is due to the Roman law which it contains.[125]

The reference to Azo is to the famous lawyer and Glossator of Bologna who was called "the master of the masters of the law." There can be no doubt that not only had Bracton "diligently studied"[126] Azo's *Summary of Roman Law*, but he made copious use of the book!

As a matter of diversion, it may be added that there was a popular jingle about Azo—of particular interest to the lawyer who aspired to judicial office:

> Unless on Azo you prepare
> Judicial robes you'll never wear.[127]

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124. 2 Holdsworth 267-86. "The introductory sections of the Treatise are modelled on the introductory sections of the Institutes. They also contain traces of the dialectical methods of the glossators . . . . But all through the book we can see that Roman doctrine is used to illustrate and explain the principles of the law, or is worked, in a modified form, into its substance . . . . Even where the substance of the law is not Roman, Roman phraseology is used, and Roman texts are followed sometimes with considerable exactness." Id. at 271, 282, 284.

125. Id. at 285-86.

126. 1 Pollock & Maitland 207. For authorities that Bracton "copied from Azo," see 2 Holdsworth 267. "Law is just when it renders to every one his own. 'Juris praecepta sunt tria haec, honeste vivere, alterum non laedere, jus suum unicuique tribuere,' says Bracton, quoting from the Digest and Azo." Rooney, Lawlessness, Law, and Sanction 73 (1937). See note 36 supra.

127. Wigmore, A Panorama of the World's Legal Systems 1008 (1936).

Zane, in a thought-provoking lecture, declared that "the greatness of Bracton's work is best proven by the reflection that five centuries were to pass away before another English lawyer, in the person of Blackstone, was to appear, competent to write a treatise upon the whole subject of English law."[128] Although the influence of Bracton has varied over the centuries and Zane's test of time has much validity, Bracton's immortality would have been assured by his emphasis upon responsibility and the supremacy of the law. For Bracton, the King, too, was subject to God and the law—and this was the answer to the state absolutism of the Tudors and the Stuarts, and is no less responsive to the totalitarian state of all ages. And in the tradition of the great lawyers of classical Rome, justice was due to all men, and all men are under the law, King and servant alike.[129]

The words of Bracton, *"Ipse autem rex, non debet esse sub homine sed sub Deo et sub lege, quia lex facit regem,"* and *"Non est enim rex ubi dominatur voluntas et non lex,"* embodied all that was noble in medieval government.[130] In all future crises, excepting Magna Carta, no words were to be cited more often than his.

The assertion of the existence of a body of law above the King was Bracton's legacy to posterity.[131] It was the dramatic answer given by Sir Thomas More, albeit unsuccessfully, on July 1, 1535, at his trial for high treason for having refused to take the Oath of Supremacy acknowledging the King as the head of the Church. "This indictment," said More, "is grounded upon an act of parliament directlie repugnant to the lawes of God and his holie churche . . . ."[132]

Of Bracton and his contemporaries of the twelfth and thirteenth centuries, Professors Pollock and Maitland have written:

> English law was administered by the ablest, and best educated, men in the realm; nor only that, it was administered by the self-same men who were "the judges ordinary" of the church's courts, men who were bound to be, at least in some measure, learned in the canon law.[133]

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128. Zane, supra note 81, at 645.

129. See passages in 2 Holdsworth 253-55.

130. "The King himself, however, must not be subject to man, but to God and to the law because it is the law which makes the King." "For there is no King where the will [of a man] governs and not the law." (Author's translation.) See McIlwain, The High Court of Parliament and Its Supremacy 101 (1910).

131. See Re, Freedom in the International Society, in Concept of Freedom 219-20, 236-38 (Grindell ed. 1955).

132. See Roper, The Life of Sir Thomas More 108 (Singer ed. 1817); The Mirrour of Vertue in Worldly Greatnes or the Life of Sir Thomas More Knight by William Roper, in The King's Classics 91 (Gollancz ed. 1903). See the account of More's trial in 1 Howell's State Trials 385 (1809). See also McIlwain, The High Court of Parliament and its Supremacy 278-79 (1901).

133. 1 Pollock & Maitland 132.

And they proceed to rectify a false notion inflicted by Blackstone upon generations of common law lawyers that the nation was "divided into two parties": "The bishops and clergy," espousing foreign jurisprudence, and "the nobility and the laity, who adhered with equal pertinacity to the old common law."[134] They proceed to pronounce the following judgment, the significance of which requires no comment:

> It is by "popish clergymen" that our English common law is converted from a rude mass of customs into an articulate system, and when the "popish clergymen," yielding at length to the pope's commands, no longer sit as the principal justices of the king's court, the creative age of our medieval law is over.[135]

It is fitting that a discussion of Glanvill, Bracton and Azo close with the thought of a modern legist who has recently written that Glanvill and Bracton were able to write their works, and particularly Bracton's "scientific systematizing of the common law or the national law of England," because they were "nurtured by romanistic doctrine."[136]

No remarks concerning the era commencing with Glanvill and ending with Bracton, during the reign of Henry III, could conclude without mentioning King John, from whom "the Army of God and the Holy Church" wrested the Great Charter. Magna Carta is the very symbol of freedom, liberty and the rule of law in Anglo-American jurisprudence.[137] Nonetheless, its historical antecedents and its humble origins as a document of human liberty are not too well known, even by the English-speaking lawyer, who relates the glorious achievement of the barons on June 15, 1215, with justifiable pride. A study of the Charter must commence with Thomas à Becket who, refusing to submit to the pretensions of Henry II, was assassinated on the altar of the Cathedral of Canterbury. It has been said of Thomas that he was "not more a martyr of religion than he was of freedom and justice."[138]

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134. 1 Blackstone, Commentaries *19. Blackstone, in referring to "the bishops and clergy," adds: "many of them foreigners." Ibid. He refers to the "popish ecclesiastics" on the following page.

135. 1 Pollock & Maitland 133.

136. Calasso, Medio Evo del Diritto 619 (1954). Glanvill and Bracton are acknowledged as "the first authorities on the common law" by jurists, historians and political scientists. Dunning, A History of Political Theories from Luther to Montesquieu 197-98 (1928), adds the name "Richard Nigel." The reference is to an anonymous book, Dialogus de Scaccario, written between 1177 and 1179 and ascribed to Richard Fitz Neal, i.e., Richard son of Nigel, Bishop of Ely, who was the nephew of Roger, Bishop of Salisbury. Written by an experienced King's treasurer, it is a fine work by an educated man on the exchequer and government. See references in 1 Pollock & Maitland 161-62.

137. See Thompson, Magna Carta: Its Role in the Making of the English Constitution, 1300-1629 (1948), and materials cited in Re, Book Review, 24 St. John's L. Rev. 185 (1949).

138. Morris, The History of the Development of Law 354 (1909).

King John's serious difficulties began when Pope Innocent III compelled him to accept Cardinal Stephan Langton as Archbishop of Canterbury, and John retaliated by confiscating Church property. Langton, a truly worthy successor of Thomas à Becket, an exponent of doctrines that all human conduct is subject to law and that "loyalty was devotion, not to a man, but to a system of law and order,"[139] joined with the barons in bringing about, in retrospect, perhaps the most dramatic of all events in English history—the signing of the Magna Carta by King John.[140]

Although the specific author of the Charter is not known with certainty, the most reasonable assumption is that its draftsman was Stephen Langton, a Doctor of Laws from the University of Bologna.[141] The belief that Langton is the author is fortified by the Charter's style and content, and the fact that he was the most prominent among the assemblage of clergy and barons.

The provisions of Magna Carta are introduced as follows:

> To all archbishops, bishops, abbots, priors, earls, barons, sheriffs, provosts, officers; and to all bailiffs, and other our faithful subjects, who shall see this present charter, greeting. Know ye, that we, unto the honor of Almighty God, and for the salvation of the souls of our progenitors and successors kings of England, to the advancement of the holy church, and amendment of our realm, of our mere and free will, have given and granted to all archbishops, bishops, abbots, priors, earls, barons, and to all freemen of this our realm, these liberties following to be kept in our kingdom of England forever.[142]

The very first article proclaims the freedom of the Church, which concept is reiterated in the last. From this it has been inferred that the Charter is "to a far greater extent" the work of Langton and the bishops than it is of the barons.[143] In this monumental historic event it is believed that Langton was assisted by Cardinal Pandulph (Pandolfo), the Papal Legate in England, who upheld Langton's appointment against the protests of King John. And it is

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139. Powicke, England: Richard I and John, in 6 The Cambridge Medieval History 205, 219 (1936). Powicke, Regius Professor of Modern History at Oxford, is one of the editors of the splendid three-volume work, Rashdall, The Universities of Europe in the Middle Ages (Powicke & Emden ed. 1936).

140. For a treatment of the provisions of Magna Carta see 2 Reeves, History of the English Law 17-30 (Finlason ed. 1880). Blackstone, among others, indicates that "the great charter of liberties, which was obtained, sword in hand, from King John, and afterwards, with some alterations, confirmed in parliament by King Henry the Third, his son . . . contained very few new grants; but as Sir Edward Coke observes, was for the most part declaratory of the principal grounds of the fundamental laws of England." 1 Blackstone, Commentaries *127-28.

141. Professor Powicke has written a biography of this famous cleric and statesman. Powicke, Stephen Langton (1928). Quite apart from passages of the Code, "the writings of both Seneca and Tacitus show that even under the Roman Empire men had become accustomed to the idea that laws existed to control rulers." Seagle, The Quest for Law 223 (1941).

142. See 2 Reeves, History of the English Law 17 (Finlason ed. 1880).

143. Morris, The History of the Development of Law 256-57 (1909).

interesting to note that although Shakespeare makes no mention of Magna Carta in *King John*, he does have the King utter the following words in answering Pandulph:

> Add this much more, that no Italian priest,
> Shall tithe or toll in our dominions.[144]

Pandulph and John later reconciled, and when in the reign of Henry III Langton asked Rome to remove Pandulph, he was replaced by Cardinal Guala Bicchieri, of whom Pollock and Maitland say: "Another lawyer who for a while controls the destiny of our land is Cardinal Guala Bicchieri, but it were needless to say that he was no Englishman."[145]

The intellectual environment immediately preceding and following Magna Carta sustains the belief of authorship herein put forth. It is the period of Ugolino, Azo, the legists and canoists—strong cultural currents, which did not escape the kings. "Henry III kept in his pay Henry of Susa, who was going to be cardinal bishop of Ostia, and who, for all men who read the law of the Church, will be simply *Hostiensis*. Edward I had Franciscus Accursii at his side."[146]

As for Magna Carta, clearly its source and inspiration were not the English feudalistic institutions, but notions of the majesty and universality of the law as proclaimed by the Roman legal tradition.[147] And as for its authorship, the concession might be made by even a Blackstone that the person most likely to have written it was Stephen Langton.

VIII. THE GENESIS OF ENGLISH EQUITY: THE CHANCELLOR, THE COURT OF CONSCIENCE, AND A MORE PERFECT REMEDY

Several references have been made to the Chancellors and the Courts of Chancery which administered "equity." When viewed dispassionately one cannot avoid the conclusion that this "equity" infused into the common law system the qualities of flexibility and liberality which evidence the maturity of law.

The Court of Chancery takes root in the notion that the King "with us," says Lord Campbell, in his *Lives of the Lord Chancellors*, "has ever been

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144. Shakespeare, The Life and Death of King John, Act III, Scene 1. Pandulph asks John why "against the church" he keeps "Stephen Langton, chosen Archbishop of Canterbury, from that holy see?" John refers to Pandulph as a "meddling priest." See comment on this passage in Thompson, Magna Carta: Its Role in the Making of the English Constitution, 1300-1629, at 164-65 (1948).

145. 1 Pollock & Maitland 121.

146. Id. at 122.

147. See Morris, The History of the Development of Law 255 (1909); Sherman, The Romanization of English Law, 23 Yale L.J. 325 (1914).

considered the fountain of justice."[148] Since he could not personally decide all controversies and remedy all wrongs, tribunals were established to execute the law—hence, the King's courts. Nevertheless, applications for relief by injured parties were still made to the King, who referred them to the appropriate forum. The office that assisted the King in this administrative phase of royal justice was called the *officina justitiae*, or Chancery.[149] This was the first occupation of the Chancellor. The second, of infinitely greater importance in the development of English law, was in deciding—always in the King's name—"a peculiar class of suits as a judge."[150] These cases involved those petitions addressed to the King, as a matter of grace, because the complainants deemed themselves wronged by the common law—either because the common law offered them no remedy or because the remedy was inadequate. This became the "equitable" jurisdiction of the Chancellor which, as it expanded, incurred the wrath of the common law judges, thus creating a problem that was not solved until 1616 when James I personally decided in favor of Chancery.

Although many descriptions are available of the Chancellor's "equitable jurisdiction," Lord Campbell's commends itself because of its simplicity and brevity. He writes:

> By "equitable jurisdiction" must be understood the extraordinary interference of the chancellor, without common-law process, or regard to the common-law rules of proceeding, upon the petition of a party grieved, who was without adequate remedy in a court of common-law; whereupon the opposite party was compelled to appear and to be examined, either personally or upon written interrogatories; and evidence being heard on both sides, without the interposition of a jury, an order was made *secundum aequum et bonum*, which was enforced by imprisonment.[151]

One additional aspect of the Chancellor's duties casts considerable light upon the atmosphere that must be pervaded Chancery, that is, his function

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148. 1 Campbell, Lives of the Lord Chancellors 3 (7th ed. 1885). Lord Campbell says that it "has been too much the fashion to neglect our history and antiquities prior to the Norman conquest" and proceeds to mention those who held the office of Chancellor under the Anglo-Saxon Kings. After naming Augemendus as the "Chancellor" or Referendarius of Ethelbert, "who received petitions and supplications addressed to the Sovereign," he adds: "There is great reason to believe that he was one of the benevolent ecclesiastics who accompanied Augustine from Rome on his holy mission, and that he assisted in drawing up the Code of laws then published, which materially softened and improved many of the customs which have prevailed while the Scandinavian divinities were still worshipped in England." Id. at 32. He then tells about St. Swithin, who also became Chancellor and accompanied Alfred the Great to Rome, "taking the opportunity of pointing out to him the remains of classical antiquity visible in the twilight of refinement which still lingered in Italy." Id. at 34.

149. 1 Campbell, op. cit. supra note 148, at 3.

150. Id. at 6.

151. Id. at 8.

as the "Keeper of the King's Conscience," and whose court also came to be called the Court of Conscience.

This came about as follows:

> From the conversion of the Anglo-Saxons to Christianity by the preaching of St. Augustine, the King always had near his person a priest, to whom was intrusted the care of his chapel, and who was his confessor. This person, selected from the most learned and able of his order, and greatly superior in accomplishments to the unlettered laymen attending the Court, soon acted as private secretary to the King, and gained his confidence in affairs of state. The present demarcation between civil and ecclesiastical employments was then little regarded, and to this same person was assigned the business of superintending writs and grants—with the custody of the great seal.[152]

By the time of Edward III, the Chancellor's court assumed a definite and separate character, and petitions as a matter of grace were addressed directly to him. Such practice soon became customary and hence the growth of the equitable jurisdiction of Chancery. Several factors, intellectual, moral and spiritual, combined to give this growth "Roman lines."[153]

Up to the time of St. Thomas More, practically all of the Chancellors had been "churchmen" or "ecclesiastics." To the end of Cardinal Wolsey's Chancellorship in 1530, the office had been held by no less than 160 "ecclesiastics."[154] Commenting upon this "clerical preponderance," Scrutton draws the inference that "the advantages of the Civil law, familiar to the Chancellors by their early training, and as the system in use in the ecclesiastical courts, are obvious."[155] And to the influence of these "clerics" must be added that of the Masters of the Chancery who were appointed to assist the Court of Chancery. These Masters, learned in civil and canon law, were to advise the Chancellor as to the equity of the civil law and matters of conscience.

The work of these ecclesiastical Chancellors has been judged to have been "an exceedingly beneficial one, for it may well be doubted whether judges trained in the practice of the Common Law would ever have possessed the courage to interfere with its rules, in the face of the professional opinion of their brethren, or indeed have been sufficiently detached in mind to discover that the rules stood in need of correction."[156]

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152. Id. at 4.

153. Scrutton, The Influence of the Roman Law on the Law of England 153 (1855).

154. 1 Spence, Equitable Jurisdiction of the Court of Chancery 340 (1846).

155. Scrutton, op. cit. supra note 153, at 153.

156. Kerly, An Historical Sketch of the Equitable Jurisdiction of the Court of Chancery 94-95 (1890).

The following summary of the nature of equitable jurisdiction, from the lips of James I, will reveal its close analogy to the *aequitas* of the Roman law and the *jus gentium* of the Roman *praetor peregrinus*. He declared: "Where the rigor of the law in many cases will undo a subject, there the Chancery tempers the law with equity, and so mixes mercy with justice . . . ."[157] To this may be added a quotation from the work of Christopher St. Germain (1460-1540), a barrister of the Inner Temple who possessed an admirable command of philosophy and the canon law. The book, written in Latin, entitled *Dialogues Between a Doctor of Divinity and a Student of the Common Law*, shows that the moral and philosophical bases of equity are found in the canon law, and depicts equity thus:

> Equity is a right wiseness that considereth all the particular circumstances of the Deed, the which also is tempered with the Sweetness of Mercy. And such an Equity must always be observed in every Law of Man, and in every general Rule thereof: And that knew he well that said thus, Laws covet to be ruled by Equity.[158]

From this latter quotation one sees the Aristotelean notion of epikeia (*epieikeia*),[159] which was adopted by the theologians.[160] Since future lay Chancellors were to turn to St. Germain's book, popularly called *Doctor and Student*, for the underlying ideas of equity, its importance is manifest.

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157. Cited in Scrutton, op. cit. supra note 153, at 154, and in 1 Spence, Equitable Jurisdiction of the Court of Chancery 409 (1846). See, e.g., the quotations from the Digest and from Cicero in the first chapter of Story's Equity Jurisprudence, 1 Story, Commentaries on Equity Jurisprudence 1-10 (14th ed. 1918).

158. St. Germain, Doctor and Student, ch. XVI, f.52 (1721). Sir William Markby in 1889 wrote that equity "has to a great extent lost in England that feature, which at first sight it would seem easiest to preserve, its elasticity." Markby, Elements of Law 76 (6th ed. 1905). "The problem of Equity was known quite early to Greek thought. It was, as is implied in the word chosen; epieikeia, something soft and yielding, in contrast with the harshness of law, and Plato, in the Laws, puts it together with clemency, as an infraction of strict justice which must sometimes be permitted. It was Aristotle however who, though he did not discard the old implications, first formulated a definition, and his formulation has never been surpassed." Jolowicz, Roman Foundations of Modern Law 54 (1957). St. Thomas Aquinas knew Aristotle's views on epikeia. "Aristotle (Ethic. v. 10) mentions epieikeia as being annexed to justice . . . ." Summa Theologica II, Q. 80.

159. Aristotle, Ethica Nicomachea, Book V, 10, in 9 The Works of Aristotle, 1137b (Ross ed. 1925). The Aristotelean definition and idea is followed closely by Lord Ellesmere in the Earl of Oxford's Case, 1 Ch. Rep. 16, 6, 21 Eng. Rep. 485, 486 (1615), wherein he stated that the Chancellor intervened because "Mens Actions are so diverse and infinite, That it is impossible to make any general Law which may aptly meet with every particular Act, and not fail in some Circumstances."

160. See the definition in Riley, The History, Nature and Use of Epikeia in Moral Theology 137 (1948), which follows the definition in Prümmer, Manuale Theologiae Moralis 110, 154 (1935), which in turn follows Aristotle's. These definitions are set forth in Re, Selected Essays on Equity xi-xii (1955). The ecclesiastical Chancellor is therein referred to as one "who perfected the common law by bringing to bear on many problems the wisdom of the Canon law and the moral tradition of the western world." Id. at xii.

Equity, therefore, originated and was presented as a canonical contribution alleviating the rigor of the law—just as was done by the Roman praetors. The analogy to the Roman *praetor peregrinus* (c. 247 B.C.), who, in doing justice, was not bound by the formalistic rules of the *jus civile*, indicates that England too was approaching a period of maturity in the law. The doing of equity or the affording of a more perfect remedy, *i.e.*, specific relief and prevention of wrongs, is the second stage of the doing of justice. And it is indeed a trenchant observation that "only those legal systems which have come to maturity display a growth of equity."[161]

Primitive systems of law, like the early Roman, granted only pecuniary compensation; notions of prevention and restriction are of a later development. And it was in the fashioning of specific remedies that the Chancellor made his greatest practical contribution to the common law.[162] An American scholar who has made a special study of equitable decrees and remedies concluded:

> The history of remedies in the other great legal system of the Western world, the Roman law, affords a striking parallel to the development which our Anglo-American law has followed. Moreover it points the way to the rounding out of our common-law scheme of remedies by means of an effective enforcement of specific relief . . . .[163]

Within this framework the genius of Maitland is apparent when he observed that "equity saved the common law."[164]

The very liberality of equity aided the Chancellors immensely in drawing upon their ecclesiastical training in deciding the cases that came before them. Bryce introduces the Roman element in English equity as follows:

> Our system of Equity, built up by the Chancellors, the earlier among them ecclesiastics, takes not only its name but its guiding and formative principles, and many of its positive rules, from the Roman *aequitas*, which was in substance identical with the Law of Nature and the *ius gentium*. For obvious reasons the Chancellors and Masters of the Rolls did not talk much about Nature, and still less would they have talked about *ius gentium*. They referred rather to the law of God and to Reason. But the ideas were Roman, drawn either from the Canon Law, or directly from the *Digest* and the *Institutes*, and they were applied to English facts in a manner not dissimilar from that of the Roman jurists. The very name, Courts of Conscience, though the conscience may in the immediate sense have been the

161. Seagle, The Quest for Law 184 (1941).

162. For the almost unlimited number of situations wherein equity injunctions are sought, see the works on equity cited in Chafee & Re, Cases and Materials on Equity (4th ed. 1958), and particularly in cases referred to in the Historical Note concerning requests for injunction against alleged nuisances. Id. at 795-96.

163. Huston, The Enforcement of Decrees in Equity 39 (1915).

164. Maitland, A Sketch of English Legal History 128 (1915).

> King's, suggests that moral element on which the Romans insisted so strongly; and the wide, sometimes almost too wide, discretionary power which Equity judges exercised, finds its prototype in the passages in Roman texts which refer to natural equity as the consideration which guides the judge in qualifying, in special cases, the normal strictness of law.[165]

Sir Henry Maine, in his *Ancient Law*, observed:

> The jurisprudence of the Court of Chancery, which bears the name of Equity in England . . . derives its materials from several heterogeneous sources. The early ecclesiastical chancellors contributed to it, from the Canon Law, many of the principles which lie deepest in its structure. The Roman Law, more fertile than the Canon Law in rules applicable to secular disputes, was not seldom resorted to by a later generation of Chancery judges, amid whose recorded dicta we often find entire texts from the *Corpus Juris Civilis* imbedded, with their terms unaltered, though their origin is never acknowledged.[166]

Scholars have traced many doctrines of equity, such as the system of uses and trusts and the equity of redemption in the law of mortgages, to canonical and Roman notions.[167] Spence states that the Chancellors availed themselves of Roman rules in the construction of legacies and documents.[168] Scrutton adds that since "Chancery had no original jurisdiction in testamentary matters," it "felt bound to adopt the rules of the Ecclesiastical Courts, which were those of the civil law."[169] Indeed much has been written about this. Oliver Wendell Holmes stated that at the end of the reign of Henry V, the Chancery Court was an established court of the realm and "had already borrowed the procedure of the Canon law, which had been developed into a perfected system at the beginning of the thirteenth century . . . ."[170] Eminent scholars have attested to this borrowing[171] and new and fascinating discoveries are constantly being made as to the specific points of contact of the two systems. One scholar in particular, who has made a special study of St.

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165. 2 Bryce, Studies in History and Jurisprudence 599-600 (1901). Scrutton capsules all this by saying: "English Equity however, invented and administered by Clerical Chancellors, derived much of its form and matter form Roman sources." Scrutton, op. cit. supra note 153, at 155.

166. Maine, Ancient Law 44-45 (9th ed. 1883).

167. A common example is the Roman fideicommissa as the origin of the English system of uses and trusts. See Holmes, Early English Equity, in 2 Select Essays in Anglo-American Legal History 705, 715-16 (1908); Scrutton, op. cit. supra note 153, at 156-57.

168. 1 Spence, Equitable Jurisdiction of the Court of Chancery 518, 523, 566 (1849).

169. Scrutton, op. cit. supra note 153, at 158.

170. Holmes, Early English Equity, in 2 Select Essays in Anglo-American Legal History 705 (1908).

171. Langdell, The Development of Equity Pleading from Canon Law Procedure, in 2 Select Essays in Anglo-American Legal History 753 (1908). "The procedure of the ecclesiastical courts is called the civil-law system, not because it ever prevailed among the ancient Romans, but because it has grown out of the latest Roman procedure, and because it prevails generally in those countries and jurisdictions which derive their procedure from the Romans." Id. at 753-54.

Germain, has recently traced English equity to the *denunciatio evangelica* procedure of the canon law.[172] This penitentiary procedure, originating in the idea that a sinner ought to make amends, reform and save his soul, served the purpose of obtaining reparation for wrongs and thus acquired legal character. This procedure, resting on the words of the Evangelist,[173] has recently received masterful treatment by one who concluded that although it disappeared on the Continent, because "most disputes could be satisfactorily dealt with on the basis of Roman law," it survives "only in English equity . . . in however modified a form."[174]

No researcher of equity, particularly during the centuries when the common law had already been cast into its distinctive mold, could possibly avoid encountering such common threads as the canon law, ecclesiastical influence and Roman thought. In fact, it has also been attempted to show that equity was designed to do more than merely amend or correct the inadequacies of the common law. It has been submitted that equity

> had for its province as well to enforce a superior morality by relieving in the interest of good conscience against many types of defects in the substantive law, that its root is in the sovereign prerogative of grace in civil matters, the same prerogative to which the Roman praetor accredited his boons.[175]

Regardless of the weight that one desires to ascribe to the various factors that have produced the end product of English equity—e.g., the ecclesiastic Chancellor, the ecclesiastical courts, the canon law—the result is undeniable. Even Blackstone had to subdue his bias against the "popish ecclesiastics" and had to admit the glaring fact that in Chancery "the proceedings are to this day in a course much conformed to the civil law."[176]

A treatise on the law of equity that has had much influence upon generations of lawyers and judges in the United States is Pomeroy's *Equity Jurisprudence*. It seems appropriate to close this phase of the discussion with the following quotation from that work:

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172. De Luca, Aequitas canonica ed equity inglese alla luce del pensiero di C. St. Germain, 3 Ephemerides juris Canonici 46, 63 (1947).

173. "And if thy brother sin against thee, go, show him his fault between thee and him alone: if he hear thee, thou hast gained thy brother. But if he hear thee not, take with thee one or two more, that at the mouth of two witnesses or three every word may be established. And if he refuses to hear them, tell it unto the church and if he refuses to hear the church also, let him be unto thee as the gentile and the publican." Matthew 18:15-17.

174. Coing, English Equity and the Denunciatio Evangelica of the Canon Law, 71 L.Q. Rev. 223, 241 (1955). "The denunciatio evangelica enforces the duties of 'reason and conscience,' or, more precisely, of the divine law and the natural law binding on human conscience. The same is true of equity as is shown by the whole treatise Doctor and Student . . . . The mere observance of the positive law is held insufficient both by denunciatio evangelica and by equity." Id. at 233.

175. Billson, Equity in its Relations to Common Law iv (1917).

176. 1 Blackstone, Commentaries *20.

> The growth and functions of equity as a part of the English law were anticipated by a similar development of the same notions in the Roman jurisprudence. In fact, the equity administered by the early English chancellors, and the jurisdiction of their court, were confessedly borrowed from the *aequitas* and judicial powers of the Roman magistrates; and the one cannot be fully understood without some knowledge of the other.[177]

IX. ADDITIONAL INROADS: THE CANON LAW, THE ECCLESIASTICAL COURTS AND THE LAW MERCHANT

It must be obvious that the failure to attribute a separate treatment to the canon law is not because it has not made a monumental contribution. Rather, since the canonical influence has been the sturdy thread that has given body and texture to the entire legal fabric, it has been impossible to separate its influence throughout the discussion of other areas. This feeling of inseparability has also struck Stubbs, who in his essay on the *History of the Canon Law in England* said that he "must . . . couple the two Roman systems together, for to all purposes of domestic litigation they were inseparable: the 'canones legesque Romanorum' were classed together, and worked together . . . ."[178] He added that "if you take any well-drawn case of litigation in the middle ages, such as that of the monks of Canterbury against the archbishops, you will find that its citations from the Code and Digest are at least as numerous as from the Decretum."[179] Indeed, if one were asked for a single source which contributed Roman law to English law, the best answer would probably be the canon law. Witness the positive statement in Winfield: "It is in the Canon Law which borrowed liberally from Roman Law that we must look for the more abiding influence of Roman Law on our system, rather than in the pure Civil Law."[180]

Certain specific references will be helpful even if only to place in evidence the great work of a Bolognese monk, Gratian, whose *Decretum* systematized the canon law.

Although the "Western church had grown up within the Empire,"[181] it was this growth and expansion, continuing after the Empire declined, that

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177. 1 Pomeroy, A Treatise on Equity Jurisprudence § 2 (5th ed. Symons 1941). See the interesting reference to Chancellor Kent of New York, the author of Kent's Commentaries, in Burdick, The Principles of Roman Law 80-81 (1938). An indication of Kent's respect for the Roman or civil law, is seen in his chapter on the civil law. He writes: "The whole body of the civil law will excite neverfailing curiosity, and receive the homage of scholars, as a singular monument of human wisdom." 1 Kent, Commentaries on American Law 507-08 (1826).

178. Stubbs, The History of the Canon Law in England, in 1 Select Essays in Anglo-American Legal History 248, 261-62 (1907).

179. Id. at 262.

180. Winfield, The Chief Sources of English Legal History 57 (1925).

181. 2 Holdsworth 137.

perpetuated the Roman tradition of a universal law. With this expansion the acquisition and formulation of rules for the government of the Church and its members became inevitable. Soon canonists would speak of a *jus commune, i.e.*, the ordinary common law of the universal church as distinguished from rules peculiar to particular provinces, long before "the term common law" was used by "temporal lawyers."[182] When these church rules, consisting of the legislation and decisions of the Popes and council resolutions, became bulky, the need was felt to gather and codify at least the important ones into a single commentary. Although these compilations began as early as the year 500, a compilation, known as the *Pannormia*, which shows the growth of a coherent body of law,[183] was produced by Ivo (Ives), who became Bishop of Chartres (1091-1116). It is interesting to note that Ivo, a contemporary of Henry I of England, was a pupil of Lanfranc at the Abbey at Bec.[184] Notwithstanding the efforts of all prior attempts to state this common law of the Church, "the fame of earlier labourers was eclipsed by that of Gratian."[185] Gratian's *Decretum*, published about 1140[186] and entitled *Concordia Discordantium Canonum* (The Concordance of Discordant Canons), although unofficial, came to be regarded as an authoritative work. It is not merely a compilation of authorities but a digest logically arranged with a discussion of doubtful materials. Not only has it been hailed as "a great lawbook," but it is significant that the "spirit which animated its author was not that of a theologian, not that of an ecclesiastical ruler, but that of a lawyer."[187] Rashdall says that the "Decretum is one of those great text-books which, appearing just at the right time and in the right place, take the world by storm."[188]

With the appearance of Gratian's *Decretum*, or *Digest*, the canon law acquired dignity and professional status as a separate body of legal learning also to be taught in the universities. As for Gratian, he became the leader of

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182. 1 Pollock & Maitland 176.

183. See 2 Holdsworth 139; Stubbs, The History of the Canon Law in England, in 1 Select Essays in Anglo-American Legal History 248, 254 (1907). For a simple and interesting presentation of "The Papal Legal System," see Wigmore, A Panorama of the World's Legal Systems 931-75 (1936).

184. 1 Rashdall, The Universities of Europe in the Middle Ages 127 (Powicke & Emden ed. 1936). The Ives (1035-1115) of the canonical text, The Pannormia, and who became Bishop of Chartres is not to be confused with St. Yves of Brittany, who is regarded as the patron of lawyers. Ives, the pupil of Lanfranc, "had as a fellow pupil another Italian, Anselm, from Aosta in Piedmont, who was of the same age, having been born in 1033." Both Ives and Anselm were later canonized. Ortolan, The History of Roman Law 418 (2d ed. Cutler 1896).

185. 1 Pollock & Maitland 112.

186. The date generally given is "c. 1150." Although Pollock and Maitland put the date between "1139 and 1142," it is probably between 1139 and 1141. See 2 Holdsworth 139 n.12; 1 Pollock & Maitland 112.

187. 1 Pollock & Maitland 113.

188. 1 Rashdall, The Universities of Europe in the Middle Ages 127 (Powicke & Emden ed. 1936).

a school of lawyers who mastered the Roman law. Henceforth the canon law was to be taught alongside of the Roman law and those who mastered both laws acquired the degree of *juris utrinsque doctor.*[189]

Even these cursory remarks may have helped explain the justification for the statement that the "canon law had borrowed its form, its language, its spirit, and many a maxim from the civil law."[190] And this is the canon law that became one of the sources of the law of England.

The ecclesiastical courts, which have had a "longer history than the Courts of Common Law and Equity,"[191] provided a direct channel for the infusion of canon law and Roman concepts into English law and English institutions. These courts, which were very numerous, were assured the development of their own Roman and canonical procedures from the moment that William the Conqueror separated them from the civil courts. The law effecting this separation provided that these courts would be administered *"secundum canones et episcopales leges rectum Deo et Episcopo suo faciat."*[192] Furthermore, William "assumes that all men know what causes are spiritual, what secular."[193]

The lasting influence wielded by these courts can, perhaps, best be appreciated by a statement of its vast jurisdiction. Contrary to what one might guess, their jurisdiction was not limited to those matters which were by their nature ecclesiastical, such as ordination, consecration, the status of ecclesiastical persons and ecclesiastical property. In the foregoing matters the jurisdiction of the ecclesiastical courts was exclusive, but it also exercised a wide jurisdiction over matters that are taken for granted today as being purely civil. In addition to a criminal jurisdiction over clerics accused of crime and cases involving offenses over religion, they possessed a vast jurisdiction over matrimonial matters relating to marriage, divorce and legitimacy, and the testamentary jurisdiction included all matters pertaining to the administration of estates, intestate succession and supervision over executors and administrators.[194]

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189. See Pound, The Lawyer from Antiquity to Modern Times 64 (1953), wherein Dean Pound says: "Bachelor, Master and Doctor of Laws (notice not of law) and the continental degree of Doctor of Either Law (J.U.D.), in each of these cases referring in terms to two systems, bear witness to the two coordinate systems of law which obtained in the Middle Ages."

190. 1 Pollock & Maitland 116.

191. Holdsworth, The Ecclesiastical Courts and Their Jurisdiction, in 2 Select Essays in Anglo-American Legal History 253 (1908).

192. Stubbs, Select Charters 85 (3d ed. 1876). "Let [the Court] do justice before God and its proper bishop by following the canons and episcopal norms." (Author's translation.) See 1 Pollock & Maitland 450, and id. at 439-57 (dealing with the clergy).

193. 1 Pollock & Maitland 450.

194. See 2 Reeves, History of the English Law 341-50 (Finlason ed. 1880); 4 id. at 69-149. See also sources cited in Holdsworth, The Ecclesiastical Courts and Their Jurisdiction, in 2 Select Essays in Anglo-American Legal History 255 (1908).

The relationship of the "Ecclesiastical law" administered by these courts to the common law of England can be seen from the following dictum of Lord Chief Justice Tindal, uttered in 1844:

> [T]he law by which the Spiritual Courts of this kingdom have from the earliest times been governed and regulated is not the general canon law of Europe, imported as a body of law into this kingdom, and governing those Courts *proprio vigore*, but instead thereof, an ecclesiastical law, of which the general canon law is no doubt the basis, but which has been modified and altered from time to time by the ecclesiastical Constitutions of our Archbishops and Bishops, and by the Legislature of the realm, and which has been known from early times by the distinguishing title of the King's Ecclesiastical Law.[195]

Notwithstanding feelings of hostility on the part of the common law courts against the ecclesiastical courts, and in spite of the effects of the Reformation in England, these courts continued to function until the middle of the nineteenth century. Even when their jurisdiction, excepting matters purely ecclesiastical, was by statute transferred to other courts, for example, the Court for Divorce and Matrimonial Causes,[196] the new courts were to proceed and give relief on principles and rules which might be conformable to those on which the ecclesiastical courts had theretofore acted and given relief.[197] Of course, these ecclesiastical courts operated on the principle that "where the Canon Law . . . is silent, the Civil Law is taken in as a director, especially in points of exposition and determination touching wills and legacies."[198] And this is precisely the attitude that was adopted by Chancery in such matters.[199]

Any discussion of the Roman contribution to the common law must offer a place of enduring prominence to the law merchant. The law merchant, or the *lex mercatoria*, is admittedly of "foreign" origin. Holdsworth, in considering courts which administer a body of law "outside the jurisdiction of the Courts of Common Law and the Courts of Equity," lists the courts which administer the law merchant.[200] Nevertheless, the law merchant was so completely received that it became, according to Coke, a part of the "lawes

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195. The Queen v. Millis, 10 Cl. & Fin. 534, 678, 8 Eng. Rep. 844, 898 (H.L. 1844).

196. Established by Matrimonial Causes Act of 1857, 20 & 21 Vict., c. 85, §§ 4, 6, 22. Such jurisdiction was transferred to the Probate, Admiralty and Divorce Division of the High Court of Justice. Supreme Court of Judicature Act of 1873, 36 & 37 Vict., c. 66, §§ 34, 70, 74; Supreme Court of Judicature Act of 1875, 38 & 39 Vict., c. 77, §§ 18, 21.

197. See Holdsworth, The Ecclesiastical Courts and Their Jurisdiction, in 2 Select Essays in Anglo-American Legal History 255, 284-86 (1908); Scrutton, The Influence of the Roman Law on the Law of England 165 (1885).

198. 1 Hale, The History of the Common Law 38 (5th ed. 1794).

199. See cases cited in Scrutton, op. cit. supra note 197, at 158.

200. Holdsworth, The Development of the Law Merchant and Its Courts, in 1 Select Essays in Anglo-American Legal History 289 (1907). The others listed are the Court of the Constable and

within the realme of England."[201] Blackstone also acknowledged that the "*lex mercatoria*, which all nations agree in, and take notice of . . . is held to be part of the law of England."[202] Yet this body of law, being the customs and usages of all merchants and of "all nations," included many rules of the Roman and civil law which continued as the practice of the merchants bordering the Mediterranean. Although many of the customs date back to the Babylonians and Phoenicians, commercial law in the modern sense began to develop during the tenth, eleventh and twelfth centuries, principally in the northern Italian city-states, and the seaport cities of Italy, Spain, France and Germany. From these sources may be said to have sprung a new *jus gentium* of commerce. These customs were written in several codes, the best known being the *Consolato del Mare*, the *Laws of Oleron*, the *Laws of Wisbuy* and the *Ordonnance de la Marine* of Louis XIV.[203]

Although worthy of individual treatment, courts of admiralty will not be mentioned since they were closely connected with the law merchant. Apart from later developments, therefore, the civil law procedure and Romanism that animated the law merchant courts also pervaded the admiralty courts. Holdsworth, in fact, says that the maritime and merchant courts are so closely connected that they may be regarded as "branches of the same Law Merchant."[204]

The law merchant and the customs of the sea, therefore, as we shall treat this area of customary law, involved the usages of merchants in lands that had been under Roman sway and developed with the needs of commerce—both land and maritime. Whereas this *jus gentium* of merchants originally applied only to merchants, it ultimately governed all commercial transactions. A remarkable system, embodying the experience of centuries, it needed only a great judge to adopt its rules and absorb them into the common law of England.

The person most responsible for this most beneficial addition and amelioration of the common law was Lord Mansfield, who merits the honor of

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the Marshal, Courts of the Forest, and the ecclesiastical courts. A most interesting early book is Malynes, Lex Mercatoria (1622).

201. Coke, Institutes of the Laws of England, Lib. I, 11b (15th ed. Hargrave & Butler 1774).

202. 1 Blackstone, Commentaries *273. " . . . the custom of merchants or lex mercatoria; which, however different from the general rules of the common law, is yet ingrafted into it, and made a part of it." Id. at *75.

203. See Howe, Studies in the Civil Law 95 (2d ed. 1905); Mears, The History of the Admiralty Jurisdiction, in 2 Select Essays in Anglo-American Legal History 312, 325-29 (1908). See also Mitchell, An Essay on the Early History of the Law Merchant (1904); Sanborn, Origins of the Early English Maritime and Commercial Law (1930).

204. Holdsworth, The Development of the Law Merchant and Its Courts, in 1 Select Essays in Anglo-American Legal History 289, 304 (1907).

being called the "father of modern Mercantile law."[205] Mansfield, who had studied Roman law at the University of Leyden, during the thirty-two years that he was Lord Chief Justice of the King's Bench, molded a modern commercial law. Once again, we encounter the element of prejudice against that which is foreign, and Mansfield was subjected to attacks because of the Roman and civil law qualities of the law that he absorbed into English law. Note the following aimed at Mansfield:

> In contempt or ignorance of the Common law of England, . . . you have made it your study to introduce into the court where you preside measures of jurisprudence unknown to Englishmen. The Roman code, the law of nations, and the opinion of foreign civilians, are your perpetual theme . . . .[206]

To Campbell's reply that there was "no sufficient ground for the general charges" that he "gave a preference to the Roman Law,"[207] one must add the sober judgment of Mr. Justice Buller in the case of *Lickbarrow v. Mason*:[208]

> [W]ithin these thirty years . . . the commercial law of this country has taken a very different turn from what it did before . . . . From that time we all know the great study has been to find some certain general principles, which shall be known to all mankind, not only to rule the particular case then under consideration, but to serve as a guide for the future. Most of us have heard these principles stated, reasoned upon, enlarged, and explained, till we have been lost in admiration at the strength and stretch of the human understanding. And I should be very sorry to find myself under a necessity of differing from any case on this subject which has been decided by Lord Mansfield, who may be truly said to be the founder of the commercial law of this country.[209]

X. EPILOGUE: CIVILIZATION AND THE UNIVERSALITY OF THE ROMAN LEGAL SYSTEM

Had an attempt been made to trace the borrowing and adaptation of specific rules, an interminable project might have been assumed. Indeed, whole areas of the law have been omitted, and even some fascinating matters have been neglected.[210] The countrymen of Mansfield, all heirs of Scottish birth,

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205. Scrutton, op. cit. supra note 197, at 180, citing Park, Insurance (1789). For an evaluation of his contribution, see 3 Campbell, The Lives of the Chief Justices of England 291-345 (1881).

206. 3 Campbell, The Lives of the Chief Justices of England 337 (1881).

207. Ibid.

208. 2 Term R. 63, 100 Eng. Rep. 35 (K.B. 1787).

209. Id. at 73, 100 Eng. Rep. at 40.

210. "Many of the basic principles of American law are Roman in many fields: adverse possession, bailments, carriers and innkeepers, contracts, corporations, the descent of property, easements, legacies and wills, guardianship, limitations of actions, marriage, ownership and possession, conveyances, sales, trusts, warranties, partnerships, mortgages. It was the Romans who developed

may well demand an apology for daring to ignore the Roman law that survives in Scotland.[211] Yet, they would have to admit that some prominence was accorded to Lord Mansfield, whereas no mention was made of Lord Holt, who presided over the King's Bench from 1689 to 1710. Like Mansfield, Holt also was learned in the Roman law. Holt was introduced to the study of Roman law by reading Bracton, and through Lord Holt, some of Bracton's Romanisms and "academic speculations . . . became living common law."[212] Not only did Holt prepare the way for Mansfield's adoption of the law merchant, but he actually anticipated Lord Mansfield's decision in *Somerset v. Stewart*,[213] which decided that one could not be a slave on English soil. Although he authored many decisions that were milestones in the development of the common law,[214] the most celebrated is *Coggs v. Bernard*,[215] decided in 1703, which contains a full exposition of the law of bailments inspired by the Roman law passages found in Bracton.

It is now evident that to find a convenient place upon which to end is no less difficult than to have found a proper point for the beginning. Rome is a legendary name of the greatest historical significance. At least twice it led the world. First, by the might of its republican and imperial legions, it gave the world political unity and a legal system. Secondly, by the diffusion of Christianity, it brought spiritual unification throughout the western world,

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the conveyance of real estate by written instruments and subscribing witnesses, and passage of title by a will, also to be in writing and with subscribing witnesses." Palmer, An Imperishable System: What the World Owes to Roman Law, 45 A.B.A.J. 1149, 1152, 1220 (1959). One may even find that certain concepts and phrases seemingly distinctively Anglo-Saxon, such as "an Englishman's house is his castle," were borrowed from Roman sources. The house-castle notion, for example, apparently first appeared in Coke's Institutes, and the "Latin, phrase, the only one Coke cites as authority, is taken almost verbatim from the Digest," and the passage in the Digest is taken from Gaius' Commentaries on the Twelve Tables. Radin, The Rivalry of Common-Law and Civil Law Ideas in the American Colonies, in 2 Law: A Century of Progress 404, 424 (1937).

211. See Levy-Ullmann, "Le Droit Écossais, 53 Bulletin de la Société de Législation Comparée 148 (1924) (it is "absolutely Roman in character"); Muirhead, An Outline of Roman Law xxxi (2d ed. 1947).

212. Plucknett, A Concise History of the Common Law 300 (5th ed. 1956).

213. Lofft 1, 98 Eng. Rep. 499 (K.B. 1772); see Smith v. Brown, 2 Salk. 666, 91 Eng. Rep. 566 (K.B. 1705). "Holt, C.J., held, that as soon as a negro comes into England, he becomes free: one may be a villein in England, but not a slave." Ibid.

214. See, e.g., Ashby v. White, Holt K.B. 524, 90 Eng. Rep. 1188, 1189 (1702), which was probably motivated by the Latin maxim, "ubi just ibi remedium." "Lord Holt, contrary to the other judges who decided for the defendant, stated that the plaintiff should have been allowed a cause of action . . . for the deprivation of his right to vote. He stated: '. . . the plaintiff had a right to vote, and that in consequence thereof the law gives him a remedy, if he is obstructed . . . . It is a vain thing to imagine, there should be right without a remedy . . . .' On the writ of error to the House of Lords, the judgment for the defendant was reversed 'by a great majority of the Lords, who concurred with Holt, C.J.' " Chafee & Re, Cases and Materials on Equity 865 n.7 (4th ed. 1958).

215. 2 Ld. Raym. 909, 92 Eng. Rep. 107 (K.B. 1703). "This Bracton I have cited is, I confess, an old author, but in this his doctrine is agreeable to reason, and to what the law is in other countries. The civil law is so, as you have it in Justinian's Inst. lib. 3, tit. 15." Id. at 915, 92 Eng. Rep. at 111. Lord Holt also cited St. Germain's Doctor and Student. Ibid.

and once again, its system of laws.[216] To tell the story of Rome and its law is to tell the story of civilization itself.

The story of civilization will not be one of self-sufficiency and autonomy. It is one of constant building upon the wisdom and experience of prior peoples and a blending of the knowledge from many lands. The numbers in which we count, the alphabet we use, and indeed language itself are eloquent tributes to the genius of other lands. And although little can be regarded as more English than London's St. Paul's, yet it is Greek and Roman; surely it is Gothic before being English. Since there is truth to the thought that the law of a people develops in much the same manner as its language, it may be worthy to repeat the illustration found in Howe. He pointed out that in the name of "a well-known society, the American Bar Association . . . there is not a word . . . of British or Anglo-Saxon origin." He hastens to add that by admitting the "Romanic origin" of the words "we would not be disparaging our noble English language, nor denying its continuous organic life and growth and its distinctly national character, nor would we be proposing to return to the use of Latin for purposes of conversation or in the writing of books. We would simply be recognizing the truth of history, which every one will admit to be a proper thing to do."[217]

It is opportune to repeat at this juncture what Judge Cardozo observed in a footnote in his *Paradoxes of Legal Science*. Citing Royce,[218] he wrote: "We may say of law what Royce says of philosophy: 'Our common dependence upon the history of thought for all our reflective undertakings is unquestionable. Our best originality . . . must spring from this very dependence.' "[219]

The notion of universality finds a classical example in the Empire that was Rome and the Roman law. The word "Roman" was clearly not confined to the seven hills or even to a peninsula. Its universality may even be highlighted by the place of birth of the greatest of its jurisconsults. Papinian, who was among jurisconsults what Homer was to poets, and who contributed about 600 extracts from his works to the *Digest*, was probably born in Syria. The greatest contribution came from Ulpian, and he was born at Tyre. A great jurist and teacher was Gaius, and although he lived in Rome, he was

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216. Professor Yntema, following the observation with which Jhering commenced his work on Roman law, says that "Rome gave laws to the world and bound the nations in unity" three times: the first "by the force of arms," the second by "the unity of the Church," and the third "through the reception of Roman law in western Europe, in the unity of law." Yntema, Roman Law as the Basis of Comparative Law, in 2 Law: A Century of Progress 346 (1937).

217. Howe, Studies in the Civil Law 109-10 (2d ed. 1905).

218. Royce, The Spirit of Modern Philosophy vii (1892).

219. Cardozo, The Paradoxes of Legal Science 57 n.146 (1928).

born in Greece.[220] As for Justinian himself, who was probably of Slavonic parentage, he was born in Tauresium in Illyricum on the eastern Adriatic coast.[221]

The Roman mind, as can be gleaned from the foregoing, was a composite of the genius of many lands. Such are the roots of civilization. And, in its final form, the Roman law was truly all-embracing and cosmopolitan. It was "the embodiment of Stoic philosophy and Christian morals. Because it drew from so many diverse sources and was applied to the citizenship of a universal empire, it proved to be the one contribution of ancient Rome which lives on in the world today."[222] These, therefore, were some of the men that helped fashion a system of laws of universal validity for the civilized world.[223]

Of this system of laws "embodied and transmitted to posterity in the law-books of Justinian," d'Entrèves says:

> It is no exaggeration to say that, next to the Bible, no book has left a deeper mark upon the history of mankind than the Corpus Iuris Civilis. Much has been written about the impact of Rome upon Western civilization. Much has been disputed about "the ghost of the Roman Empire" that still lurks far beyond the shores of the Mediterranean. The heritage of Roman law is not a ghost, but a living reality. It is present in the court as well as in the market-place. It lives on not only in the institutions but even in the language of all civilized nations.[224]

This universality is attested by Bryce:

> The Roman law is indeed still worldwide, for it represents the whilom unity of civilized mankind. There is not a problem of jurisprudence which it does not touch: there is scarcely a corner of political science on which its light has not fallen.[225]

The discussion has concerned itself with the degree of enlightenment that the common law of England derived from Roman law. What may one conclude of the Roman contribution to the common law? Some of the main channels of transmission have been mentioned. Without making extravagant

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220. Wigmore says that Gaius, the jurist, typifies the advent of law as a science. One of "Gaius' treatises, the Institutes, served as the text-book of legal study for three centuries after his death (which occurred perhaps about 200 A.D.), and is the only Roman law-book, prior to Justinian, that has survived to us in fairly complete text." Wigmore, A Panorama of the World's Legal Systems 437 (1936).

221. His original name was Uprauda, derived from prauda, which in old Slavic means jus, justitia.

222. Shotwell, The Long Way to Freedom 606 (1960).

223. Sohm, Institutes 70 (3d ed. Ledlie transl. 1907). Chapter II is entitled, "Roman Law as the Law of the World."

224. d'Entrèves, Natural Law 17 (1951).

225. 2 Bryce, Studies in History and Jurisprudence 898 (1901).

claims as to the exact extent of the contribution, it ought to be sufficiently clear that "there must be some profound error on the part of those who so stoutly deny the obligation of the law of England to the Roman system."[226] To those who deny this contribution one may reply with the saying of Liebnitz concerning philosophers—that they are often right in what they affirm and often wrong in what they deny.[227]

Winfield's statement of the indebtedness to the Roman system of laws is as profound as it is important:

> But it would be a mistake to gauge the effect of Roman Law by a nice calculation of the especial rules in our law which can be affiliated to it. What men gained by it was not a heap of fresh material for building English law, but a knowledge of the principles of legal architecture.[228]

It is hoped that enough has been said to show that the roots of the common law of England are not exclusively Anglo-Saxon. Since there is neither virtue nor greatness in autonomy, and since such a conclusion would do violence to the rules of probability in civilization, the more objective evaluation would acknowledge a Roman influence. Even assuming that the soil was not prepared during the Roman occupation, it is impossible to discount the role of St. Augustine and the missionaries who followed him;[229] and all of this before the Norman invasion with its influx of a host of Roman law scholars commencing with Lanfranc. The story thereafter shows more clearly how the common law was nurtured in an atmosphere of Roman intellectuality—ethical, philosophical and judicial.

It has been said that greatness can only come from participation in the culture of other people. Jhering expressed this thought well when he justified the reception of Roman law in Germany on the broad ground that no nation can attain the highest civilization except by participation in the civilization of the world.[230]

As for the Romans, time has decreed that their most permanent contribution was their law. What can be said of Rome can be said of Justinian. Justinian, like earlier Roman emperors, was a great builder of roads and public buildings. The most splendid of his many churches was the dome-covered

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226. Howe, Studies in the Civil Law 110 (2d ed. 1905).

227. Liebnitz, Opera Philosophica 702 (Erdmann ed. 1840).

228. Winfield, The Chief Sources of English Legal History 60 (1925).

229. See Dawson, Religion and the Rise of Western Culture 59, 61 73 (Image Books ed. 1958).

230. "German jurisprudence . . . commences with, and is due to, the reception of Roman law. As the child of Roman jurisprudence, it was but natural that, from the very outset, German jurisprudence should bear the impress of its origin." See Smith, Four German Jurists, in A General View of European Legal History 110, 121 (1927).

"No sooner, therefore, had Roman law effected its first entrance in Germany, that its own inherent virtues ensured it a rapid and easy victory. Roman jurisprudence came, saw and conquered." Sohm, The Institutes 2 (3d ed. Ledlie transl. 1907).

Cathedral of St. Sophia. However, history will continue to proclaim his name because he was the Roman Emperor who finally codified the Roman law.[231]

And so, perhaps abruptly, and at a point not as felicitous as desired, our survey comes to an end. It concludes with the hope that "insular" patriotism may some day give way to that of "mankind at large."[232] It reaffirms Cicero's profound conviction of the equality of men and the solidarity of mankind.[233] When such a philosophy becomes a rule of daily life, all men, of whatever heritage, who read of Papinian, Ulpian, Augustine, Lanfranc, Vacarius, Glanvill, Bracton, Langton and countless others, will conclude that they were men worthy of gratitude and commemoration. The greatest debt of gratitude, of course, is owed by those who reap the blessings of the common law.

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231. Justinian reigned from 527 to 565 A.D. It was his plan to consolidate the entire existing law into one Code. For a summary account of how this was accomplished by a commission of professors and advocates under the supervision of Tribonian, see Sohm, The Institutes 121-25 (3d ed. Ledlie transl. 1907). For a discussion of "The Legislation of Justinian" see Jolowicz, Historical Introduction to the Study of Roman Law 488 (1932). "The importance of his work lies in the fact that in his 'Digest' and in his 'Code,' he collected a great mass of excerpts from classical authors, and of imperial enactments, and that he gave to Roman law what was, in a sense, its final form." Id. at 6.

232. "The justice of mankind at large . . . is rooted in the social union of the race of men." Cicero, Tusculan Disputations, I, xxv, 64.

233. See Cicero's De Officiis and his De Republica, and discussion in McIlwain, The Growth of Political Thought in the West (1932). See summary of Cicero's philosophy in 1 Scott, Law, The State and the International Community 143-57 (1939).

NATIONAL ITALIAN AMERICAN BAR ASSOCIATION

STUDENT WRITING CONTEST WINNERS

The National Italian American Bar Association has established an annual student writing contest, open to all law students, in the interest of promoting scholarship and the study of jurisprudence. Through the generosity of the National Italian American Bar Association's members, the authors of the first and second place submissions in the contest will receive $1,000 and $500 scholarships, respectively, and their pieces will be published here in *The Digest*.

In line with the theme of this Quincentennial issue, the topic for this year's first annual student writing contest was: "The Contributions of Roman Law to the American Legal System." The National Italian American Bar Association is proud to announce that this year's award recipients are:

FIRST PLACE RECIPIENT

DEBORAH J. KRAUSS
HARVARD UNIVERSITY

Deborah J. Krauss is currently a law clerk to the Honorable Peter C. Dorsey, United States District Court Judge, District of Connecticut. She received her J.D., *cum laude*, from Harvard University in June, 1992. She received both her M.A. and B.A. in history from the John Hopkins University in 1989, where she was elected to Phi Beta Kappa.

SECOND PLACE RECIPIENT

FRANCA ELIA HARRIS
COLUMBIA UNIVERSITY

Franca Elia Harris is currently a second year law student at the Columbia University School of Law. She expects to receive her J.D. from the Columbia School of Law, as well as her M.B.A. from the Columbia Business School in 1994.

The Changing Influence of Roman Law: Ideals and Reality in Nineteenth Century America

DEBORAH J. KRAUSS*

I. INTRODUCTION

> *What should we say of the jurist, who never aspired to learn the maxims of law and equity which adorn the Roman codes? . . . Shall [the minister] follow the commentaries of fallible man, instead of gathering the true sense from the Gospels themselves?* [1]

To which "jurist" does Joseph Story, the author of the above quotation, call our attention? Although the Romans referred to some members of their legal profession as "jurists," neither the English nor the Americans ever did so. The Roman jurists were scholars who gave legal advice and also issued opinions interpreting the law upon the request of a litigant, a judge, or the Emperor. The Roman jurist, unlike the Anglo-American lawyer, did not argue cases in court, a function performed by orators.[2]

Story's use of the term "jurist" to describe the American lawyer was aspiration rather than description. Story was responding to what he, and other early nineteenth century American legal thinkers, perceived as a problem: the focus of the American lawyer upon technical details rather than upon substantive categories and rules of law. Legal thinkers during the early decades of the nineteenth century hoped that the study of Roman law would enable the American lawyer to become more like the jurist, able to maneuver within broad areas of the law, and less immersed in minor cases and procedural mechanics. By arguing that the law was a "science" appropriate for university study, the American thinkers hoped to eliminate what they saw as an improper focus on details.

Perhaps these thinkers believed that the lack of training in the categories and rules of law was especially problematic in a society like the United States, where lawyers performed many functions and where law was assuming the role of a secular religion. In 1835, Alexis de Tocqueville noted the

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1. J. Story, *Characteristics of the Age* (1826), *in* THE MISCELLANEOUS WRITINGS OF JOSEPH STORY 362 (William W. Story ed.,1852). Joseph Story was an Associate Justice of the Supreme Court of the United States and the first incumbent of the Dane Professorship of Law at the Harvard Law School.

2. *See* B. Nicholas, AN INTRODUCTION TO ROMAN LAW 29 (3d ed. 1962); H.J.Wolff, ROMAN LAW: AN HISTORICAL INTRODUCTION 111 (1951).

extent to which the law was responsible for ensuring social stability in the United States:

> [T]he authority which Americans have entrusted to members of the legal profession, and the influence which these individuals exercise in the government, is the most powerful existing security against the excesses of democracy . . . [lawyers] are the masters of a science which is necessary, but which is not very generally known: they serve as arbiters between the citizens; and the habit of directing to their purpose the blind passions of parties in litigation, inspires them with a certain contempt for the judgment of the multitude.[3]

By Story's time, some Americans were arguing that the law was an irrational mass of detail and that cases were decided according to the whims of individual judges. The leaders of the legal profession may have feared that unless the legal system could be portrayed as consistent and systematic, the law would no longer serve to prevent the "excesses of democracy."

Story urged the American lawyer to study the Roman law "maxims." Story was referring to the Roman *regulae iuris*, or rules of law. The *regulae iuris* came to include abstract maxims, though the earlier jurists thought of *regulae iuris* as rules with a clearly defined scope.[4] In seventeenth century England, a conviction that the scientific method could be applied to law led Francis Bacon to publish a collection of legal maxims;[5] the influence of Roman and civil law on this collection is apparent.[6] Bacon collected legal maxims because he believed that law, like chemistry or astronomy, was an inductive science,[7] and that by collecting numerous instances of the particular, generalizations would emerge.[8] Story echoed this idea of law as a science, but with an important new twist: where Bacon derived the data for

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3. A. de Tocqueville, DEMOCRACY IN AMERICA 123-24 (Richard D. Heffner ed., 1956).
4. P. Stein, REGULAE IURIS: FROM JURISTIC RULES TO LEGAL MAXIMS 74-108 (1966).
5. *See* F. Bacon, ELEMENTS OF THE COMMON LAWES OF ENGLAND (1630).
6. Bacon wrote:

> [W]hereas some of these rules have a concurrence with the civill Romane law. . . such grounds which are common to our law and theirs I have not affected to disguise into other words than the Civilians use. . . I tooke hold of it as matter of greater Authority and Majestie to see and consider the concordance betweene the lawes. . . on the other side, the diversities betweene the civill Romane rules of law and ours. . . I have not ommitted to set downe.

Id. at preface.

7. According to Bacon:

> I doe not finde, that. . . I can in any kinde conferre so profitable an addition unto that science, as by collecting the rules & grounds, dispersed throughout the body of the same lawes; for hereby no small light will bee given in new cases. . . .

Id.

8. Shapiro, *Law and Science in Seventeenth-Century England*, 21 STAN. L. REV. 727, 729-37 (1969).

legal conclusions from English cases, Story and his American contemporaries explicitly turned to Roman law sources.

Perhaps the most striking aspect of Story's remark is his elevation of Justinian's codification to the level of a sacred text. This approach did not prevail in American law; the common law develops case by case, as judges apply analogous fact patterns rather than general principles laid down by a text. Story and his colleagues, by arguing that the Roman texts were in fact essential to the American lawyer, exhorted the American legal profession to adopt a different notion of what attorneys do.

Yet Story's notion was not itself Roman. The Romans did not decide cases through recourse to the maxims contained in Justinian's compilation. As early as 450 B.C.[9] and continuing throughout the Roman Republic and Empire, Roman judges and jurists interpreted the law on a case by case basis to fit new needs as the society and its commerce expanded.[10] The Roman law was not codified until the sixth century A.D., when Justinian compiled the *Corpus Juris Civilis*, the largest portion of which was the *Digest* (or *Pandects*).[11] Justinian's codification was an attempt to revive the study of Roman law in the West, where it had been in decline since the division of the Empire in the fourth century. He promulgated his Code in Italy, North Africa and part of southern Spain when he reconquered these areas from their Germanic rulers. However, legal unity, like political unity, was short-lived; Rome again lost most of the reconquered western areas soon after Justinian's death.[12]

Story's approach would have been more familiar to his European "civil law" contemporaries. In the late eleventh century, Italian legal scholars had revived the study of Roman law in the West[13] after discovering a copy of Justinian's *Digest*. Roman law became the subject of university study in Bologna and then spread throughout Europe.[14] Due to its intellectual force and to its connection with the imperial authority of the Roman Empire, the

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9. *See* A. Watson, ROME OF THE XII TABLES: PERSONS AND PROPERTY (1975).

10. *See* Nicholas, *supra* note 2, at 19-27; Rabel, *Private Laws of Western Civilization*, 10 LA. L. REV. 1, 4, 5 (1949).

11. The Digest was a compilation of the writings of the Roman jurists, especially those of the classical period. *See* Nicholas, *supra* note 2, at 42-43; A. Von Mehren & J. Gordley, THE CIVIL LAW SYSTEM: AN INTRODUCTION TO THE COMPARATIVE STUDY OF LAW 6 (2d ed. 1977). The *Corpus Juris Civilis* consists of the Institutes, the Digest, the Code, and the Novels. The Institutes, the Digest, and the Code were promulgated between 533 and 534 A.D. The Novels contain imperial legislation enacted after the Code was issued. *See* Nicholas, *supra* note 2, at 38-45; Von Mehren & Gordley, *supra*, at 6.

12. *See* Wolff, *supra* note 2, at 163-77.

13. The study of Roman law had continued without interruption in the Eastern (Byzantine) Empire. *See* Wolff, *supra* note 2, at 178-83.

14. *See* J. Baldwin, THE SCHOLASTIC CULTURE OF THE MIDDLE AGES: 1000-1300, at 70-77 (1971).

Roman law gradually was "received" as the applicable law throughout western Europe. As a result of the assimilation of Roman law into the law of western European nations, by the time of the nineteenth century codifications, western European jurists perceived Roman law as a law of peaceful adjudication that was both impartial and universal.[15] Today, Roman law is the substantive and procedural basis of the civil law systems of continental Europe, including Italy, France, Germany and Spain, of all Latin American countries, and of a number of African, Asian and middle eastern nations.[16]

Story, like other Americans during the first part of the nineteenth century, saw Roman law through two post-Roman filters. First, these legal thinkers frequently did not distinguish Roman law itself from the European civil law methodology. Civil law scholars had accepted Justinian's codification as an authoritative text and as a source of rules and categories when they adopted Roman law into their own later societies. Second, Story and his contemporaries perceived Roman law through the lenses of their own common law system and of nineteenth century American society. For example, Story seems to have assumed in the statement quoted above that the dichotomy between law and equity existed in the Roman sources, although this distinction was in fact a product of the common law.

The complexities in Story's comment derive from his attempt to use Roman law to achieve certain goals in early nineteenth century America. The same difficulties and ambiguities pervade the statements made by other members of the American legal profession about Roman law during the first part of the nineteenth century. This article will analyze the purposes which American legal thinkers sought to further through the use of Roman law texts in the nineteenth century, and the extent to which their efforts succeeded.

II. ROMAN LAW, ORDER, AND AMERICAN LEGAL EDUCATION

A. ROMAN LAW AND CATEGORIZATION OF THE COMMON LAW

By the 1820s, the time was ripe for Story's approach. During the seventeenth and eighteenth centuries, American law, like English law, had been organized procedurally, according to forms of action. A plaintiff who sought relief in the common law courts had to state his or her case in accordance with one of a limited number of standard forms. Books of pleadings and abridgements were the typical source books for practicing American lawyers. These books listed the appropriate forms of pleading for bringing and defend-

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15. For a description of this process, *see* Nicholas, *supra* note 2, at 45-54; J. Whitman, THE LEGACY OF ROMAN LAW IN THE GERMAN ROMANTIC ERA 3-40 (1990); Wolff, *supra* note 2, at 183-225.

16. *See* A. Watson, ROMAN LAW AND COMPARATIVE LAW 92-93 (1991).

ing different kinds of common law actions; they did not provide a rational means for perceiving law separately from procedure. Yet the writ system did provide the common law with some structure by enabling lawyers to classify cases according to the appropriate forms of action.[17]

The demise of the writ system in the United States between 1825 and 1850[18] eliminated the procedural basis which shaped the way American lawyers perceived the law. Without the pre-defined categories created by the writs and forms of action, the common law appeared chaotic, and the ever-lengthening rows of undigested case reports seemed inaccessible. At the same time, the law was becoming increasingly fragmentary as the numerous American jurisdictions issued more and more opinions.[19] How was a nineteenth century American lawyer to make sense of the law? There was a consensus that the common law did not contain within itself the source of an adequate system.[20]

As the forms of action fell into disuse, American legal thinkers began to arrange the law according to substantive categories.[21] They argued that law was a "science," by which they meant that law could be organized according to a system of classifications. According to Daniel Mayes, a judge and a professor at the law school at Transylvania University in Lexington, Kentucky, "law is a science simple in its elements, and . . . these when fully understood are easy of combination, and application to any given state of facts. . . ."[22]

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17. For a description of the forms of action, *see* F. W. Maitland, THE FORMS OF ACTION AT COMMON LAW: A COURSE OF LECTURES (A.H. Chaytor & W.J. Whittaker eds., 1989); W. Nelson, AMERICANIZATION OF THE COMMON LAW: THE IMPACT OF LEGAL CHANGE ON MASSACHUSETTS SOCIETY 1760-1830 (1975).

18. *See* Nelson, *supra* note 17, at 85-88.

19. *See* Stein, *The Attraction of the Civil Law in Post-Revolutionary America*, 52 VA. L. REV. 403, 417 (1966).

20. According to Daniel Mayes:

> The lawyer has always seen a particular species of action brought to obtain remedy for a specific wrong. . . Wholly unable to assign a reason for any thing they do. . . [lawyers] acquire the art, whilst wholy [sic.] ignorant of the science of jurisprudence. . . If [the lawyer] be uninstructed in the elements and first principles upon which the rule of practice is founded, the least variation from established precedents, will totally distract and bewilder him.

D. Mayes, *An Address to the Students of Law in Transylvania University* (1834), *in* THE GLADSOME LIGHT OF JURISPRUDENCE: LEARNING THE LAW IN ENGLAND AND THE UNITED STATES IN THE 18TH AND 19TH CENTURIES 146-47 (Michael H. Hoeflich ed., 1988). *See also* M. Horwitz, THE TRANSFORMATION OF AMERICAN LAW, 1870-1960: THE CRISIS OF LEGAL ORTHODOXY, ch.1 (1992).

21. *See* Horwitz, *supra* note 20, at 12-13.

22. D. Mayes, *An Address to the Students of Law in Transylvania University* (1834) *in* THE GLADSOME LIGHT OF JURISPRUDENCE, *supra* note 20, at 152.

The early nineteenth century legal thinkers divided the law into discrete functional categories, arguing that there was, for example, a law of sales, a law of wills, and a law of insurance, and that each of these categories contained "natural" rules which could be applied consistently in each case.[23] This approach would enable American lawyers to make sense of the law and would help to unify the system. In the words of Joseph Story: "The habits of generalization. . . will do something to avert the fearful calamity, which threatens us, of being buried alive, not in the catacombs, but in the labyrinths of the law." [24] Instead of focusing on writs or technical details, the American lawyer would approach the law in terms of substantive categories containing rational rules.

From what sources was the American lawyer to derive these categories and the natural rules they contained? From Roman law and civil law texts, according to the early nineteenth century legal thinkers. They claimed that American lawyers should use the Roman law as an example of categorization and also as a source of rules to supplement the common law. Legal thinkers argued that Roman law epitomized a rational legal system based on substantive rules and grounded in clearly defined categories. Roman law was *ratio scripta*, "written reason."[25] According to Christian Roselius, professor of law at Tulane, the American law student should study the writings of the ancient Roman lawyers because:

> in them alone do we meet with that admirable union of theory and practice; that concise yet clear exposition of principles, forcibly illustrated by their application to striking cases, for which we look in vain in the works of other writers.[26]

Adoption of the Roman rules would eliminate the unwieldiness of American law, just as Justinian's compilation, "we are informed. . . superseded for ordinary use some camels' loads of written Commentaries on the law."[27]

B. THE ROLE OF LEGAL EDUCATION

Whether the law would be arranged scientifically depended upon legal education. The law could not be organized according to Roman law substantive categories and rules unless future lawyers, judges and legal academics

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23. *See, e.g.*, B. Montague, SUMMARY OF THE LAW OF LIEN (1824); W. Phillips, TREATISE ON THE LAW OF INSURANCE (1823).

24. J. Story, *Progress of Jurisprudence* (1821), *in* THE MISCELLANEOUS WRITINGS OF JOSEPH STORY, *supra* note 1, at 237.

25. *See, e.g.*, C. Roselius, *Introductory Lecture, in* THE GLADSOME LIGHT OF JURISPRUDENCE, *supra* note 20, at 226; 2 D. Hoffman, A COURSE OF LEGAL STUDY 502 (2d ed. 1836).

26. C. Roselius, *Introductory Lecture, in* THE GLADSOME LIGHT OF JURISPRUDENCE, *supra* note 20, at 236.

27. J. Story, *Codification of the Common Law, in* THE MISCELLANEOUS WRITINGS OF JOSEPH STORY, *supra* note 1, at 724.

saw legal cases and issues in these terms. Legal thinkers during the first half of the nineteenth century argued that law, like any other science, could be mastered only through organized instruction. They insisted that law books be systematically selected and methodically studied.[28] Hence Benjamin Butler, in an 1835 plan to establish a law school in New York, attempted to elaborate a "systematic course of instruction in the principles of legal Science," where subjects are treated in "philosophical order," and "as parts of a great system."[29]

Legal educators argued that the study of Roman law and civil law in American universities would enable lawyers to derive the rules which they could apply to future cases. In the words of Simon Greenleaf, professor of law at Harvard, "[n]o lawyer will have mastered his profession by an acquaintance with the common law alone."[30] Butler also urged American law students to study Roman and civil law and insisted on the importance of Roman and civilian materials.[31] Joseph Story argued that an American lawyer who had studied Roman legal texts would as a result be able to understand new legal issues:

> Where shall we find such ample general principles to guide us in new and difficult cases, as in that venerable deposit of the learning and labors of the jurists of the ancient world, the Institutes and Pandects of Justinian?[32]

These legal thinkers also emphasized that earlier unacknowledged borrowings by the common law from the Roman and civil law systems made it necessary for the American legal profession to be well-versed in Roman law. According to David Hoffman, professor of law at the University of Maryland from 1816 to 1836:

> Having sprung from the Roman code, we are bound. . . to resort for illustration and authority, to the pages of the Digest and Code, in the same manner, and with the same view, as we at present resort to the modern British authorities on innumerable other subjects.[33]

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28. 2 Hoffman, *supra* note 25, at xiii, 19-20.

29. B.F. Butler, *A Plan for the Organization of a Law School in the University of the City of New York* (1835), *in* THE GLADSOME LIGHT OF JURISPRUDENCE, *supra* note 20, at 168, 169, 171.

30. S. Greenleaf, *A Discourse Announced at the Inauguration of the Author as Royall Professor of Law at Harvard University* (1834), *in* THE GLADSOME LIGHT OF JURISPRUDENCE, *supra* note 20, at 140.

31. B.F. Butler, *A Plan for the Organization of a Law School in the University of the City of New York*, *in* THE GLADSOME LIGHT OF JURISPRUDENCE, *supra* note 20, at 174-75.

32. J. Story, *Progress of Jurisprudence* (1821), *in* THE MISCELLANEOUS WRITINGS OF JOSEPH STORY, *supra* note 1, at 198, 234-35.

33. 2 Hoffman, *supra* note 25, at 508.

Story applauded Hoffman's endorsement of the study of civil law,[34] and later noted that American law students should study Roman and civil law because "there has never been a period in which the common lawyers . . . have not been compelled to borrow its precepts."[35] Story claimed that the areas of American substantive law which had been most influenced by Roman or civil law, including the American rules relating to bills of exchange and promissory notes, bailments, and maritime law, had thereby been improved into "a regular system" exhibiting "scientific arrangement and harmony of principles."[36]

When confronting some of these claims by members of the early nineteenth century American legal profession, we are struck by the gulf between rhetoric and reality. Over the course of its history, the common law did borrow Roman law rules and ideas directly from Roman texts and indirectly from civilian sources. However, few would agree that such borrowing occurred to the extent that these nineteenth century Americans claimed. Hoffman's assertion that the common law had "sprung from the Roman code" is odd, since England did not experience the "reception" of Roman law that occurred on the continent. Story's list of the fields of American law most influenced by Roman law is also odd. For example, the Romans never developed commercial paper; hence Roman law could not have been the source of the common law rules regarding bills of exchange and promissory notes.

C. WHY ROMAN LAW?

Why did nineteenth century American legal thinkers insist that the categories and rules which would lend structure to American law be found in Roman sources? There are a number of potential explanations. First, in the eyes of nineteenth century Americans, Justinian's *Corpus Juris Civilis* was the repository of a complex legal system tested and improved by centuries of experience. The ancient Roman law had proved to be so enduring and adaptable that, thirteen centuries after Justinian, it continued to provide the basis for the legal systems of many modern nations:

> The Pandects of Justinian. . . are a monument of imperishable glory to the wisdom of the age; and they gave to Rome, and to the civilized world, a system of civil maxims, which has not been excelled in usefulness and equity.[37]

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34. J. Story, *Course of Legal Study* (1817), *in* THE MISCELLANEOUS WRITINGS OF JOSEPH STORY, *supra* note 1, at 90.

35. J. Story, *Growth of the Commercial Law*, *in* THE MISCELLANEOUS WRITINGS OF JOSEPH STORY, *supra* note 1, at 280.

36. J. Story, *Course of Legal Study*, *in* THE MISCELLANEOUS WRITINGS OF JOSEPH STORY, *supra* note 1, at 69.

37. J. Story, *Progress of Jurisprudence*, *in* THE MISCELLANEOUS WRITINGS OF JOSEPH STORY, *supra* note 1, at 238.

Americans during the early nineteenth century also admired the examples of the Roman lawyers, including "Cicero, the elder Antony and the elder Cato," noting that "minds more comprehensive than theirs seldom fall to the lot of man."[38]

Nor were early nineteenth century Americans reluctant to seek alternatives to the English common law. In fact, since the time of the American Revolution, many members of the American legal profession felt that they should strive to develop a distinct American legal system which, rather than merely imitating the English laws, would instead incorporate the best overall rules, principles and methods.[39] Some noted that the English system was particularly inappropriate for the United States, since the American lawyer, unlike his English counterpart, did not perform a strictly circumscribed function; rather, the American lawyer:

> is, or may be, at once, proctor, advocate, solicitor, attorney, conveyancer, and pleader; he may draw libels and bills, frame pleas and answers, direct process, prepare briefs, sketch drafts of conveyances, argue questions of fact to the jury, and questions of law to the court. . .[40]

This willingness to seek alternatives to the English law, combined with the post-revolutionary sympathy for France, led Americans to borrow ideas from the *Corpus Juris Civilis* and from later continental sources.[41]

A variety of additional factors help to explain the American interest in Roman law during the early nineteenth century. The widely publicized discovery of an important classical Roman legal text, Gaius' *Institutes*, in Verona in 1816 added to the attraction which Roman law held for American

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38. Anon., *Study of the Law* (1837), *in* THE GLADSOME LIGHT OF JURISPRUDENCE, *supra* note 20, at 203. The elder Antony, or Marcus Antonius (the grandfather of the famous Mark Antony), was a Roman orator of the late second and early first centuries B.C. He was not one of the more well-known orators, and none of his speeches survive. Cicero, however, included the elder Antony as one of the participants in the dialogue in *De Oratore*. *See* M.T. Cicero, ON ORATORY AND ORATORS (1808 ed.). The nineteenth century American author of *Study of the Law* probably learned of the elder Antony through this work.

The reference to Marcus Antonius is indicative of the lingering connection between law and rhetoric in the nineteenth century American mind. In fact, in *De Oratore* the elder Antony argues that it was not necessary for an orator to have a serious knowledge of the law. Law, according to Marcus Antonius:

> can be understood without a professional knowledge of it. . . all the utility of the civil law in any cause, may, on the shortest notice, be known either from books or its professors. For this reason, those very eloquent men have their assistants, who are skilled in law affairs, though they themselves know nothing of the matter. . .

1 M.T. Cicero, ON ORATORY AND ORATORS 121 (1808 ed.).

39. Stein, *supra* note 19, at 407.

40. J. Story, *Growth of the Commercial Law*, *in* THE MISCELLANEOUS WRITINGS OF JOSEPH STORY, *supra* note 1, at 286-87.

41. Stein, *supra* note 19, at 408-11.

academics and lawyers.[42] In addition, a growing number of translations of civil law scholarship also increased Roman and civil law influences in the United States. For example, the first volume of *History of the Roman Law in the Middle Ages* by the great German scholar Friedrich Carl von Savigny was published in English in 1829.[43] Additional works by Savigny dealing with Roman law,[44] and with substantive areas of law including the law of possession,[45] were also translated during the mid-nineteenth century. Articles and reviews in English explained and analyzed Savigny's work.[46]

Many American legal thinkers studied in European universities and were influenced by continental juristic thinking. For example, Hugh Swinton Legaré, a native of South Carolina, studied Roman law and civil law at Edinburgh and later travelled to Germany, where he met with prominent German legal scholars. Throughout his career as a lawyer, author, and Attorney General of the United States, Legaré maintained his interest in European legal scholarship and encouraged other Americans, including J. Burton Harrison and Thomas Caute Reynolds, to study in Europe.[47] Charles Follen, the first professor of Roman law at Harvard Law School, was born in Germany and studied law there before coming to the United States.[48]

Furthermore, increasing domestic commerce with the state of Louisiana, whose law was said to embody "the living Institutes of Justinian,"[49] called attention to examples of applied Roman law. Teaching in Louisiana, Professor Roselius noted:

> [T]he principal foundation of the laws of this State, in civil matters is, the Roman law: indeed, there are but few principles enunciated in the Code, the origin of which cannot be traced to the Roman jurists. Hence it has always been conceded by all intelligent members of the profession, that the

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42. *See* Hoeflich, *Transatlantic Friendships & the German Influence on American Law in the First Half of the Nineteenth Century*, 35 AM. J. COMP. L. 599, 599-600 (1987).

43. *See* F. Von Savigny, THE HISTORY OF THE ROMAN LAW DURING THE MIDDLE AGES (Cathcart trans., 1829); *see also* Hoeflich, *Savigny and his Anglo-American Disciples*, 37 AM J. COMP. L. 17, 19 (1989).

44. *See* F. Von Savigny, SYSTEM OF THE MODERN ROMAN LAW (Holloway trans., 1867); *see also* Hoeflich, *Savigny and his Anglo-American Disciples*, *supra* note 43, at 19.

45. *See* F. Von Savigny, VON SAVIGNY'S TREATISE ON POSSESSION (Perry trans., 1848); F. Von Savigny, POSSESSION IN THE CIVIL LAW (Kelleher trans., 1888); *see also* Hoeflich, *Savigny and his Anglo-American Disciples*, *supra* note 43, at 19.

46. *See* J. Reddie, *Historical Notices of the Roman Law and of the Progress of Its Study in Germany* (1826), which urged the study of Roman law and advocated the ideas of the historical school of jurisprudence, of which Savigny was the founder. *See* Hoeflich, *supra* note 43, at 19-20.

47. Hoeflich, *Transatlantic Friendships & the German Influence on American Law in the First Half of the Nineteenth Century*, 35 AM. J. COMP. L. 599, 607-08 (1987).

48. *Id.* at 605-06.

49. S. Greenleaf, *A Discourse Pronounced at the Inauguration of the Author as Royall Professor of Law in Harvard University*, *in* THE GLADSOME LIGHT OF JURISPRUDENCE, *supra* note 20, at 139.

> study of the Roman Law, in connection with our own Code, is indispensably necessary for a thorough understanding of the laws of Louisiana.[50]

It is also possible that American legal thinkers turned to Roman law in the early part of the nineteenth century in order to counter arguments that American law was arbitrary. There were signs during the first few decades of the nineteenth century that the public was growing increasingly dissatisfied with the seeming chaos and unpredictability of law and the legal process. Distrust of the legal system and lawyers was increasing.[51] According to Mayes, in order for law to retain its normative force in American society, law and the legal process had to become more certain and predictable.[52] A theory that law was a science with natural rules to be discovered in Roman law may have helped to eliminate inconsistencies in the legal system, or at least to create an appearance of greater consistency.

Although all of the factors discussed above contributed to the early nineteenth century attention to Roman law, the catalyst was most likely the battle for legitimacy which American legal academics were fighting during the first part of the nineteenth century.[53] Training to become a member of the bar was predominately practice-oriented and informal. The aspiring lawyer who did not receive his training at the English Inns of Court could, for a fee, become an apprentice in the office of a practicing lawyer. Ideally, the student-apprentice would learn the law by personal observation and discussion, as well as by reading the books in the lawyer's library.[54] However, many practitioners were uninterested in instructing students:

> [T]he youth destined for the bar. . . get admission into the office of some attorney, generally choosing one of eminence, and call themselves his students, not that he acts as their instructor, but because the book they read, is taken off a shelf in his library, and the room in which that book is read is called the office of Mr. A. or Mr. B. Sometimes he tells them what book to read, and when he is told that this is done, the direction is given to read it again or take up another. The difference between having read, and understanding a work, is not much, sometimes not at all attended to. Whether

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50. C. Roselius, *Introductory Lecture, in* THE GLADSOME LIGHT OF JURISPRUDENCE, *supra* note 20, at 236.

51. *See* M.J. Horwitz, THE TRANSFORMATION OF AMERICAN LAW: 1780-1860 at 257 (1977); R. Stevens, LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850S TO THE 1980S at 7 (1983); Hoeflich, *Law & Geometry: Legal Science from Leibniz to Langdell*, 30 AM J. LEGAL HIST. 95, 119 (1986). For an example of a lay-person's attempt to eliminate the need for attorneys, *see* Anon., THE LAW INSTRUCTOR, OR FARMER'S AND MECHANIC'S GUIDE (1824).

52. *See* D. Mayes, *An Introductory Lecture Delivered to the Law Class of Transylvania University on the 5th November, 1832* (1833), *cited in* Hoeflich, *Law & Geometry: Legal Science from Leibniz to Langdell*, *supra* note 51, at 117.

53. *See* Hoeflich, *Law & Geometry: Legal Science from Leibniz to Langdell*, *supra* note 51, at 118.

54. *See* A. Chroust, THE RISE OF THE LEGAL PROFESSION IN AMERICA: THE COLONIAL EXPERIENCE 30-32 (1965).

> the student has or has not acquired knowledge by his reading, the supposed preceptor is not apt to enquire.[55]

Hence the apprentice's legal education was often limited to copying out pleadings.[56]

By the early nineteenth century, common law studies had begun to enter universities, but the apprenticeship method remained the dominant mode of preparation for the bar. Most of the law professorships established in colleges were intended for undergraduates;[57] they did not provide complete training, and they frequently lapsed.[58] In the university law schools that were organized during the first half of nineteenth century, including Harvard, Yale, and the University of Virginia,[59] law study bore greater resemblance to an undergraduate major than to contemporary university legal education. More successful were the private law schools that developed as outgrowths of the law offices of successful practitioners: the most well-known of these schools was established at Litchfield, Connecticut in 1784.[60]

In order to secure the place of law studies in the university curriculum and that of law teachers on university faculties, legal academics needed to develop a theory which would set university law studies apart from apprenticeship and would convince potential students and the public that university law studies bestowed distinct expertise and status. The argument that law was a science based on natural rules to be found in Roman legal sources performed this dual function. Both science and Latin were standard university subjects.[61] The notion of legal science based on Roman law set the emerging university legal education apart from the apprenticeship system, since the latter taught the traditional, writ-based, practice-oriented skills. It was only in the university that students could be taught Roman law categorization and rules as well as the scientific mode of reasoning necessary to apply them.

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55. D. Mayes, *An Address to the Students of Law in Transylvania University* (1834), *in* THE GLADSOME LIGHT OF JURISPRUDENCE, *supra* note 20, at 157.

56. For an example of this phenomenon, *see* D. Coquillette, *Justinian in Braintree: John Adams, Civilian Learning, and Legal Elitism, 1758-1775*, *in* COLONIAL SOCIETY OF MASSACHUSETTS, LAW IN COLONIAL MASSACHUSETTS: 1630-1800 at 359, 362 (1984). *But see* D. Gold, THE SHAPING OF NINETEENTH-CENTURY LAW: JOHN APPLETON AND RESPONSIBLE INDIVIDUALISM 4-5 (1990), for an example of a positive experience with the apprenticeship method.

57. The first such professorship was at William and Mary in 1779. A number of other professorships of law were established during the 1790s, including one at King's (Columbia) College filled by James Kent. *See* Stevens, *supra* note 51, at 4-5; C. Warren, A HISTORY OF THE AMERICAN BAR 343-56 (2d ed. 1980).

58. Stevens, *supra* note 51, at 4-5.

59. Warren, *supra* note 57, at 354, 358-65.

60. Stevens, *supra* note 51, at 3; Warren, *supra* note 57, at 357-58.

61. *See* Hoeflich, *Law & Geometry: Legal Science from Leibniz to Langdell*, *supra* note 53, at 118.

Early nineteenth century Americans who argued that law should be a university subject probably had a variety of motives for doing so. A number of historians have argued that the attempt to situate law in the universities was an exclusionary move. These scholars have noted that requiring university attendance precluded people who could not pay tuition, particularly minorities, immigrants, and other members of the working-class, from joining the legal profession. Some have argued that lawyers enhanced their professional status at the expense of these groups.[62] However, an opposite argument is also plausible. The apprenticeship system against which the early nineteenth century legal academics fought had functioned as a strict control device as well as a system of training. The apprenticeship system had kept the bar small and under the regulation of the older lawyers.[63]

For good reasons or bad, then, and probably for a combination of both, members of the legal profession during the early nineteenth century thought that they could use Roman law to change their profession. Legal education was to be their vehicle. The legal profession would not change if the apprenticeship method remained the dominant mode of preparation for the bar. Legal thinkers knew that they could not "instruct a student in the science of law by initiating him in the deep mystery of copying papers or counting their folios."[64] The legal education of even the most zealous apprentice remained limited:

> Short as the allotted term of study is for those who ardently desire a knowledge of the law, their hours of study are liable to all sorts of vexatious interruptions. . . . Causes must be pushed on to judgment or decree, and the attention of the anxious student is so often interrupted and averted that at last he despairingly ceases to bestow it, and worse than all, he falls into habits of idleness, always difficult to be eradicated.[65]

Immersion in day-to-day legal practice would not give the future lawyer a sense of the substantive categories of the law or of how they fit together to form a coherent system. According to one observer in 1837, law office study was "altogether incompetent to imbue the mind with a deep and solid acquaintance with [the law's] broad and general principles."[66]

Hence, in order for lawyers to master the rules which would enable them to understand the system in which they functioned, university law schools needed to replace the apprenticeship method:

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62. *See, e.g.*, M. Bloomfield, UPGRADING THE PROFESSIONAL IMAGE: AMERICAN LAWYERS IN A CHANGING SOCIETY, 1776-1876 (1976); Stevens, *supra* note 51, at 92-103; Konefsky, *Book Review*, 40 STAN. L. REV. 1119 (1988).

63. L. Friedman, A HISTORY OF AMERICAN LAW 84-85 (1973).

64. Anon., *Study of the Law* (1837), *in* THE GLADSOME LIGHT OF JURISPRUDENCE, *supra* note 20, at 202.

65. *Id.*

66. *Id.* at 207.

> The establishment of a law university, in which the pursuit of the science should be the primary object, and in which it should be pursued assiduously, methodically, and on a broad and philosophical basis, is to our country a matter of the highest moment.[67]

According to Hoffman, if law students were to study at university law schools, not only would they become better lawyers, but they would also enjoy the educational process more.[68] The early nineteenth century legal academics looked to the civil law countries for a model of an academic method of legal study with Roman law at its source.[69] However, they did concede that, at least for a time, university legal education could occur in conjunction with practical experience in a law office.[70]

In sum, American legal thinkers during the first part of the nineteenth century believed that Roman law would enable them to realize their aspirations for the American legal profession. They used Roman law to help set a standard for themselves and for other members of their profession. Legal education was central to their undertaking. Due to professors like Story and Hoffman, the course of legal instruction in the developing law schools, and the new textbooks and treatises, included a significant amount of Roman and civil law. The early nineteenth century legal thinkers were also responsible for the organization of the common law according to substantive categories, and for the filling-in of gaps in the common law rules. They looked to Roman law sources for these categories and rules.

D. LATE NINETEENTH CENTURY DEVELOPMENTS

In the later part of the nineteenth century, legal education underwent a radical transformation. Beginning in the 1850s, law schools offering complete instruction in law began to replace the earlier professorships of law.[71] Law was definitively established as a university subject after Christopher Columbus Langdell was appointed dean of Harvard Law School in 1870. Langdell's goal was to turn the legal profession into a university-educated one, in part by requiring first two and then three years of graduate study in law.[72]

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67. *Id.*

68. *See* 1 Hoffman, *supra* note 25, at 32.

69. For example, Butler sought advice from a German jurist while attempting to draw up his plan for a law school in New York. *See* Hoeflich, *Transatlantic Friendships & the German Influence on American Law in the First Half of the Nineteenth Century*, 35 AM. J. COMP. L. 599, 601 (1987).

70. *See, e.g.*, B. Butler, *A Plan for the Organization of a Law School in the University of the City of New York* (1835), *in* THE GLADSOME LIGHT OF JURISPRUDENCE, *supra* note 20, at 172-73.

71. Stevens, *supra* note 51, at 21. *See, supra*, text accompanying notes 57-59, for a discussion of the early lecturers in law.

72. Stevens, *supra* note 51, at 36-37.

During Langdell's deanship, university legal training became a necessity for leaders of the profession.[73]

Langdell instituted reforms which rapidly spread throughout American legal education. Langdell, like the early nineteenth century legal thinkers, argued that law was a science:

> Law, considered as a science, consists of certain principles or doctrines. To have such a mastery of these as to be able to apply them with constant facility and certainty to the ever-tangled skein of human affairs, is what constitutes a true lawyer.[74]

However, unlike the legal science of Story and his contemporaries, Langdell's science consisted of investigation and experimentation, not of classification. Furthermore, general principles of law, not sets of rules, were the goal of Langdell's inquiry. And, more akin to Bacon[75] than to Story, Langdell argued that the lawyer was to derive these principles from appellate cases, not from Roman law sources: "the shortest and the best, if not the only way of mastering the doctrine effectually is by studying the cases in which it is embodied."[76] In fact, Langdell explicitly rejected the importance of Roman law.[77]

However, in important respects, the influence of Roman law made Langdell's argument that law was a science possible. Langdell's case method was based on the assumption that there was a unitary, principled system of objective doctrines that could produce consistent results from case to case. The early nineteenth century legal thinkers had sought to establish such a system of doctrines by referring to Roman law. Hence, Langdell's science was an outgrowth of the developments which had involved Roman law during the first half of the nineteenth century.

During the last few decades of the nineteenth century, American legal academics continued to apply Roman law to their own system, though their Roman and civil law teaching and research were of a different genre from the work of Story and Hoffman. Many late nineteenth century thinkers turned to a primarily historical and comparative approach linked to the "historical school" of jurisprudence prominent in European scholarly circles. They deemphasized Roman law as a source of *ratio scripta* and made few attempts to

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73. *Id.* at 35-64.

74. C. Langdell, A SELECTION OF CASES ON THE LAW OF CONTRACTS, at vii (1871).

75. Robert Stevens noted that Langdell's "vision of legal science would have been acceptable to Bacon." Stevens, *supra* note 51, at 52. *See supra* text accompanying notes 5-8, for a discussion of Francis Bacon's contributions to legal thought.

76. Langdell, *supra* note 74, at vii.

77. According to Harvard President Eliot, "Dean Langdell thought that English and American law should be studied by itself without admixture of other subjects, such as government, economics, international law, or Roman law." Eliot, A LATE HARVEST at 53, *cited in* Stevens, *supra* note 51, at 69.

use substantive Roman legal rules to supplement the Anglo-American common law. Rather, they used Roman law studies to demonstrate the historical evolution and transmission of originally Roman legal rules. According to one commentator, because of the historical connections between the Roman, civil and common law, common lawyers should study Roman and civil law to better understand their own legal system and its development.[78] In the words of Roscoe Pound, such an approach enabled students of the common law "to reach its fundamental ideas, develop them logically, and give the system form and internal coherence."[79]

Oliver Wendell Holmes, Jr., in an 1896 oration entitled "The Use of Law Schools," discussed the changes that had occurred in legal scholarship between the first and last decades of the nineteenth century. After praising Story's Commentaries as "epoch-making," Holmes added:

> Story's simple philosophizing has ceased to satisfy men's minds. I think it might be said with safety, that no man of his or of the succeeding generation could have stated the law in a form that deserved to abide, because neither his nor the succeeding generation possessed or could have possessed the historical knowledge, had made or could have made the analyses of principles, which are necessary before the cardinal doctrines of the law can be known and understood in their precise contours and in their innermost meanings.
>
> The work is now being done. Under the influence of Germany, science is gradually drawing legal history into its sphere. The facts are being scrutinized by eyes microscopic in intensity and panoramic in scope. At the same time, under the influence of our revived interest in philosophical speculation, a thousand heads are analyzing and generalizing the rules of law and the grounds on which they stand. The law has got to be stated over again; and I venture to say that in fifty years we shall have it in a form of which no man could have dreamed fifty years ago.
>
> Corresponding to the change which I say is taking place, there has been another change in the mode of teaching. . .[80]

Holmes, like the other legal thinkers and educators of his time, no longer argued that American law had been influenced by Roman law or civil law. But the "analyses of principles" which occurred in Holmes' era would not have proceeded as they did had the earlier thinkers not used Roman law to organize and supplement common law rules and doctrines. In fact, analyses of principles would not have occurred at all had the earlier academics not

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78. *See* Leonhard, *The Vocation of America for the Science of Roman Law*, 26 HARV. L. REV. 389 (1913).

79. R. Pound, *Foreward to "The Valuation of Property in the Roman Law,"* 34 HARV. L. REV. 227 (1921).

80. O.W. Holmes, Jr., *The Use of Law Schools*, *in* THE GLADSOME LIGHT OF JURISPRUDENCE, *supra* note 20, at 268.

established a place for law in the university, an endeavor to which the appeal to Roman law had been fundamental.

III. ROMAN LAW AND THE AMERICAN LAW OF CONTRACTS

A. LAW OF CONTRACTS

By analyzing Roman and civil law texts, American legal thinkers through the 1850s created contracts as a branch of the common law, defined the categories within the law of contracts, and derived the rules which continue to apply to specific types of contracts to this day. In the first half of the nineteenth century, American legal thinkers consciously used Roman law to give the common law of contracts a systematic doctrinal structure which it had previously lacked. They also borrowed from Roman law at the level of rules. The use of Roman law to create the American law of contracts sometimes involved distortions of Roman law; this is especially true as the level of generality increased. Yet the use of Roman law as a model of classification and as a source of specific rules enabled American thinkers to develop, by mid-century, a body of contract law no longer dependent on the forms of action.

Before the nineteenth century, the common law relating to contracts did not have a theory or a systematic doctrinal structure. Anglo-American common law practitioners and academics did not conceive of "contracts" as a discrete area of law. Before the publication of the first English treatise on contract law in 1790,[81] the common law relating to contractual agreements consisted entirely of scattered case reports and, in the later eighteenth century, approximately forty pages of Blackstone's *Commentaries*.[82] The Anglo-American law of contracts was organized not by definitions, doctrines, and principles, but by the writs of debt, covenant, general assumpsit and special assumpsit.[83]

In the eighteenth century not only was there no law of contracts; nor was there a coherent body of law relating to sales, negotiable instruments, or any other categories now considered part of contract law.[84] Judges had decided cases dealing with these transactions, of course, but these decisions were not situated within systematically organized bodies of law. The case law system necessarily resulted in a fragmentary adoption of whatever rules applied to the cases as they arose, rather than in a systematic acceptance of a coherent body of laws.

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81. *See* J. Powell, ESSAY UPON THE LAW OF CONTRACTS (1790).

82. Blackstone discussed contracts in Book II, which is devoted entirely to the law of property. *See* 2 W. Blackstone, COMMENTARIES ON THE LAWS OF ENGLAND 440-70 (1766). He also discussed contracts in Book III in a chapter entitled "Of Injuries to Personal Property." *Id.* at 154-66.

83. *See* Maitland, *supra* note 17, at 51-52, 55-58.

84. *See* G. Gilmore, THE DEATH OF CONTRACT 8-9 (1974).

Hence, when Kent published his *Commentaries on American Law*[85] between 1826 and 1830, the area of contracts was still not clearly defined, and the scope of the law of contracts was limited. Kent's chapter entitled "Of Contracts" is a sub-section of Part V, "Of the Law Concerning Personal Property."[86] Missing from Kent's chapter on contracts were a large number of subjects later subsumed within the field of contract law, including bailments, partnership, and commercial paper; Kent discussed these topics elsewhere, as separate sub-sections of property law. For Kent, "Contracts" seems to have been a residual category which consisted primarily of the law relating to the sale of goods.

Over the next few decades, American treatise writers established contracts as a separate field of law. Using Roman and civil law sources, they defined the area of contracts and sought to "elucidate and systematize, as far as practicable, the general law applicable to the subject."[87] It was an innovation in Anglo-American law for these writers to define contract at all; the extent to which the idea was novel in the common law system is shown by the authority which the American writers cited. For example, William W. Story,[88] on the title page of his treatise on contracts, quoted from Justinian's *Digest* to explain what the idea of contract encompassed.[89] In an 1853 treatise on contracts, John William Smith used civil law scholarship to define the subject matter of a contract.[90]

American treatise writers developed a coherent common law of contracts during the first part of the nineteenth century by dividing the law of contracts into categories. These thinkers formulated the law of contracts as a collection of discrete bodies of rules. Hence, the early treatises on contracts were organized according to a series of independent categories: A typical

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85. James Kent (1763-1847) was chancellor of New York from 1814 to 1823; he wrote the four-volume COMMENTARIES ON AMERICAN LAW after his retirement from the bench.

86. *See* 2 J. Kent, COMMENTARIES ON AMERICAN LAW 449-557 (6th ed. 1848).

87. W. Story, A TREATISE ON THE LAW OF CONTRACTS NOT UNDER SEAL at vii (2d ed. 1847).

88. William Wetmore Story was the son of Joseph Story. After publishing several legal works, W.W. Story moved to Italy and spent the remainder of his life as a sculptor.

89. *"Obligamur aut re, aut verbis, aut simul utroque, aut consensu, aut lege, aut jure honorario, aut necessitate, aut peccato. — Pandectae Justinianeae." Id.* Why did William Story cite this particular passage from the *Digest* (D.44.7.52), which is an excerpt from Modestinus' *Second Book of Rules*? The passage is a relatively obscure one, written by a jurist who was not among the most frequently cited in the *Digest*; hence it is puzzling that Story would look to it for a general statement about contracts. In fact, the quotation pertains not only to contracts, but to obligations in general, which in Roman law included delicts (roughly equivalent to our notion of torts) as well. *See* Gaius, 3 INSTITUTES § 88; Justinian, 3 INSTITUTES, tit. XIII. We have seen the extent to which categories were still fluid during the first part of the nineteenth century; perhaps Story was contemplating the possibility of an American law of obligations. The obscurity of the *Digest* passage supports the hypothesis that Story may have been thinking in terms of a category that was not adopted into American law.

90. *See* J. Smith, THE LAW OF CONTRACTS: A COURSE OF LECTURES 418-24 (3d ed. 1853) (citing Pothier).

table of contents listed, according to no general arrangement, chapters on bailments, sales, hire, guaranty, landlord and tenant, and so forth.[91] In each treatise, a chapter devoted to each type of transaction outlined the applicable rules. The early nineteenth century treatise writers did not attempt to connect these categories conceptually.

The American treatise writers used Roman law contracts categories to systematize American law. For example, American contracts treatises written in the 1840s and 1850s contained a section on bailments. The category of bailments itself had no corresponding category in Roman law. The American thinkers during the first part of the nineteenth century divided the law of bailments according to the Roman law contracts categories: *depositum*, *commodatum*, *mandatum*, *pignus*, and *locatio conductio*. At Roman law, *depositum* (the handing over of a thing for safe-keeping), *commodatum* (loan for use), and *pignus* (pledge) were "real" contracts, formed by delivery. *Mandatum* (the performance of a service gratuitously for the benefit of another) and *locatio conductio* (hire) were "consensual" contracts, arising by mere agreement.[92]

The American authors distinguished these transactions not according to whether they were formed by delivery or consent, but according to which party benefitted. This approach enabled them to systematize the law by distinguishing bailments according to the standard of care applicable to each transaction. The types of contracts, and the standards of care which applied to them, remained distinctly Roman. The American thinkers repeatedly used Roman and civil law sources to define the categories of bailment and to support the individual rules applicable to each category.

For example, American legal thinkers noted that *depositum* and *commodatum* were both gratuitous: "for, if compensation be given, it is a bailment of hiring."[93] Yet *depositum* benefitted the depositor, while *commodatum* benefitted the borrower. Accordingly, the degree of care which the borrower was obligated to exercise in a contract of *commodatum* was greater than that to which the depositee was held in a contract of *depositum*. At Roman law, the borrower in *commodatum* was held to the highest standard of care: he was liable for negligence, and could escape liability only for accidents beyond his control.[94] In contrast, the depositee was not liable for negligence, but only for damage occasioned through his positive act.[95]

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91. *See, e.g.*, 1 T. Parsons, THE LAW OF CONTRACTS (1855); W. Story, *supra* note 87.
92. *See* 3 Gaius, INSTITUTES §§ 89-162; 3 Justinian, INSTITUTES, tit. XIV-XXVII.
93. W. Story, *supra* note 87, at 610.
94. 3 Justinian, INSTITUTES, tit. XIV.
95. *Id.*

The American thinkers accepted the Roman standard of care differentials.[96] For example, Parsons noted that in the contract of *commodatum*, "the benefit belongs exclusively to the bailee; and he is therefore bound to great care, and liable for slight negligence."[97] When Parsons departed from the Roman rules, however slightly, he noted the disparity. For example, in the contract of *depositum*:

> By the Roman law [the bailee] was answerable only for fraud; for if the bailor thus deposited goods with a negligent person, he took upon himself the risk of negligence. So it seems to have been held by Bracton, who copied from the Roman law. But by the English and American law, such bailee is, as we have seen, liable for gross negligence, although he may have been wholly innocent of any fraudulent intent.[98]

The same standard of care which applied to *depositum* also governed cases of *mandatum*.[99]

The nongratuitous Roman contracts, in contrast, could not be distinguished according to whether benefit inured to the bailor or to the bailee. Hence the standards of care were more difficult to define. The American thinkers concluded that *pignus*[100] and *locatio conductio* were bailments for "the mutual benefit of both parties."[101] Accordingly, the pledgee and the hirer were held to an intermediate standard of "ordinary care," between the standards applicable to *depositum* and to *commodatum*.

This discussion of the law of bailments demonstrates that American legal thinkers during the first part of the nineteenth century created a law of contracts in the form of a list of enforceable transactions, rather than a general theory of contract. The system was modelled after the Roman law. The Roman law of contracts had developed as a list of enforceable transactions; a

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96. Lord Holt had incorporated this distinction into the common law in the case of *Coggs v. Bernard*, 2 Lord Raym. 909. "In this case that eminent judge, Sir John Holt, may be said to have laid the foundation of the Law of Bailment for England. He borrows most, perhaps all, of his principles from the civil law." 1 Parsons, *supra* note 91, at 569-70 n.(*p*); *see also id.* at 591 n.(*t*).

97. 1 Parsons, *supra* note 91, at 590.

98. 1 Parsons, *supra* note 91, at 574. *Cf.* 3 Justinian, INSTITUTES 132 (J.B. Moyle trans.):

> [The depositee is liable] only where [the object] is lost through some positive act on his part: for for [sic.] carelessness, that is to say, inattention and negligence, he is not liable. Thus a person from whom a thing is stolen, in the charge of which he has been most careless, cannot be called to account, because, if a man entrusts property to the custody of a careless friend, he has no one to blame but himself for his want of caution.

Id. But cf. W. Story, *supra* note 87, at 612 ("at the civil law, gross negligence and fraud are considered as nearly equivalent to each other") (citing Justinian's DIGEST and two civilian scholars).

99. *See* W. Story, *supra* note 87, at 619-23; 1 Parsons, *supra* note 91, at 580-89.

100. At Roman law, *pignus* was a form of real security. Yet the American thinkers considered it to be a bailment for the benefit of both parties: "A pledge is a bailment for the mutual benefit of both parties, for while the pledgee obtains security for his debt, the pledgor obtains credit or delay, or other indulgence." 1 Parsons, *supra* note 91, at 591.

101. W. Story, *supra* note 87, at 637.

Roman agreement was not a contract unless it satisfied the requirements of one of the pre-defined contract types. Although the Roman jurists did develop some general ideas, including principles of fraud, duress and mistake, applicable to contracts in which consent was an element,[102] the Romans did not formulate a general theory of contract. Hence their law was one of contracts, rather than of contract.[103]

For example, the consensual contract of sale (*emptio venditio*) required that the parties agree on a specific thing to be bought and sold and on a fixed price. An agreement which did not satisfy these requirements (*e.g.*, an agreement to "sell" for a reasonable price) was not a contract of sale.[104] Each type of contract had a corresponding form of action; a plaintiff who had entered into a contract of sale but who mistakenly brought an action for breach of a different contract (*e.g.*, hire, or *locatio conductio*) would lose the case.[105]

As a result of this emphasis on specifics rather than on a general theory of enforceability, the Roman jurists were able to work out in detail the features of each type of contract. The Roman jurists, by isolating characteristic transactions, were able to assign to each contract the legal consequences which seemed most appropriate. Once they determined that a given transaction fell under a particular heading, the established rules of that type of contract could be applied. Furthermore, the parties, in entering into the agreement, could know what consequences would follow.[106]

The American treatise writers through the 1850s adopted some of the specific Roman rules governing each category of contract in addition to the categories themselves. For example, American treatise writers adopted the Roman rules regarding the contract of sale.[107] They cited Roman and civil law authority for the rules, without questioning why the parties should be bound by them without having consented to them. Hence, the thing sold in a contract of sale must be "specific or identified. . . otherwise, it is not strictly a contract of sale."[108] There could be no contract of sale for a thing that was not in existence: "The civil law came to the same conclusion on this point."[109] Kent analyzed a number of passages from Justinian's *Digest*, including an opinion of the Roman jurist Papinian, in the text of his discussion,

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102. Some of these principles resonated in American legal thought during the first part of the nineteenth century, though in a limited manner. For example, some writers explained the effect of mistake on a contract with reference to Roman and civil law authority. *See, e.g.*, 2 Kent, *supra* note 36, at 468; W. Story, *supra* note 87, at 321-23.

103. *See* Nicholas, *supra* note 2, at 165.

104. *See* 3 Gaius, INSTITUTES §§ 139-41; 3 Justinian, INSTITUTES, tit. XXIII, on the contract of *emptio venditio*.

105. Nicholas, *supra* note 2, at 165.

106. *Id.* at 165-66.

107. *See, supra*, text accompanying notes 104-05, for a description of the Roman contract of sale.

108. 2 Kent, *supra* note 36, at 468.

109. *Id.* at 469 (citing Justinian's DIGEST 18.1.57).

and also cited the civilian scholar Pothier and the French Civil Code in support of the requirement that the thing be specifically identified.[110]

The treatise writers also adopted from Roman law the requirement that a contract of sale include a fixed price: "The price to be paid must be certain, or so referred to a definite standard that it may be made certain."[111] As authority for the requirement of a fixed price, Parsons, Story, and Kent all cited the *Corpus Juris Civilis*; Kent and Story cited civil law authority as well.[112] They also accepted the Roman law rule that mutual consent was required to form a contract of sale.[113] As a result of the consent requirement, they concluded, there was no contract of sale if there was an error or mistake in a fact going to the essence of the contract.[114] A contract is binding regardless of a mistake in law, however: "The same rule prevails in the Roman law and in foreign countries on the continent of Europe, where the Roman law prevails."[115]

Why did American legal thinkers model the law of contracts after the Roman law? By the time of the Roman Empire, the Roman law of contracts had grown into a detailed body of rules capable of supporting extensive business activity.[116] Later societies adjusted the Roman law of contracts to new purposes. In the sixteenth and seventeenth centuries, contracting by consent, agency, assignment of debts, and contracts in favor of third parties were developed out of Roman law concepts.[117] The civil law systems drew heavily on Roman sources for contract law. The law of contract remains one of the most distinctly Roman branches of the civil law,[118] and civil law countries retain the typical contracts of the Roman law.[119]

American legal thinkers during the first part of the nineteenth century proclaimed that the Roman law of contracts was superior to the common law. The Roman law was scientific where the common law was unsystematic and hence inadequate:

> Any science which has been carefully elaborated, is apt to be accurate in its nomenclature and classifications. So, again, this very accuracy contributes largely to the perfection of the science. This is strikingly the case with the

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110. *Id.* at 468-69.

111. 1 Parsons, *supra* note 91, at 439.

112. *See* 2 Kent, *supra* note 36, at 477; W. Story, *supra* note 87, at 671; 1 Parsons, *supra* note 91, at 439.

113. *See, e.g.*, W. Story, *supra* note 87, at 672.

114. *See* 2 Kent, *supra* note 36, at 477 (citing Pothier); W. Story, *supra* note 87, at 672.

115. W. Story, *supra* note 87, at 322-23 n.1.

116. Rabel, *supra* note 10, at 1, 6. For a description of the business and commerce of the Roman Empire, *see* J. Carcopino, DAILY LIFE IN ANCIENT ROME 173-84 (1940).

117. Rabel, *supra* note 10, at 9.

118. Nicholas, *supra* note 2, at 206.

119. This is apparent upon examination of the French and German civil codes. *See* C. CIV., bk. 3, tit. 3; BGB, bk. 2.

> Roman Law of Contracts; which, of all the titles of that system, is the most perspicuous, natural, and systematic. It will readily be conceded that the phraseology and classification of this subject, under the common law, are neither sufficiently extensive nor correct, even for ordinary practical purposes.[120]

They claimed that it was appropriate to look to Roman law in order to systematize the American law of contracts because many of the individual common law rules relating to contracts had originated in Roman law. In the words of Kent:

> The title [on the interpretation of contracts] in the Pandects, as well as the sententious rules and principles, which pervade the whole body of the civil law, show how largely the common law of England is indebted to the Roman law, for its code of proverbial wisdom. There are scarcely any maxims in the English law but were derived from the Romans. . .[121]

They argued that only those areas of the American law of contracts which had been influenced by Roman law were just: "Our law of contracts. . . has become equitable only so far as it has ceased to be feudal, and liberal so far as it has been drawn from Roman fountains."[122]

Much of the borrowing which these writers described had in fact occurred. The English common law relating to commercial contracts had developed slowly and sporadically. With the decline in jurisdiction over contracts cases of the English local and ecclesiastical courts, both of which had heard many contracts cases at various periods,[123] the judges of the central royal courts were faced with problems to which their learning did not provide solutions. As a result, during the seventeenth and eighteenth centuries, the judges of the central royal courts referred to Roman law, civil law and the law merchant (a developing body of transnational law) in order to decide disputes involving commercial contracts. As a result, they imported many Roman and civil law rules into the common law of contracts:

> The doctrine of contracts is comparatively of recent origin in the law of England. Feudalism, and a very limited trade and commerce, gave. . . but little occasion, during many centuries, for the cultivation of this portion of the law. Nothing, therefore, was more natural, after the decline of feudalism, and the growth of commerce in England, than that its judges should resort to the Civil Law for light on the subject of contracts.[124]

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120. 2 Hoffman, *supra* note 25, at 541.

121. 2 Kent, *supra* note 36, at 552.

122. J. Story, *Digests of the Common Law* (1826), *in* THE MISCELLANEOUS WRITINGS OF JOSEPH STORY, *supra* note 1, at 405-06.

123. Donahue, *Ius Commune, Canon Law, and Common Law in England*, TULANE L. REV., at § 2(C) (forthcoming).

124. 2 Hoffman, *supra* note 25, at 541.

English judges, most notably lord Holt and lord Mansfield, based their decisions in the area of commercial contracts on Roman and civil law rules. In so doing, these judges incorporated the Roman law of contracts into English common law:

> Lord Holt promptly adopted the entire system, furnished to his hand, by the Digest, and the writings of the continental civilians; and Lord Mansfield, on other contracts, incorporated into the English law doctrines which were no where to be found, but in the Roman text, or in the numerous commentaries of more recent times.[125]

We have seen that in many areas of the law of contracts, including bailments and sales, common law categories and rules were in fact borrowed from the Roman law.[126] In other instances, however, the claims of the nineteenth century writers seem exaggerated, especially in the relatively few instances where they attempted to move beyond discrete transaction categories into general principles. One example is the discussion of consideration. During the mid-sixteenth century, English common law judges had developed a rule that no action would lie on a promise unless there had been consideration for that promise. The early nineteenth century legal thinkers claimed that the doctrine of consideration derived from the Roman law or the civil law. According to William Story, "[a]n agreement, without consideration, is utterly void, and no action can be maintained thereupon. . . The same rule obtains in the Roman law. . . ."[127] Kent argued that consideration derived from the civil law:

> A contract without a consideration is a *nudum pactum*, and not binding in law, though it may be in point of conscience; and this maxim of the common law was taken from the civil law, in which the doctrine of consideration was treated with an air of scholastic subtlety.[128]

These writers were equating consideration with the civilian doctrine of *causa*, according to which either liberality or exchange would render a promise binding.[129] Some nineteenth century American thinkers, including William Story, situated the doctrine of *causa* in the Roman law. However, the doctrine bore little resemblance to the meaning of *causa* at the time of Justinian. The doctrine of *causa* was formulated not by Roman jurists, but by medieval scholars who used Aristotelian philosophy, and specifically the ideas of liberality and commutative justice, to understand the Roman

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125. 2 Hoffman, *supra* note 25, at 541-42.

126. *See, supra* text accompanying notes 92-101, 107-15.

127. W. Story, *supra* note 87, at 349, 349 n.1.

128. 2 Kent, *supra* note 36, at 463 (*citing* Justinian's DIGEST).

129. J. Gordley, THE PHILOSOPHICAL ORIGINS OF MODERN CONTRACT DOCTRINE 49-57 (1991).

texts.[130] While in the Roman texts *causa* meant simply a "reason" why people entered into a contract, the medieval doctrine of *causa* went beyond Roman law to express a general truth about when a promise ought to be enforced.[131]

The doctrine of *causa* was also broader than the doctrine of consideration.[132] Although *causa* may have played some role in the formulation of the idea of consideration in the sixteenth century,[133] by Story's time contracts to make a gift were not deemed to have consideration. The early nineteenth century American writers equated consideration with *causa* because they were borrowing extensively from Roman and civilian sources; *causa* was the only concept to be found in these sources that approximated the doctrine they were trying to explain.

Like the Romans, the American treatise writers during the first part of the nineteenth century developed the law of contracts as a series of discrete transactions. Their achievements were to conceptualize "contracts" as a field of law, to categorize the specialized bodies of law within that field, and to elaborate the rules and doctrines which applied to each category. They drew upon Roman law sources in all of these stages. They did not set out a general theory of contract and did not think in such terms. They treated, one after the other, the various types of contracts possible. Even when they discussed consideration, they listed it as a discrete area of the law of contracts, rather than as a unifying theme.

B. LAW OF CONTRACT

Langdell, when he wrote the first casebook on contracts, declared:

> The number of fundamental legal doctrines is much less than is commonly supposed. . . . It seemed to me, therefore, to be possible to take such a branch of the law as Contracts, for example, and, without exceeding comparatively moderate limits, to select, classify and arrange all the cases which had contributed in any important degree to the growth, development, or establishment of any of its essential doctrines. . . .[134]

With Langdell we see the law of contracts organized according to general principles for the first time. The idea had emerged that there was a general theory of contracts. Langdell's casebook gave no indication that the law of contracts previously had been organized according to discrete transaction types such as sales, bailments, guaranty and trusts. Rather, the three princi-

130. *Id.*
131. *Id.*
132. *See id.* at 137-39.
133. *See* Barton, *The Early History of Consideration*, 85 LAW Q. REV. 372 (1969).
134. Langdell, *supra* note 74, at iv.

pal chapters of Langdell's casebook are entitled Mutual Assent, Consideration, and Conditional Contracts.

Langdell set the stage for American law to become a law of Contract in the singular, rather than a law of contracts. William Anson intended his *Principles of the Law of Contract*, published in 1880, to be "an outline of the principles of the law of Contract."[135] Anson explicitly rejected the earlier idea of Parsons and Story that the function of a treatise was to delineate the rules for specific transactions:

> The main object with which I have set out has been to delineate the general principles which govern the contractual relation from its beginning to its end. . . . I have striven to maintain a due proportion in my treatment of the various parts of the subject, and to avoid entering into the detail of the special kinds of contract.[136]

Similarly, when Reuben Benjamin published *Principles of Contract* in 1889, his purpose was also "to embody the fundamental principles of contract. . ."[137] Benjamin's book was divided into three major parts: The Formation of Contract, The Interpretation of Contract, and The Discharge of Contract. Each of these parts was further subdivided into collections of principles. The chapter on Formation, for example, was arranged into sections entitled Offer and Acceptance, Consideration, The Statute of Frauds, Capacity of Parties, Reality of Consent, and Legality of Object.[138]

These late nineteenth century treatise writers did not cite Roman law. Some asserted that it was not relevant: "The history and antiquities of the subject have, of necessity, been dealt with only so far as was absolutely necessary to explain existing rules."[139] Langdell, for example, supported his general principles almost exclusively by citation to English cases, supplemented by some cases from New York and Massachusetts. Benjamin included a list of American cases underneath each statement of principle.

In some instances the late nineteenth century writers explicitly rejected the possibility of a Roman law origin for the general principles. For example, these writers elevated consideration to the level of general principle: "It is a fundamental principle, that equity will not decree the specific execution of a contract, unless the undertaking to be enforced is founded upon a valuable consideration. . . ."[140] But while the treatise writers of the first part of the nineteenth century had sought to explain and justify the requirement of con-

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135. W. Anson, PRINCIPLES OF THE LAW OF CONTRACT at v (1880).

136. *Id.*

137. R. Benjamin, THE GENERAL PRINCIPLES OF THE LAW OF CONTRACT at iv (1889).

138. *Id.* at vi-xi.

139. Anson, *supra* note 135, at v.

140. J. Pomeroy, A TREATISE ON THE SPECIFIC PERFORMANCE OF CONTRACTS 79 (1879).

sideration by searching for Roman law parallels,[141] the later writers refuted all such attempts. Ashley, in *The Law of Contracts*, wrote that "[u]ntil recent times it has been erroneously believed that the roots of the conception of consideration were to be found in the Roman law. . ."[142] Another treatise writer concluded that there was "[n]o probable connexion of *causa* with the common law doctrine."[143]

Because the Romans had conceived of the law of contracts in terms of functional categories, not general principles, Roman law was less directly relevant to the elaboration of general principles than it had been to the earlier fashioning of categories and doctrines. Yet the creation of general principles in the late nineteenth century was crucially related to what had occurred during the first part of that century. The earlier thinkers had used Roman law to develop a law of contracts containing a doctrinal structure and consistent rules; had they not created such a system, there would have been nothing from which to construct general principles. The late nineteenth century thinkers formulated general principles around doctrines and rules that had been derived earlier in the century from Roman law.

IV. CONCLUSION

Traditionally, legal historians have argued that the Anglo-American common law, unlike the civil law, remained virtually insulated from the influence of Roman law. They explain that there was no "reception" of Roman law in England because, after the Norman Conquest, the English kings created institutions to strengthen and maintain central authority, including the king's court. In the twelfth century, the law of the king's court became one law common to all the realm.[144] Those who argue for the lack of Roman law influence on the common law conclude that the United States also remained insulated from the influence of the Roman law by simply adopting the laws of England. The strongest evidence for this view appears when we compare specific common law rules with the Roman counterparts; in very few instances can we trace any direct Roman law influence with certainty.

However, the basic principles and organizing ideas of the Anglo-American common law system are strikingly similar to those of the Roman-based civil law countries.[145] This is in part because early common law borrowings from the Roman law were extensive, though unacknowledged; for example, Roman law had considerable influence on the twelfth and thirteenth century

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141. *See, supra,* text accompanying notes 127-33.
142. C. Ashley, THE LAW OF CONTRACTS 65 (1911).
143. WALD'S POLLACK ON CONTRACTS 191 (Williston ed., 1906).
144. *See* Von Mehren & Gordley, *supra* note 11, at 12.
145. *See* Gordley, *supra* note 129, at 1.

English common law treatise writers Glanvill and Bracton.[146] Roman law also entered the common law through the ecclesiastical canon law: The Church courts in England were staffed at the upper levels exclusively by people trained in canon law, for which a knowledge of Roman law was necessary, and these courts had jurisdiction over cases concerning promises, wills, ecclesiastical property, defamation, and morals offenses.[147]

Yet a more recent example will show that perhaps the most important influence of Roman law occurred on a different level. In 1929 a boundary dispute came before the Supreme Court of Wyoming.[148] Chief Justice Blume, in discussing whether the defendant had adverse possession of the disputed land, noted that the result depended on the meaning of the requirement that possession be taken and held under a claim of right. Blume asked: "What is the meaning of the phrase 'claim of right,' or 'claim of title,' or 'claim of ownership'?. . . Hundreds of cases have considered this point, but it is not yet finally settled in the United States. . . ."[149] The court then turned immediately to Roman law to shed light on this question:

> We are reminded of the controversy that has for several generations been waged between the expounders of the Roman law on this subject, for in that law, too, the intent to claim — the mind of the owner (animus domini or possidendi) — was required.[150]

After analyzing the Roman law at some length, Blume concluded that under Roman and civil law, there was a presumption that one holds for himself, with the result that physical possession alone was sufficient for adverse possession:

> The Romans, with their practical tact, adopted the rule that such physical possession alone was required to be proved, and that it was for the opponent to show that the apparent possession was not with intent to claim it as owner.[151]

Persuaded by the weight of the Roman authority, the Wyoming court adopted the Roman rule instead of following the American presumption that possession is subservient to the title of the true owner.[152]

Why would a state court in Wyoming in 1929 decide a case on the basis of Roman law? This article has sought to show that the influence of Roman

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146. *See* Plucknett, *The Relations Between Roman Law and English Common Law Down to the Sixteenth Century: A General Survey*, 3 U. TORONTO L.J. 24, 32-40 (1939); *see also* Sherman, *The Romanization of English Law*, 23 YALE L.J. 318, 325-27 (1914) (for a more extreme version).

147. Donahue, Book Review, 84 YALE L.J. 167, 170 (reviewing B. Levack, THE CIVIL LAWYERS IN ENGLAND 1603-1641: A POLITICAL STUDY (1973)).

148. *See City of Rock Springs v. Sturm*, 39 Wyo. 494, 273 P. 908 (1929).

149. *Sturm*, 273 P. at 911.

150. *Sturm*, 273 P. at 911.

151. *Sturm*, 273 P. at 911.

152. *Sturm*, 273 P. at 913.

law on the American legal tradition is more complex than a simple comparison of common law rules with Roman ones would suggest. In the nineteenth century, Roman law was part of a complex and often self-contradictory attempt to organize American law, an attempt to which a more systematic method of legal education was perceived as essential. In the area of contract law, members of the nineteenth century American legal profession consciously borrowed from Roman law at the level of organization and even at the level of rules. Roman law continues to function in the United States as it did for the nineteenth century legal thinkers: as an ideal according to which we determine whether our learning, and the development of our legal system, have equalled our aspirations.

Roman Civil Liability: The Precursor to Anglo-American Tort Law

FRANCA ELIA HARRIS*

I. INTRODUCTION

Legal scholars have readily acknowledged the pervasive and ubiquitary influence of Roman law in such fields as criminal law, contracts and property.[1] Many mistakenly believe, however, that the American tort law system owes its nascency to the English Common law, an Anglo-centric attitude which does not give due credit to the influential role played by Roman law in the development of our tort law. Future jurists are taught a dogmatic tort law, which is assumed to arise out of the abyss of the Dark Ages. They are thus shielded from the evolutionary process which, in fact, yielded our nation's tort law and, as a result, are denied the richness and true marvel that is this body of law.

The word "tort" is commonly employed, often as a term of art, with little thought being given to its etymological origin. Many students approach the study of torts seeking nothing more than to pigeonhole different fact patterns into prescribed causes of action,[2] while giving scarce thought as to the meaning of the word "tort" itself, which is derived from the Latin *torquere*, meaning to twist or wrest aside.[3] The original meaning and true significance of this term are left to be unearthed by the dedicated and lucky few who are willing to dig a bit deeper. This is the task which I will attempt to undertake in this article, in the hopes of providing a greater understanding of the dynamics at work in the creation, understanding, dissemination and adaptation of a particular form of law — the tort law — having its origins in ancient Rome.

I will initially outline the development of Roman civil law from the Twelve Tables through the *lex Aquilia* and Justinian's *Corpus Iuris Civilis*. I will then discuss the manner in which the Roman invasion forever changed the legal environment of England and led to the English Common Law system. Finally, I will trace the unique effect that Ancient Roman law has had

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1. *See, e.g.*, B. Nicholas, ROMAN LAW 98-205 (1962); II C. Sherman, ROMAN LAW IN THE MODERN WORLD §§ 573-581, 746-812 (1937).

2. *See* W.W. Buckland & A. McNair, ROMAN LAW & COMMON LAW 338 (1952).

3. BLACK'S LAW DICTIONARY 1489 (6th ed. 1990). *See also* WEBSTER'S NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE 2673 (2nd ed. 1949).

on the American legal system, and, in particular, on the evolution of modern American tort law.

II. THE DEVELOPMENT OF ROMAN TORT LAW

A. THE TWELVE TABLETS AND THE LEX AQUILIA

Many scholars believe that it took approximately a thousand years for Roman law to develop fully, from 753 B.C. to 250 A.D.[4] In 451-450 B.C., a special commission drew up the earliest Roman code of seventy-six civil laws, called the Twelve Tables, which were set up in the Roman Forum on twelve tablets of bronze.[5] Rome was at this time the capital of the known world — Spain, France, England, Austria, the countries on the Mediterranean including the Holy Land and Egypt, as well as Germany to the Rhine River, were all under its control. Wherever the Roman army went, its system of government and laws followed, and, in time, the Roman legal system tended to supplant the pre-existing legal system.[6] Beginning in 6 B.C. with the reign of Augustus, the first Roman Emperor and the originator of the *Pax Romana*, the Empire enjoyed a two hundred year period of relative peace which enabled it to solidify and expand its influence among its citizens and subjugates.

Damage and injury to persons were actionable under the Twelve Tables. Unlawful damage under the Tables was a *noxia*. Although the Twelve Tables did not expressly define this term, they, nonetheless, gave it a well-understood meaning by listing the classes of cases that were considered *noxiae*. Among these were such basic wrongs as damaging or destroying another person's property or causing bodily harm to another. The bodily injury category was further divided into *membrum rumpere*, breaking a bone in the limbs; and *os frangere*, breaking a bone in the head or trunk.[7] The Twelve Tables also recognized: (i) *occidere seruum quadrupedemue pecudem*, injury to four-legged animals; (ii) *urere aedes aceruumue frumenti iuxta tugurium positum*, setting fire to a house or corn near the house; (iii) *impescere in laetam segetem*, grazing in field where a crop has come up; (iv) *succidere arbore*, felling a tree; and (v) *rumpere rem*, breaking or severing a thing.[8]

The prescribed remedy in most cases of damage to a person or his property was to provide a retaliation in kind — the "*lex talionis*." For example, in

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4. *See, e.g.* J. Zane, THE STORY OF LAW 169 (1927); B. Nicholas, ROMAN LAW, *supra* note 1, at 14.

5. R. Nice, TREASURY OF LAW 69 (1964). According to one historian, the original twelve tablets were said to have perished when the Gauls burned Rome in 390 B.C. Many private copies, however, survived this conflagration. *See* B. Nicholas, ROMAN LAW, *supra* note 1, at 15.

6. II C. Sherman, ROMAN LAW IN THE MODERN WORLD, *supra* note 1, at § 413.

7. E. Grueber, THE LEX AQUILA 186 (1886).

8. *Id.*

case of damage to property *noxiam sarcire*, compensation was made by either replacing or repairing the thing injured.[9] Liability for most of the torts recognized by the Twelve Tables was likewise based on the nature of the thing damaged. In some instances, a victim could accept money compensation, but was not compelled to do so. In others, the victim was required to accept a sum of money which was either arbitrarily set, as in 300 *asses* for the breaking of a bone, or was determined by a judge (*iudex*) after trial. In the case of an award of monetary compensation, any default of payment by the wrongdoer ordinarily led to the imposition of a *lex talionis*.[10]

Notably, the Twelve Tables did not recognize a general action for damage to property,[11] a deficiency which prompted the adoption of the *lex Aquilia*. Although the exact date of its enactment is unknown, the *lex Aquilia* is commonly believed to have originated from a plebescite proposed by the tribune Aquilius. Following the last secession by the plebs, the *lex Valeria Horatia*, which made plebiscites binding on all citizens, was enacted in 449 B.C.[12] It is safe to infer that the *lex Aquilia* was enacted sometime later; many scholars, including the famous Roman jurist Ulpian, believe that the exact date of its enactment is somewhere around 287 B.C.[13] Although the *lex Aquilia* did not expressly supersede any prior laws, it had that effect because it provided more specific and effective remedies.[14] The law was divided into three chapters: the first two covered specific types of losses, while the third, over whose meaning we will see there is considerable debate, probably acted as a kind of residual or catchall provision.

The first chapter, as recorded by Gaius,[15] provided that "*ut qui seruamme alienum alienamue quadrupedem uel pecudem iniuria occiderit, quanti id in eo anno plurimi fuit, tantum aes dare domino damnas esto.*"[16] Translated literally, this provision states that "if anyone wrongfully ["iniuria"] slays a male or female slave belonging to another person, or a four-footed herd animal, let him be condemned to pay the owner as much money as the maximum the property was worth in the year [previous to the slaying]."[17] The first chapter of the *lex Aquilia* thus imposed a penalty for the unlawful killing

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9. *Id.* at 188.

10. B. Nicholas, ROMAN LAW, *supra* note 1, at 209-210.

11. E. Grueber, THE LEX AQUILA, *supra* note 7, at 192.

12. Justinian, THE DIGEST OF ROMAN LAW (introduction by C. Kolbert) 11 (1979 ed.).

13. 1 F.H. Lawson & B.S. Markensinis, TORTIOUS LIABILITY FOR UNINTENTIONAL HARM IN THE COMMON LAW AND THE CIVIL LAW (hereinafter "TORTIOUS LIABILITY") 1 (1982).

14. *Id.* at 4.

15. *Libro VII ad edictum provinciale* in D.j.t. 2 pr.

16. E. Grueber, THE LEX AQUILA, *supra* note 7, at 196.

17. B.W. Frier, A CASEBOOK ON THE ROMAN LAW OF DELICT 4 (1989).

of slaves and four-footed animals of the type that were generally found in herds.[18]

One who violated this provision was compelled to pay the highest value which the slave or animal would have fetched in the year preceding the injury that caused the death. This mode of setting damages was most likely designed to protect the injured party from fluctuations in market values, but, according to one historian, "also had the result, . . . , that if a man killed a slave who was blind when killed, but who had lost his sight only within the previous year, he would be liable for a great deal more than the loss he had actually caused."[19] Significantly, the first chapter of the *lex Aquilia* also provided for punitive damages in some instances, stating that the damages for certain specified injuries "will be double against one who denies liability."[20]

The second chapter of the *lex Aquilia* created an action against an adstipulator who had released a debt in fraud of a stipulator.[21] One can only guess why such a provision was included in the *lex Aquilia*, but some scholars speculate that it arose because a patrician debtor had pressured an adstipulator to release the debt of a plebeian creditor. However, this exegesis does not explain adequately the central position of this provision in the *lex Aquilia*. At least one scholar has speculated that this prominence may be attributable to the fact that the provision corresponded to a section that was originally in the Twelve Tables.[22]

Much scholar's ink has also been spilt debating the meaning of the third chapter of the *lex Aquilia*. As recorded by Ulpian,[23] it provided: "*Certerarum rerum preater hominem te pecudem occisos si quis alteri damnum faxit,*

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18. Although this provision was originally restricted to farm animals, such as cattle, it was later extended to cover elephants and camels. 1 F.H. Lawson & B.S. Markensinis, TORTIOUS LIABILITY, *supra* note 13, at 1. On this point, Gaius, in the *7th Book on the Provincial Edict*, stated:

> [T]hus it appears that the statute assimilates to our slaves four-footed animals which belong to the class of pecudes and are kept in herds . . . . A dog does not fall within pecudes . . . still less [do] wild beasts . . . . Elephants, however, and camels are "mixed" for on the one hand they do service as draught animals but on the other they are wild by nature, and they should be included in the first chapter.

Id.

19. B. Nicholas, ROMAN LAW, *supra* note 1, at 218.

20. *Id.* This provision has led some to question whether the *lex Aquilia* could best be characterized as a penal law, a compensatory one, or a hybrid of both. 1 F.H. Lawson & B.S. Markensinis, TORTIOUS LIABILITY, *supra* note 13, at 5.

21. *Id.* at 11. Though a verbal contract, a *stipulatio* was the most solemn and formal of all the contracts in the Roman system. *See* BLACK'S LAW DICTIONARY 1586 (1977). According to Sandars, an adstipulator was one who took the place of a procurator at a time when the law refused to allow stipulations to be made by procuration. B. Sandars, JUSTINIAN INSTITUTES 348 (5th ed. 1955).

22. Daube, 52 L.Q.R. 267-68 (1938), *quoted in* 1 F.H. Lawson & B.S. Markensinis, TORTIOUS LIABILITY, *supra* note 13, at 5.

23. *Libro XVIII ad edictum* in D. h.t. § 5.

quod usserit, fregerit, ruperitmu-iniuria, quanti ea res erit in diebus triginta proximus, tantum aes domino dare damnas esto."[24] As noted above, several legal historians believe that this chapter was a catchall provision designed to cover any injury not falling within the first or second chapters and requiring the defendant to pay damages within thirty days.[25] But, others believe that the reference to thirty days provided a rule of thumb similar to that contained in the first chapter, requiring a wrongdoer to pay the victim the highest value of the property within the last thirty days.[26] And still others posit that this thirty day valuation period was prospective, in order to allow for the possibility that the full extent of an injury might not be immediately apparent.[27]

Injury to freemen and slaves were treated alike in the earlier law, but not so under the *lex Aquilia*. The *lex Aquilia* treated slaves as property, grouping them under the third chapter with other property. Similarly, a father's remedy for damage to his son was also difficult to recognize under the *lex Aquilia*, as children were considered property of their parents.[28] However, the parents interests in their children were different from those in a slave. The remedy itself was for loss of earning capacity and medical expenses. In order to recover for injury to a freeman, there must have been a willful intent to commit the injury; negligence did not suffice. There was no remedy at all for killing a freeman.[29]

A critical aspect of the original *lex Aquilia* was that it penalized only affirmative acts; a mere failure to act was insufficient to trigger liability.[30] Thus, for example, under the original *lex Aquilia*, an action could be brought only if the death or injury resulted from direct contact between the body of the wrongdoer and the thing — *corpore corpori*. The law, in effect, thus only punished trespasses[31] The *lex Aquilia*'s narrow applicability in this regard, however, was later cured by the creation of the *actiones utiles* and *actiones in factum*, which both diminished the requirement of an affirmative act. The praetor gave such actions, for example, in situations in which the defendant had not directly "slain" a slave, but had indirectly caused the death to occur.[32] The *actio in factum* and the analogous *actio utile* thus extended liabil-

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24. *Quoted in* E. Grueber, THE LEX AQUILA, *supra* note 7, at 196.

25. 1 F.H. Lawson & B.S. Markensinis, TORTIOUS LIABILITY, *supra* note 13, at 6.

26. *Id.* at 7.

27. *See* II F. de Zulueta, INSTITUTES OF GAIUS 211 (Oxford Univ. Press 1931); F.H. Lawson, 12 NEGLIGENCE IN THE CIVIL LAW 8 (Oxford Univ. Press 1972) (and references cited therein).

28. *See, however,* the discussion of Gaius' *Institutes* accompanying footnotes 48-55, *infra*.

29. 1 F.H. Lawson & B.S. Markensinis, TORTIOUS LIABILITY, *supra* note 13, at 11.

30. E. Grueber, THE LEX AQUILA, *supra* note 7, at 209.

31. F.H. Lawson, NEGLIGENCE IN THE CIVIL LAW, *supra* note 27, at 14.

32. B. W. Frier, A CASEBOOK ON THE ROMAN LAW OF DELICT, *supra* note 17, at 3.

ity through a chain of causation, a concept which eventually would become a central tenet of the American law of negligence.[33]

Another central tenet of the *lex Aquilia* was that liability could be imposed only if the defendant acted with *iniuria*, that is, with culpability, unlawfulness or the absence of right.[34] This requirement, another major contribution of the Roman legal system to American tort law,[35] was designed to focus not only on the absence of legal excuse, but also on the blameworthiness of the wrongdoer's conduct. The Roman concept of *iniuria* was very comprehensive, encompassing not only physical assaults, but also virtually any type of disregard of another's public or private rights, provided that the act was done wilfully and with contumelious intent.[36] For example, it was *iniuria* to prevent another from moving freely about or from using public property. The concept of *iniuria* also extended to actions involving incorporeal losses, making it the forerunner of modern torts, such as defamation and slander.[37]

Related to the concept of *iniuria* were the delicts of *culpa* and *dolus*. *Culpa* signified the moral blameworthiness of the wrongdoer in either acting or not acting, while *dolus* covered only intentional acts.[38] Aquilian law initially took no interest in the motive with which a defendant exercised his rights, nor were different degrees of *culpa* considered. However, once this concept of *culpa* became an accepted part of Roman law,[39] jurists required that a defendant's conduct be characterized by *culpa* or *dolus*. Because these words in Latin have a subjective moral meaning, fault was determined by the defendant's unique personality, physical capacity and intelligence, all leading to a determination of whether he conducted himself in a way acceptable to Romans generally.

Under the *lex Aquilia*, a lapse of judgment was actionable if it caused another to suffer a loss. Indeed, carelessness (*negligentia*)[40] was the most common form of *culpa*. As described by one historian:

> Culpa is . . . defined as a failure to foresee what a careful man could have foreseen . . . . If a man digs a bear-trap into which another's slave falls and is injured, he is liable if he dug it where people commonly go, but not if he dug it in a place where such traps are commonly placed — and so forth.[41]

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33. 1 F.H. Lawson & B.S. Markensinis, TORTIOUS LIABILITY, *supra* note 13, at 16.

34. B. Nicholas, ROMAN LAW, *supra* note 1, at 215. The Roman jurist Paulus would later summarize this rule as "[n]o one commits a wrong, unless he did that which he has no legal right to do." DIGEST 50, 17, 151.

35. W.W. Buckland, A TEXTBOOK OF ROMAN LAW FROM AUGUSTUS TO JUSTINIAN, 589-90 (1950); B. Nicholas, ROMAN LAW, *supra* note 1, at 218.

36. B. Nicholas, ROMAN LAW, *supra* note 1, at 215.

37. *Id.*

38. *Id.* at 22.

39. 1 F.H. Lawson & B.S. Markensinis, TORTIOUS LIABILITY, *supra* note 13, at 26.

40. *Id.* at 29.

41. B. Nicholas, ROMAN LAW, *supra* note 1, at 222.

As in the American legal system, the Roman tort system imposed different levels of duty. In certain circumstances, for example, when a defendant was acting as a professional, a jurist could find him liable even if the defendant did not know what he was expected to know as a professional. Similarly, *culpa* could not be attributed to children or to the insane, who were deemed incapable of understanding the implications of their behavior.[42]

Dolus was morally and legally different than *culpa*. *Dolus* found in conjunction with an *iniuria* described an intentional act which gave rise to an injury. However, *dolus* appearing alone, according to Labeo, is any craft or deceit employed for the circumvention or entrapping of another person.[43] Aquilian law did not recognize an *actio doli*, a penal action, but rather dealt with *actio generalis in factum*, a general decision on the facts, similar to a trespass in the case of English Common Law.[44] The *actio doli* helped form the initial thinking for our modern concepts of interference with contractual or personal relations.[45] The *lex Aquilia* itself, in contrast to modern day tort law, thus was only partly punitive in its design.

The final and most important requirement of the *lex Aquilia* was that the offended party must have suffered a loss or *damnum* (damages).[46] This requirement represented an important limitation on the filing of actions because not all types of harms were cognizable under Aquilian law. In general, harm under the *lex Aquilia* met the requirement of *damnum* only if there was a pecuniary loss, *e.g.*, one measurable in money, thereby excluding situations in which property was slightly damaged but did not lose any of its utility or value.[47] Accordingly, while the *lex Aquilia* made real strides in redressing a majority of harms, it too did not cover every type of damage to property.

B. THE CONTRIBUTIONS OF GAIUS AND JUSTINIAN

Although texts of the Twelve Tables and the *lex Aquilia* survive to this day, much of the impact that Roman law had on the development of American tort law can be attributed to two men who lived after the great Imperial period of Roman history: the jurist Gaius and the Emperor Justinian.

In the second century, Gaius, a distinguished Roman teacher of law born during the reign of Hadrian,[48] wrote many works interpreting the Twelve

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42. *Id.* at 26.

43. W.W. Buckland & A. McNair, ROMAN LAW & COMMON LAW, *supra* note 2, at 594.

44. F.H. Lawson, NEGLIGENCE IN THE CIVIL LAW, supra note 27, at 22-23.

45. *See also* the text accompanying footnotes 92-94, *infra*.

46. E. Grueber, THE LEX AQUILA, *supra* note 7, at 233; II. Sherman, ROMAN LAW IN THE MODERN WORLD, *supra* note 1, at § 817.

47. II C. Sherman, ROMAN LAW IN THE MODERN WORLD, *supra* note 1, at §§ 817, 828.

48. One historian has written that Gaius was "the teacher of the empire. He reaped the reward which comes to those who write simply. His works were known in the provinces of both East and West. Without a simple writer to whom to turn as guide, Roman law might well have been tram-

Tables and other urban and provincial edicts. His dominant place in history, however, is attributable primarily to his authorship of *The Institutes*, a beginner's text in law. Prior to the issuance of *The Institutes*, much of Roman law had been embodied in inflexible forms of action, which were characterized by specific pleading formulae that had to be fastidiously followed. If one's injury did not specifically fall within a prescribed formula, chances were good that the praetor would reject the filing of a suit. Thus, "[t]he forms of action were prefabricated sets of words in which claims were made," two historians have stated; "[i]f you wanted a brand new one, you could argue it before the praetor, but in nine cases out of ten the plaintiff took his claim so to say off the peg, out of the edict of the urban praetor where models were displayed."[49]

Gaius' *Institutes* dramatically changed this situation. "All our law," Gaius stated in words later to be copied by Justinian, "relates either to persons, to things, or to actions."[50] Gaius organized his *Institutes* accordingly, breaking it into three basic divisions — one covering persons, another on the subject of things (*i.e.*, property, obligations and succession), and a third relating to courses of action.[51] This seemingly simple act of organizing the law on a tripartite basis had a profound and wide-ranging impact on the development of Roman law, because the division caused Roman judges and legal scholars to view every Roman law from three perspectives — "the point of view of the persons affected, the subject-matter concerned, or the remedies that may be required in the case of breach."[52] *The Institutes* thereby provided a framework for expanding Roman tort law beyond the procedural

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pled or corrupted in the East, after the extension of the citizenship to all free citizens of the empire in AD 211, as it was in the West. It was Gaius more than anyone who kept it alive." A.M. Honore, GAIUS 97 (1962).

49. P. Birks & G. McLeod, JUSTINIAN'S INSTITUTES 17 (1987).

50. Gaius i. 8. *quoted in* H.F. Jolowicz, ROMAN FOUNDATIONS OF MODERN LAW 61 (1957).

51. The flavor of Gaius' work is well represented by the *Commentary in the Institutes of the Civil Law*, in which Gaius explains who is covered by the law:

> (i) All peoples who are ruled by laws and customs partly make use of their own laws, and partly have recourse to those which are common to all men; for what every people establishes as law for itself is peculiar to itself, and is called the Civil Law, as being that peculiar to the State. . .
>
> (ii) The Civil Law of the Roman people consists of statutes, plebiscites, Decrees of the Senate, Constitutions of the Emperors, the Edicts of those who have the right to promulgate them, and the opinions of jurists.
>
> (iii) A statute is what the people order and establish. A plebiscite is what the commonalty order and establish. The designation "the people" refers to both the patricians as well the entire body of citizens.

Id. at 124.

52. H.F. Jolowicz, ROMAN FOUNDATIONS OF MODERN LAW, *supra* note 50, at 64. *See also* W.W. Buckland, A TEXTBOOK OF ROMAN LAW FROM AUGUSTUS TO JUSTINIAN, *supra* note 35, at 58.

envelopes which had characterized — and limited — the Twelve Tables and the *lex Aquilia*.

Gaius, however, also made specific contributions to the Roman law of torts. For example, he interpreted Roman Law to give a man the right to suffer an *iniuria* not only through himself, but also through his dependent children, and his wife, even if they were not in his *manus* (hands or household).[53] Therefore, if a man's daughter was married and she suffered an injury, that act could also be deemed to injure her husband as well as her father. Injury to slaves were similarly perceived to be injuries to the master.[54] The *Institutes* also protected the right of Roman citizens to be free from threats. Gaius also expanded the concept of *metus*, a complex praetorian machinery, which was designed to relieve an individual who had been forced by threats to go through some legal transaction or other damaging act. The aggrieved party must not only have suffered financial damage, but threats or harm to his life, family or honor. Actual physical injury was not needed.[55]

Gaius' *Institutes* influenced many subsequent works, including the codifications of Roman law commissioned by the Emperor Justinian. Following the fall of Rome, the barbarians controlled most of the former Roman Empire. Constantine had himself declared the Holy Roman Emperor in 306 A.D. He accepted Christianity and constructed his capital city on the ancient site of Byzantium, calling it Constantinople. He used the wide spread belief in Christianity to create a centralized administrative authority, a stable currency and a single Church affiliated with the state. In 438 A.D., the Emperor Theodosius II sought to reduce and systemize the large numbers of laws that had been issued since Constantine's reign. As described by one historian, the compilation he produced, the *Codex Theodosianus*, "was indeed more than a compilation, since the commission entrusted with the work was directed to make alterations and amendments in the interests of clarity and consistency."[56]

The grand scheme to delimit and codify Roman law came to its fruition during the reign of the Holy Roman Emperor Justinian. Justinian, who was born Petrus Sabbatius in Macedonia, rose to power under his uncle Justin I, whose name he took when he became Emperor in Constantinople in 527 A.D., at the age of 45.[57] Justinian formed a commission, headed by one of

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53. R.W. Nice, TREASURY OF LAW, *supra* note 5, at 150-155.

54. B.W. Frier, A CASEBOOK ON THE ROMAN LAW OF DELICT, *supra* note 17, at 188, 198.

55. W.W. Buckland, A TEXTBOOK OF ROMAN LAW FROM AUGUSTUS TO JUSTINIAN, *supra* note 35, at 593.

56. B. Nicholas, ROMAN LAW, *supra* note 1, at 38.

57. *See* B. Birks & G. McLeod, JUSTINIAN'S INSTITUTES, *supra* note 49, at 8.

his ministers, Tribonium, which between 528 and 535 A.D. issued a three-volume major work entitled the *Corpus Iuris Civilis*.[58]

The first segment of this work, the *Codex Justinianus*, was originally issued in April, 529 A.D., and then revised in November, 534 A.D.[59] It was a collection of constitutions, updated to delete materials that had become obsolete.[60] The second and largest segment of the *Corpus Iuris* was Justinian's major juristic work, the *Digest* or *Panadects*,[61] which was issued in late 530 A.D. and consisted of 50 books, divided into titles (chapters) according to subject matter.[62] The *Digest*, which drew heavily on extracts from writers on the law and responses of juris consults, was mainly intended to preserve the best of the classical literature and to provide a summary of the law in force during the Justinian reign.[63] Finally, in 533 A.D., Justinian's Commission issued the *Institutes*, which as its name in Latin suggests — *instituere*, to teach — was intended to be an official, elementary textbook for students. This work, which is but one-twentieth the size of the *Digest*, borrowed heavily from the Gaius' *Institutes* and from the *Digest* itself.

The *Digest* is perhaps Justinian's most important work because it served to preserve the thoughts of many earlier Roman jurists and scholars whose work has vanished. Justinian, however, is partially responsible for the loss of these works because, as one historian has noted, he, "intending his *Digest* to be of unquestionable authority, forbade any future direct citation of the original works upon which it was based (and also the making of any commentary upon his *Digest*) so that they tended to die of neglect."[64] Yet, through his efforts, the *Digest* captured for posterity the jurisprudence developed by thirty-nine prestigious Roman scholars, including major aspects of the works of Gaius, Julian, Papinian, Paul and Ulpian.[65]

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58. B. Nicholas, ROMAN LAW, *supra* note 1, at 39. For a lengthy work on the life of Tribonium, see T. Honore, TRIBONIUM (London, 1978). Honore describes Tribonium as "[t]he last Roman jurist, his was the hand which preserved and renewed Rome's lawyers and its laws." *Id.* at 256.

59. This second version of the *Codex* is the only version to survive. See C.H. Roberts & T.C. Skeat, THE BIRTH OF THE CODEX 15-35, 75 (1983).

60. B. Nicholas, ROMAN LAW, *supra* note 1, at 39.

61. The name "Digest," from the verb *digerere*, signified that the materials were distributed under titles, a fact which is evident upon examination of the Digest, which had 432 such titles. *See* P. Birks & G. McLeod, JUSTINIAN'S INSTITUTES, *supra* note 49, at 10.

62. J. Zane, THE STORY OF LAW, *supra* note 4, at 189.

63. R.W. Nice, TREASURY OF LAW, *supra* note 5, at 124-158. *See also* 2 Lawson & Markensinis, TORTIOUS LIABILITY, *supra* note 13, at 32. Nearly everything in this volume was nearly 300 years old at the time it was incorporated, with approximately 40 percent of the *Digest* taken from the jurist Ulpian, who was murdered in 223 A.D. *See* T. Honore, ULPIAN 40-41 (1982).

64. Justinian, THE DIGEST OF ROMAN LAW (introduction by C. Kolbert), *supra* note 12, at 14.

65. *Id.*

II. THE IMPACT OF ROMAN LAW ON AMERICAN TORT LAW

A. ROMAN LAW AND THE DEVELOPMENT OF THE ENGLISH COMMON LAW

The compilations of Justinian have greatly influenced European legal education and the codification of laws down to the present. Due to the constant warfare caused by the barbarian invasion, however, few of the new legal principles embodied in Justinian's work came to be implemented throughout what had been the Roman Empire.[66] Indeed, throughout the Dark Ages and the pre-Renaissance period, little attention was given to Roman Law *per se*, although it influenced much of that era's legislation indirectly. Much of the law in this period was Church law; despite the end of Roman government in England, Christianity had taken hold and at the time of the Norman conquests in the eleventh century, it enjoyed a revival. The Norman laws were, in part, religious laws, giving great power to the priesthood in lay legal matters. These ecclesiastical/civil courts indirectly made use of many of the concepts of Roman Law, including the *Ius Civile*.[67] Unfortunately, many kings looked to the old Roman praetorian law to justify their power as despots.[68]

During the reign of Henry III, a priestly judge named Bracton wrote "Bracton's Note Book" in which he catalogued every kind of case that had arisen in England to show how the common law lay courts administered justice. He drew on Roman law to analyze these cases.[69] Other priestly judges, again drawing on Roman law, developed a method for perfecting pleadings.[70] Yet, as English law evolved during the medieval period, it appeared to depart more and more from its Roman roots. As the system of common law began to stretch across the isle, the influence of Roman law began to fade in the eyes of the justices.

This all changed following the revolution of 1688, when after great turmoil in the common law system, Sir John Holt, in 1703, brought into one case almost the entire Roman law concerning bailments.[71] A similar phenome-

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66. R.W. Nice, TREASURY OF LAW, *supra* note 5, at 190.

67. For example, these courts incorporated the idea of having witnesses attest to the truth of a defendant's or litigant's claim. *See* Gajarsa, *The Contributions of Roman Law to American Civil Procedure*, 2 NIABA L. J. 11, 14 (1992).

68. R. W. Nice, TREASURY OF LAW, *supra* note 5, at 225-229.

69. *See* H. Bracton, HENRICI DI BRACTON DE LEGI BUS ET CONSUETUDINIBUS ANGLI (Twiss ed. 1878). *See generally*, J. Thayer, LEGAL ESSAYS (1908); K. Guterbock & B. Coxe, BRACTON AND HIS RELATION TO THE ROMAN LAW (1866).

70. On the return day of the writ, the plaintiff's counsel would state orally to the court his cause of complaint. If the court considered it in bad form and the plaintiff could not remedy the deficiencies, the action was dismissed. R.W. Nice, TREASURY OF LAW, *supra* note 5, at 259-260.

71. *See Coggs v. Bernard*, 92 Eng. Rep. 622 (1703). *See also* Coquillette, *Legal Ideology and Incorporation IV: The Nature of Civilian Influence on Modern Anglo-American Commericial Law*, 67 B.U. L. REV. 877, 938 (1987).

non occurred almost sixty years later when, in 1760, Lord Mansfield incorporated the Roman notions of quasi-contract into the English Common Law.[72] While the latter decision was the last large scale overt incorporation of Roman legal principles into the English common law, it did not mark the end of Roman influence, but rather the beginning of an extended period during which legal scholars either purposely or inadvertently down-played the contributions of Roman law.[73] In fact, the English would continue to improve their common law system by incorporating Roman principles in an almost insensate fashion, generating ever changing precedents to coincide with an ever changing society.

B. THE GENESIS OF THE AMERICAN TORT SYSTEM

It was from this English common law system, heavily indebted to Roman law principles, that the American tort system sprang. The United States, a former English colony, bears the imprint of its colonizers, who, when they came from England, brought their system of common law with them. Originally, the colonial courts were modelled on their English counterparts and the American judges were either trained in England or under a compatible system in the colonies. But, during and after the American Revolution, when the young nation sought to show its autonomy, it began to establish a legal system and court structure that would meet its own peculiar needs.[74]

That system became increasingly reluctant to rely on English precedent. This is well-illustrated by the decision in *Brown v. Collins*,[75] an action for trespass damages which arose when horses owned by a defendant were frightened by a locomotive, bolted across the plaintiff's land, and broke a post. The New Hampshire Supreme Court summarized the case as "one where, without fault of the defendant, his horses ran away with him, went upon plaintiffs land and did damage there, against the will and desire of the defendant."[76]

One of the closest English precedents on point was *Rylands v. Fletcher*.[77] In *Rylands*, the owners of a certain lot, which unbeknownst to them was situated upon old mine caverns, constructed a reservoir thereon. Due to the weakness of the underlying land, the reservoir burst and flooded an adjacent

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72. *Moses v. McFerland*, 2 Burr. 1005, 97 Eng. Rep. 676, 455 nb 139 (1760). *See also* Oldham, *Reinterpretations of 18th-Century English Contract Theory: The View from Lord Mansfield's Trial Notes*, 76 GEO. L.J. 1949, 1963 (1988).

73. R.W. Nice, TREASURY OF LAW, *supra* note 5, at 302.

74. *See* R. Pound, THE SPIRIT OF THE COMMON LAW 112-38 (1921) (describing the early evolution of the American court system).

75. 53 N.H. 442 (1873).

76. *Id.* at 443. See also R. Epstein, CASES AND MATERIALS ON TORTS 91 (1990).

77. 3 L.R.-E & I. App. 330 (H.L. 1868).

owner's property. The case went through numerous appeals,[78] until finally arriving at the House of Lords, where Lord Cranworth enunciated the following rule of strict liability:

> In considering whether a defendant is liable to a plaintiff for damage which the plaintiff may have sustained, the question in general is not whether the defendant has acted with due care and caution, but whether his acts have occasioned the damage . . . . And the doctrine is founded on good sense. For when one person, in managing his own affairs, causes, however innocently, damage to another, it is obviously only just that he should be the party to suffer.[79]

Applying this rule of law, the House of Lords affirmed the Exchequer's chambers' judgment that the reservoir builders were liable for the damages caused by the flood.[80]

In delivering the decision of the New Hampshire Supreme Court in *Brown v. Collins*, Justice Doe rejected the strict liability analysis employed in *Rylands*, criticizing it —

> as adopting an arbitrary test of responsibility that confounds all degrees of danger, pays no heed to the essential element of fault, puts a clog upon natural and reasonably necessary uses of matter, and tends to embarrass and obstruct much of the work which it seems to be man's duty to carefully do.[81]

Justice Doe found that the principles established in *Rylands* were "introduced in England at an immature stage of English jurisprudence. . .[w]hen the development of many of the rational rules now universally recognized as principles of the common law had not been demanded by the growth of intelligence, trade and productive enterprise."[82] "To extend these principles to the present case," he added, "would be contrary to American authority, as well as to our understanding of legal principles."[83] Applying what would become the traditional concept of the American law of negligence, the New Hampshire Supreme Court held that the defendant could not have reasonably anticipated the damage and, therefore, was not liable.[84]

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78. The first proceeding, 3 H. & C. 774 (Ex. 1865), resulted in a judgment for the defendant. This judgment was appealed to the Court of the Exchequer Chamber, which reversed the lower court's decision and entered judgments for the plaintiffs. 1 L.R.- Ex. 265, 279-80 (1866).

79. 3 L.R.-E & I. App. 330.

80. *Id.*

81. 53 N.H. at 450.

82. 53 N.H. at 450.

83. *Id.*

84. 53 N.H. at 452. *See also Losee v. Buchanan*, 51 N.Y. 476 (1873); *Marshall v. Welwood*, 38 N.J.L. 339 (1876). *Cf. Ball v. Nye*, 99 Mass. 582 (1868). *See generally*, Smith, *The Manufacture and Distribution of Handguns as an Abnormally Dangerous Activity*, 54 U. CHI. L. REV. 369, 381 (1987) (discussing the interplay between *Rylands* and *Brown v. Collins*).

The *Brown v. Collins* decision represents an important juncture in the development of American tort jurisprudence for it sounded the death knell of strict adherence to English precedent and signified the ascendancy of "American authority," which due to strong nationalistic feelings, was rising to the fore. However, upon closer examination, Justice Doe's analysis in *Brown v. Collins* clearly reflects the influence of Aquilian law. In believing that the English rule — that a man was strictly liable for any damage caused by everything brought onto his land — proved too severe, Justice Doe effectively incorporated into the American tort law the Aquilian concept of *culpa*. As discussed above,[85] for a defendant to be liable under the *lex Aquilia*, he must have either acted intentionally to cause harm or acted carelessly in not living up to the standard of a reasonable man. In *Brown*, this *culpa* ingredient was missing, for the landowner neither intentionally caused the horses to bolt, nor did he manage them carelessly.

Although liberally sprinkled with Latin phrases, Justice Doe's opinion in *Brown* nowhere discusses the Roman principle of *culpa*. This is hardly unusual, as American jurists, either out of ignorance or for other reasons, have often borrowed Roman law concepts wholesale without appropriate attribution. Indeed, unfortunately, the typical reaction of American legal scholars to Roman law has been scorn, as exemplified by the comments of Oliver Wendell Holmes, who, in *The Common Law*, declared that the Roman law system "could not last when civilization had advanced to any considerable height."[86] Holmes, in fact, was quite critical of Aquilian tort law, and, in particular, the concept of *respondeat superior*.[87] He thought it unreasonable to require a person "to pay large sums for other people's acts, in which they had no part and for which they are in no sense to blame."[88] Yet, even when virtually every jurisdiction rejected Holme's criticism and adopted the doctrine of *respondeat superior*, nary a mention was made in the case law of the Roman origins of this rule.

Commonly recognized or not, the influence of Roman law can readily be observed in many of the fundamental concepts of our tort law. For example, the influence of the *lex Aquilia* and *The Institutes* of Gaius are apparent in the area of intentional torts — as an examination of the traditional elements of such torts reveals. For there to be an intentional tort, there must be *iniuria*, that is, the commission of an act which violates a legal right.[89] The

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85. *See* text accompanying footnotes 35-42, *supra*.

86. O. Holmes, THE COMMON LAW 16 (Little Brown & Co. ed., Harvard Press 1963).

87. "*Respondeat superior*: Let the Master answer. This doctrine means that a master is liable in certain cases of the wrongful acts of his servant, and a principal for those of his agent." BLACK'S LAW DICTIONARY, *supra* note 3, at 1311.

88. O. Holmes, THE COMMON LAW, *supra* note 86.

89. See DIGEST 47, 10, 1 ("injuria est omne, quod non jure fit) and the text accompanying footnotes 35-42, *supra*.

requirement of *iniuria* also serves to encapsulate the majority of the recognized defenses to intentional torts, including privilege, necessity, consent, self-defense, or justifiable defense of property or person.[90] And, as under the Roman system, to be actionable, an intentional tort under the American legal system must result in damages or *damnum*.[91]

Other interesting correlations between Roman and American law in the area of intentional torts occur in terms of the delicts of *metus* and *dolus*. Both of these delicts, identified by Gaius in his *Edicts*, were designed to protect private rights: *metus* protects the right of the individual to be free from physical threats to induce him to make a legal transaction or other damaging act,[92] while *dolus* proscribed the use of fraud or deceit to accomplish the same end. Taken together, these two delicts can be viewed as the forerunners of modern intentional torts that are based on the use of intimidation, such as intentional interference with contractual relations.[93] In particular, the delict of *metus* incorporated modern notions of duress.[94]

In the field of negligence, the Roman contribution is no less pervasive and inspiring. The five basic elements of negligence in American law may be summarized as follows:

(1) a preexisting legal duty to take care, in acting, that the plaintiff not suffer injury or harm of a specific type (the duty of care);
(2) a breach of that duty by the defendant (negligence);
(3) an actual injury or harm suffered by the plaintiff (the loss);
(4) a reasonably close causal connection between the defendant's action and the plaintiffs loss (causation); and
(5) the absence of special exculpatory circumstances.[95]

At least as of the time of Justinian, the requirements for the Roman delict of *negligentia* were very much the same: there must be a violation of a duty owed the plaintiff (*iniuria*), a causation of injury to the plaintiff (*culpa, dolus*) and legally cognizable damages (*damnum*). A further word on several of these tort elements is in order.[96]

As in modern American tort law, the Roman concept of *negligentia* hinged on a wrongdoer's violation of reasonably perceived duty to take care. As

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90. The requirement of *iniuria* was negated under Roman law if the purported wrongdoer was acting with *iure*, that is, with consent or with privilege. *See* THE DIGEST 43, 16, 3 §§ 3, 7 and 9. *See also* II C. Sherman, ROMAN LAW IN THE MODERN WORLD, *supra* note 1, at § 821.

91. *See* the text accompanying footnotes 46-47, *supra*.

92. The Roman jurist Ulpian defined *metus* as intimidation designed to cause some "trepidation of mind due to some instant or future danger." THE DIGEST 4, 2, 1 ("Metus est instantis vel future periculi cause mentis trepidatio.")

93. II C. Sherman, ROMAN LAW IN THE MODERN WORLD, *supra* note 1, at § 831.

94. *Id.*

95. *See* J. Fleming, THE LAW OF TORTS 108-110 (1965).

96. B.W. Frier, A CASEBOOK ON THE ROMAN LAW OF DELICT, *supra* note 17, at 29; W.W. Buckland & A. McNair, ROMAN LAW & COMMON LAW, *supra* note 2, at 367-69, 377.

discussed above,[97] such a duty was an implicit feature of Roman society, as was the concept of the reasonable person.[98] A Roman was not held to a standard which he was incapable of fulfilling, but only to that of a reasonable person of his capacity.[99] The breach of this standard of care was captured under the Roman concept of *culpa*, which did not require a conscious act on the part of the wrongdoer.[100] Although unrelated to the concept of *culpa*, an injured party was also required to demonstrate that his injury was caused by the defendant's carelessness or unskillfulness.[101] Proof of such causation eased considerably once the Roman legal system adopted the delicts of *actiones in utiles* and *actio in factum*, both of which allowed for recovery without any need for actual physical contact between the defendant and the plaintiff.[102]

Roman law made particularly important contributions to the concepts of contributory negligence and intervening causes. As to the former, the Roman jurist Pomponius is quoted in *The Digest* as saying that "no one is injured by what he suffers through his own fault."[103] In a similar vein, the Romans were of the view "that the negligent or intending person was liable for the harm if he caused it but not if some intervening agency prevented his act from producing its effect.[104] Adumbrating further on this theme, another prominent historian has written:

> Celsus, Marcellus and Ulpian agree that if one man gives a slave a mortal wound and another afterwards kills him, only the latter is liable under the first chapter for killing, and the former only under the third for wounding. In 15,1 Ulpian reports Julian with approval, as saying that if one man gives a slave a mortal wound and his death is hastened by the fall of a house or a shipwreck [natural disaster] . . . his original wounder . . . is only liable for the wounding, since the [natural disaster] prevented it from being clear that he had killed the slave.[105]

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97. *See* text accompanying footnotes 40-42, *supra*.

98. *See* F.H. Lawson, NEGLIGENCE IN THE CIVIL LAW, *supra* note 27, at 36-43.

99. *See* text accompanying footnotes 40-42, *supra*.

100. Compare the following statement from a decision written by Oliber Wendell Holmes: "So far as civil liability, at least, is concerned, it is very clear that what I have called 'the external standard' would be applied; so that, if a man's conduct is such as would be reckless in a man of ordinary prudence, it is reckless in him." *Commonwealth v. Pierce*, 138 Mass. 165, 176 (1884).

101. Early difficulties encountered by plaintiffs in seeking damages for unintentional acts were not cured until the creation of the *actiones in utiles* and *actio in factum*. These delicts allowed praetors to permit the bringing of cases in which the chain of causation was more tenuous, as where damage was done without direct physical conduct or when pecuniary damage occurred to the plaintiff without any physical damage. *See* text accompanying footnotes 30-35, *supra*.

102. *See* text accompanying footnote 33, *supra*.

103. THE DIGEST 50, 17, 203 ("Quod quis culpa sua damnum sentit, non intelligitur damnum sentire").

104. F.H. Lawson, NEGLIGENCE IN THE CIVIL LAW, *supra* note 27, at 53.

105. 1 F.H. Lawson & B.S. Markensinis, NEGLIGENCE IN THE CIVIL LAW, *supra* note 27, at 51. The Praetors also recognized joint tortfeasors (p 51 pr Julian):

A finding of intervening cause was thus based on the assumption that the second injury was of sufficient severity to have caused the death on its own.[106]

IV. CONCLUSION

The similarities between our tort system and that of ancient Rome are far more extensive than could ever be presented in this short discussion. A true understanding of any legal subject cannot be attained without some understanding of its history. However, the legacy of Roman law is not only its historical value, providing insights into the ancient Roman culture and society, but also in that law's adaptability to changing societal norms. The story of Roman law is one of constant change, flexibility in meeting current needs, and continuity. It is this continuity which is in evidence in the many contributions of Roman law to the American legal system, and, in particular, to the American law of torts. Perhaps, at this time of change in our legal system, it is time to begin the study of tort law at its beginning — not in England, but in Rome.

> [If] a slave is so wounded by one man as to make it certain that he will die from the blow and afterwards dies from a blow given by another, both are liable for killing; for if one man gives a slave a mortal wound and after an interval another strikes him in such a way as to hasten his death, both are liable for killing.

Id.

106. There are, of course, some important differences between the Aquilian concept of negligence and that of our own legal system. Aquilian liability originally covered only losses related to property and did not cover such torts as wrongful death or injury of a freeman. Further, the main focus of Roman jurists was also very different from that of the American judge, for it was on the wrongfulness of the defendants conduct, as opposed to the duty which was owed. *Id.*

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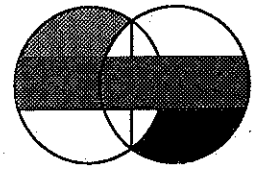

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