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JUSTINIAN IN THE HINTERLANDS: ROMAN LAW AS AN INTRODUCTION TO A STANDARD CURRICULAR COURSE ON ENGLISH LEGAL HISTORY

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Most English-language law schools offer one or more courses on legal history. The courses usually focus on English legal history — especially the development of common law doctrines and institutions. In the United States the courses may also cover Anglo-American legal history or there may be a separate course on American legal history. In contrast, Roman Law is offered infrequently as a substantive course, and the history of Roman legal doctrines and institutions is not usually included in the course or courses on legal history.1

Shunning Roman Law is often justified on historical and pedagogical grounds. Knowledge of Roman Law is not of immediate practical importance for the professional education of the modern American lawyer and its study was discouraged by no less an authority than Justice Holmes.2 The perception of the common law tradition as insular and autonomous is rooted deeply3 and efforts to challenge it have been controversial.

Nevertheless, I would like to suggest that Roman Law can provide an important introduction to the historical study of English law and can be incorporated successfully into the law school curriculum as part of the standard course treatment of English legal history. Including a course on Roman legal history faces several obstacles. The first is self evident: time devoted to Roman Law reduces time available for English legal developments. As it is, one must cover one year every three minutes if one hopes to get from 1066 up to the present century in a course that meets three hours weekly for fifteen weeks. Still more powerful resistance to including Roman Law may stem from professional academic historical training. Steeped in historicist values, serious students of history form an almost instinctive antipathy to the sort of overarching comparative and retrospective undertaking that combining. common law and Roman Law history suggests. Historians — perhaps more in the United States than in England — learn and internalise a historical version of Heisenberg's principle: the accuracy of historical description is inversely proportional to the duration of events described. Legal history is suspect enough already, often used to exemplify "tunnel history."

Yet, for better or worse, legal history is taught as a survey in which the historian communicates the kind of comparative and general discourse that he or she learns to suspect. The historian tries, of course, to instil cautious and critical attitudes towards the process of generalisation. But the historian generalises nonetheless, and some of the best generalising is done by those most guilt-ridden about doing so.4 Indeed, legal history provides an opportunity to explore the problems of reconstruction and anachronism as one means of developing historical understanding as well as deepening thought about present-day law. To the extent that such reflective appreciation

of historical methods is a valid goal of a course on legal history, it would not appear to be hindered by raising the more extreme kinds of comparative problems inherent in a treatment of Roman Law.5

Resistance to including Roman Law may reflect also a lack of expertise in Greek and Roman social and legal history.6 Here my response is more personal, as I will match my ignorance on those subjects with anyone's, and as a new teacher I am probably less accustomed to the anxiety it generates. In a broad topical course on English legal history, we confront constantly inevitable and large gaps in our knowledge. We engage in the always never quite successful effort to maintain a working level of competence in related areas in which we pretend to no expertise. We try to assimilate recent work being done on the seigniorial courts, the ordeals or the law reform acts of the nineteenth century. Most of us would not exclude a history of uses, though our research is on Blackstone's attitude towards the jury. If a treatment of Roman Law is historically or pedagogically defensible, we can learn to teach it.7

The advantages of teaching Roman Law have been argued persuasively by others. Yet the benefits of including Roman Law as an introduction to a course on English legal history for American students must be measured by the success of the course — a highly subjective and impressionistic task — and by balancing advantages against competing disadvantages, such as the weight of material not covered.

While I do not hazard a definite answer, I want to discuss my own experience with including Roman Law as an introduction to a course on English legal history. The course, part of the standard curriculum at the University of Mississippi law school, was offered in the fall terms of 1987 and 1988. The course was not required but satisfied a perspectives requirement.8 Eighteen students enrolled in 1987 and 79 enrolled in 1988. None of the students had previously studied legal history; most had not studied English constitutional history; virtually none had studied a course in Greek or Roman history; and most were first or second year students.

The course was designed to cover English legal history from the Conquest to Blackstone. After an introductory treatment of the development of royal judicial procedure, the course was organised thematically:

I. Institutional background and overview.

II. Writ system and the emergence of the common law. Topics included real and personal actions, pleading, records, and the historical and interpretive problems posed by the general issue.

III. Land law. Topics included feudalism and tenure, estates and ownership, unfree tenements, disposition at death and inter vivos transfers.

IV. Wills and intestate succession.

V. Equity and uses.

VI. Injury and obligation. Topics included the expansion of trespass and case, the emergence of assumpsit, and the doctrine of consideration.

VII. Criminal law.9

Treatment was obviously extremely selective within each thematic area. Within each thematic area, treatment was chronological. Materials included one text, one novel, and miscellaneous writs, cases, records, articles, and readings from other texts.10

The first three or four meetings of the course dealt with Roman Law. Some background material was presented in lectures, but much of the time spent on Roman Law was devoted to classroom discussion and analysis of excerpts from the Digest dealing with delict and injury.11 The treatment of Roman Law concluded with a short lecture that attempted to narrate its subsequent history — touching on its fate on the Continent (Savigny's insistence that Roman Law was never totally lost), its resurgence during the Renaissance and its effect on the Continental Codes.

The course also sought to introduce students at an early stage in their study of legal history to the problem of Roman Law's effect on the common law: the problem of Glanvill and Bracton, the resurgence of the authority of Roman Law illustrated by the opinions of Chief Justice Holt and the influence of the Roman Law on various

eighteenth- and nineteenth-century treatise writers. It was suggested that the resurgence of Roman Law influenced both the conception and substance of Blackstone's lectures.12 Doctrinal contributions of Roman Law were summarised. And the relevance of Roman Law for the local legal system was suggested: the first European law was introduced to the geographical area corresponding to southern Mississippi from Spain and France; Mississippi borders on Louisiana, a jurisdiction that retains much of the Civil Code; and Mississippi retains a dual court system of law and equity.

The treatment of Roman Law was an abject failure if measured against my original expectations. These included the optimistic anticipation that discussion of Roman Law would stimulate students to raise historical and comparative questions about the origins and growth of the common law. I had also hoped that the introductory treatment of Roman Law would make students more sensitive to the problems of intellectual influence and historical continuity within English legal history. But as we proceeded from Roman Law to the common law in both terms that the course was offered, students expressed bewilderment as to the connection. Moreover, during the ensuing treatment of English legal history students made comparisons only rarely with Roman Law. While the lack of continuing influence bothered students at first, few later questioned why Roman Law was not referred to for authority during the elaboration of liability for trespass and case.

Though students did not appear actively to employ Roman Law in considering the development of English institutions, it is hard to assess whether the introduction to Roman Law affected students' appreciation of the absence of connection — the understanding of the insularity of the common law. Student responses to examination questions both years provide a more significant, if impressionistic, basis for evaluating the influence of the study of Roman Law on historical perspectives.13

The impressions suggested by my reading of the examinations provide insight into the students' integration of Roman Law into their understanding of English legal history. This conflicts with negative impressions that I had formed as a result of class discussions. The examinations consisted of "take home" exercises in which students were allowed about two weeks to submit a constructive essay (not to exceed ten typed pages) in response to generalisations about English legal history. Performance was evaluated by the ability to deal critically and creatively with the general problem and by the ability to support the thesis with historical narrative, including explanation of any important evidence contrary to the student's thesis. The question in 1987 required students to agree or disagree with Churchill's view that the writ system imbued English legal history with a conservative spirit.14 The question in 1988 required students to discuss important causes of change in English legal history.15

The most striking and unexpected result the first year I offered the course was that the great majority of students did not elect to address Roman Law: thirteen of eighteen did not mention Roman legal history or mentioned Roman law only in the most peripheral way. This result was surprising partly because of the time devoted to Roman law during the course. Moreover, I had hoped that covering the material first would make it more memorable and would help shape comparative approaches to the development of legal systems generally. Only five papers treated Roman Law as appropriate to the problem; none treated it at great length.

1987 Exam Approaches

	Agree with Churchill	Disagree with Churchill
Discuss Roman Law	2	3
Not discuss Roman law	10	2

The spread suggests that most students did not find treatment of Roman Law helpful for dealing with the general character of English legal history — a response consistent both with the traditional avoidance of Roman Law by English legal history and with the traditional academic historical emphasis on internal narrative description. But, like the classroom silence, the omission of Roman Law says little or nothing about the effect of study of Roman Law on student perception of English legal development.16

More intriguing than the neglect of Roman Law by most papers is the apparent correlation between agreement with Churchill's statement and decision not to discuss Roman Law. Five students disagreed with Churchill's thesis and eleven agreed.17 But of those students disagreeing, over half (three) treated Roman Law while two did not.

The impression supported by the spread is that those papers that did not address Roman Law were strongly inclined to agree with Churchill: nine to two. The converse is not suggested as strongly. But the correlation is made striking by comparison: those papers that addressed Roman Law or approached the problem from a comparative perspective were much more inclined to disagree with Churchill than those that did not treat Roman Law: three out of five as opposed to two out of thirteen. At the same time, the spread suggests that the decision to discuss Roman Law was not a function of the students' primary agreement or disagreement with Churchill, for of those disagreeing with Churchill, two of five did not treat Roman Law. Nor does the spread suggest that students who agreed with Churchill were motivated to exclude Roman Law as inconsistent with their thesis, for those who did treat Roman Law were also almost equally divided.

The distribution obviously does not establish that a comparative approach promotes disagreement with Churchill. But alternative impressions suggested by the spread are equally intriguing. Agreement with Churchill may correlate with the decision to treat Roman Law while disagreement may have no correlation. If the correlation manifests a connection between the decision to agree or disagree and the decision to discuss Roman Law, the decision to agree with Churchill may have affected the decision to discuss Roman Law. The decision to disagree may have had no affect, a weaker affect, or an adverse affect, on the decision to exclude treatment of Roman Law.

The approaches of students to the 1988 question also suggest the relation between the decision to integrate a discussion of Roman Law and the writers' perceptions of the continuity of English legal history. The question discouraged treatment of Roman Law by focusing discussion on causes of legal change between 1066 and 1765,18 and the vast majority of papers supported the traditional view of the insular development of English legal history and did not treat Roman Law. But of the few papers that treated Roman Law, about half specifically disagreed with the view that English law developed in isolation from external influences.

1988 Exam Approaches

	Insular history criticized	Insular history accepted
Not treating Roman Law		Over 6019
Treating Roman law	3 or 620	4

How do the impressions relate to the argument for the inclusion of Roman Law as an introduction to a course on English legal history? Whether the inclusion of Roman Law, even superficially, as part of the common knowledge of lawyers is important — that is, whether the advantages outweigh the disadvantages — remains a question of values and priorities. But we may be in better position to evaluate whether the treatment of Roman Law affects the general

historical approach of students and shapes their appreciation of general trends within English legal history. In this respect, the question is not simply whether an educated lawyer should know something about Justinian — or whether it is more important to know something about Justinian than the law reform movement during the Commonwealth.21 The question is whether knowledge of Justinian actually affects students' knowledge of English legal developments.

The impressions suggest that the Roman Law introduction did affect student attitudes, but that the introduction had disparate impact. While the majority of students did not integrate discussion of Roman Law into their treatment of the proper characterisation of English legal history, those students who were most willing to challenge the continuity of English legal history and perhaps most inclined to challenge authority, integrated a treatment of Roman Law into their appreciation of English legal history. To venture an inference that begs challenge, Roman Law either fostered more critical attitudes or students with more critical attitudes benefited from the study of Roman Law by incorporating it as part of their historical narrative. On the other hand, the impressions allow us to say little or nothing about the affect of Roman Law on those who did not discuss it. The absence of discussion of Roman Law of itself supports no impression. We cannot tell whether Roman Law reinforced a view of English history which led the majority to exclude a discussion of Roman Law.

To the extent that history seeks to impart a suspicious attitude towards generalisations, the inclusion of Roman Law seems to have furthered its aims. To the extent that the remarkable insularity of the common law and the problem of its continuity can be appreciated only from a broader perspective students appeared to have benefited from the treatment of Roman law as an introduction to a course on English legal history.

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1 Scotland is an obvious exception because of the important influence of Roman and Civil Law on its domestic law. In the nineteenth century Roman law was an important part of American legal pedagogy, but in 1963 only seven American law schools offered courses that treated Roman Law. See M Hoeflich, Roman and Civil Law in American Legal Education and Research Prior to 1930: A Preliminary Survey [1984] *U Ill L Rev* 719, at 721. Roman Law was offered as part of the legal curricula of several Australian universities until the early 1980s and was a prerequisite for a degree in laws at the University of Adelaide until 1960. *See* JJ Bray, A Plea for Roman Law [1983] AdelLawRw 9; (1983) 9 *Adel L Rev* 50, at 51. A few mavericks (such as Bray) have argued for the return of Roman Law to a place of prominence in the law school curriculum. And recent proposals for the extension of the topical coverage of legal history courses have been advanced by others like Professor Funk, whose experience has been an outgrowth of interest in International or Comparative Law rather than common law history. See DA Funk, World Legal History Needs You (1987) 37 *J Legal Educ* 598; DA Funk, Introducing World Legal History: Why and How (1987) 18 *U To1 L Rev* 723.

2 Justice Holmes did not recommend the study of Roman law: "in spite of the very great authority by which the study of it is recommended, I never have been able to believe that it has the value so often supposed." OW Holmes, The Bar as Profession, in *Collected Legal Papers* (New York: Harcourt Brace, 1921) at 155. Holme's deprecation of Roman Law was both pragmatic — it did not immediately contribute to the practitioner's "fighting success" — and historical — he emphasised that the "main roots of our law are Frankish" rather than Roman. OW Holmes, A Postscript, in *Collected Legal Papers* (New York: Harcourt Brace, 1921) at 163.

3 See F Pollock & F Maitland, *The History of English Law before the Time of Edward I,* 2nd ed (SFC Milsom ed, Cambridge: Cambridge UP, 1968) at vo1 2 558; J Baker, *An Introduction to English Legal History,* 2nd ed (London: Butterworths, 1979) at 27; SFC Milsom, *Historical Foundations of the Common Law,* 2nd ed (London: Butterworths, 1981) at 43.

4 Milsom, *supra* note 3, at 8, writes, "legal history is not unlike that children's game in which you draw lines between numbered dots, and suddenly from the jumble a picture emerges: but our dots are not numbered." Despite his constant warnings that we can understand little changes and not big ones, that the accuracy of historical explanation and its freedom from anachronisms, are inversely proportional to the scope of questions asked, Milsom has written a wonderful account of the big picture.

5 My defence here falls, of course, to the extent that it takes the form that because we are bad, we should become worse. It is also open to challenge on the grounds that it asks us to widen a gap between professional academic history and popular legal history. I do believe, however, that the undertaking that I am trying to defend on pedagogical can also be defended on historiographic grounds.

6 Bray is undoubtedly correct in identifying the decline of interest in teaching Roman Law with the decline of Latin as a required subject in secondary school. Bray, *supra* note 1, at 51.

7 My own preparation included reading Gaius, Justinian's *Institutes,* parts of the *Digest,* an old (and thoroughly unreliable) translation of one of the eighteenth-century efforts to reconstruct the 12 Tables, a contemporary textbook on Roman Law, and a nineteenth-century series of lectures on Roman Law delivered at Harvard. Excellent background material is also provided by a number of contemporary texts and histories on Roman Law that are in use at law schools in civil law jurisdictions. *See* for example, A Gonzalez & B Valdes, *Curso de Derecho Romano*, 2nd ed (Mexico: Editorial Pax-Mexico Liberia Carlos Cesarman SA, 1987).

8 Students may elect among one of three or four perspectives courses but must take one in order to graduate.

9 The order of treatment varied in the two years.

10 The main texts used were Baker, *supra* note 3, for 1988 and Plucknett, *A Concise History* of *the Common Law,* 5th ed (London: Butterworths, 1956) for 1987. Students read either Henry Fielding's novel, *Jonathan Wild* or Jane Austen's *Pride and Prejudice* and presented short papers on the novels in class.

11 Students were asked to read D.9.2.1–57; D.46.2.1–93; D.47.8.1–2; D.47.8.4.pr; D.47.10.1–2. A popular paperback edition of selections was used, The *Digest of Roman Law: Theft, Rapine, Damage and Insult* (C Kolbert trans & ed, Harmondsworth: Penguin, 1979). The readings not only covered different kinds of civil liability for wrongs; they also introduced students to the problem of interpretation and historical reconstruction, as the *Digest* was compiled from previous texts (which were not always consistent). The readings also presented to students the theoretical problem of source of legal authority. Sources of law within the *Digest* include the compilers themselves, the words of the jurists compiled, the Twelve Tables, (D.9.2.2; D.46,2,55), natural reason (D.9.2.2; D.46,2,55), the Lex Aquilia (D.9.2.2; D.9.2.27), and the edict and *ius honoraria.* Problems of analogical reasoning and even procedural issues and problems of res judicata, waiver, and election are presented.

12 In this I was indebted to the suggestions in LS Cushing, *An Introduction to the Study of Roman Law* (Boston: Little Brown, 1854) at 172–76, whose observations have gone unnoticed by more recent students of Blackstone.

13 I emphasise that the following discussion is pure impression and makes no pretense to resting on any statistical method. Data are presented to illustrate impressions only. Even if it were possible in theory to remove all the fatal defects, even if the size of the group allowed for statistically meaningful samples, and even if distributions rose to a statistically meaningful level, uncontrolled factors external to the course and exam process would remain and render any effort at objectivity futile.

14 In 1987 the relevant text of the exam was:

Historians have often characterised English legal history as conservative. Winston Churchill, identifying the growth

of the common law with the system of original writs, related the history of common law remedies to what he considered to be unique features of the place of law in English society: “[C]umbersome though it was, the writ system gave to English law a conservative spirit which guarded and preserved its continuity from that time on in an unbroken line.” Discuss whether English history has been conservative. A good answer should first, of course, clearly define the problem — in particular, the meaning of “conservative”. Whatever position you take should be supported by ample reference to specific historical developments that were discussed in class and addressed by various readings. (You may find that comparing or contrasting the history of Roman law helps your discussion, gut you should focus on the history of English law).

15 In 1988 the relevant text of the exam was:

It is sometimes said that English legal history is characterised by its isolation. Baker writes that English law flourished in noble isolation and even from arts of Britain.” [J.Baker, An *Introduction to English Legal History* 28 (2d ed. 1979).] But if English legal doctrines and institutions were unusually free from the influences of other legal systems, what were the major forces in the development of English law from the Conquest till Blackstone? Your task is to identify one or more important causes of legal change and to explain its operation during the period covered in the course.

l6 Rationalizing the omission of Roman Law by most students, I must emphasize that the course indeed treated English historical material internally; consequently, the avoidance of Roman Law by most papers may merely reflect the values imparted by the instructor and other sources.

17 In two cases I could not tell whether the students agreed or disagreed. Neither problematic paper dealt with Roman Law. I have included them in the matrix with those that agreed with Churchill.

18 In discussing the requirements, the instructions again stated: You may find that contrasting or comparing the history of Roman Law helps your discussion, put you should focus on the history of English law.

19 Many of these neither criticised nor rejected the traditional view of English legal history but nevertheless identified only internal causes of legal change.

20 Three papers discussed the influence of Canon Law on the development of specific subjects of private law in England and they mentioned in passing the impact of Roman Law on Canon Law.

21 This is an example of one of several important topics that were neglected because of the time devoted to Roman Law.