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# The Importance of Roman Law for Western Civilization and Western Legal Thought

by *Franz Wieacker\**

## Part One: Ancient Roman Law

### I. INTRODUCTION

I have been asked to speak about the importance of ancient and medieval Roman law for western civilization and western legal thought. After a general introduction, my first lecture will deal with the relevant characteristics of ancient Roman law. The subject of the second lecture will be the forms in which these elements were adopted by western society and the continuing presence of these "roots" in the modern legal systems of the European-Atlantic world.

The large amount of material which has been handed down to us and which we encompass in the term "Roman law" forms a constituent part of the occidental world. It formed nations and legal systems and allowed them to become aware of their own identity. It provided the basis for the rational character of the systems and the legalism of the western nations. Further, even the very principle of settling social and economic conflicts not only by force, authority or compromise, but also by the application of general conceptual rules — which is *the* characteristic feature of western legal thought — became possible on the basis, and perhaps only on the basis, of Roman law, or what was thought to be Roman law. In reality, to use the fine words spoken in

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\* Emeritus Professor of Roman Law and [German] Civil Law, University of Göttingen, Federal Republic of Germany. The text of this article is taken from lectures given by Professor Wieacker at the Harvard Law School on April 8 and 9, 1980. Because the lectures are a synthesis of Professor Wieacker's works, it seemed best to leave the article in the lecture form in which it was given and not to provide a full complement of footnote support. The reader who wishes some further introduction in English to the material treated here might wish to consult H. JOLOWICZ & B. NICHOLAS, *HISTORICAL INTRODUCTION TO THE STUDY OF ROMAN LAW* (3d ed. 1972), for the Roman law, and W. ULLMANN, *LAW AND POLITICS IN THE MIDDLE AGES* (1975), for the medieval developments, both of which contain up-to-date bibliographies. For an elaboration of Professor Wieacker's ideas and references, the reader is referred to three of his works: *VOM RÖMISCHEN RECHT* (2d ed. 1961); *ALLGEMEINE ZUSTÄNDE UND RECHTSZUSTÄNDE GEGEN ENDE DES WESTRÖMISCHEN REICHS* (*Ius Romanum Medii Aevi* No. I, 2, a, 1963); *PRIVATRECHTS-GESCHICHTE DER NEUZEIT* (2d ed. 1967).

honor of the famous European legal historian, Paul Koschaker, Roman law is a *vinculum iuris quo totiens occidens continetur* [a bond of law by which so often the West is held together, *ed.*].<sup>1</sup>

Although they developed along different lines, the two great legal systems of the Western world have this rational character in common. I am referring, of course, to a well-known dualism. On the one hand, there are the legal systems of the European continent and of Latin America. These systems are essentially characterized by the great codifications. In the first place, there are the Latin codes modeled after the Napoleonic codes. In the second place, there are the Central-European codes of Austria, Germany and Switzerland and their followers in other countries. Within the boundaries of the United States we find a well-known example of this legal system in the Code of Louisiana. On the other hand, there is the common law of the Anglo-American countries which, if you will allow me to speak as a continental legal historian, I regard as an historical unity. On the whole, this system is characterized by a unique court system and, despite the growing importance of statute law, by the dominance of case law based on the principle of the binding force of precedents.<sup>2</sup>

## II. THE RECEPTION OF ROMAN LAW

### A. *The Continental Systems*

Historically, the continental systems grew mainly from the medieval Roman law. The substantive rules of these systems largely follow those of Justinian's law. The medieval doctrine of *ius commune* allowed these rules to be applied directly and to supersede much of the original legal tradition of each nation. Even more important than this external reception was the adoption of the Bolognese legal method of the *studium civile*. This method established the basic characteristics of the continental judicial systems, *i.e.*, decision-making not on the basis of precedents but by way of subsuming a case under the terms of an abstractly formulated authoritative text or statute.

The reception of Roman law into the continental legal systems took place in the following ways:

First, the old, legally untrained jurors (*Schöffen*, *échevins*, *etc.*), comparable

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1. See Wieacker, *Zur Aktualisierung des römischen Rechts*, in 1 L'EUROPA E IL DIRITTO ROMANO: STUDI IN MEMORIA DI PAOLO KOSCHAKER 532 (D. Giuffrè ed. Milan 1954). [This paper presents Professor Wieacker's ideas with respect to the role of Roman law in the modern world. See Part Two, § IV of text, *infra*. See also F. WIEACKER, *PRIVATRECHTSGESCHICHTE DER NEUZEIT* 424 n.32 (2d ed. 1967). *Ed.*]

2. Here, for the sake of brevity, I must omit any reference to the Scandinavian legal system. This system occupies an independent position, in many respects, between the two principal western legal systems. Further, the well-known similarities between the two main systems, *i.e.*, the factors which make the code and the case law systems approximate each other, must also be neglected.

to the English jurymen, were gradually replaced by legally educated *doctores iuris civilis et canonici*. At the same time, these *doctores* became official servants of the sovereign in power.

Second, these new "oracles of law," who held key positions in both the judicial and administrative branches of government, gave practical effect to a peculiar conception of Justinian's law. The conception had already become ideologically predominant in the Holy Roman Empire and subsequently became predominant in the western European kingdoms by means of the fiction *superiorem non recognoscens imperator est in terra sua* [he who acknowledges no superior is emperor in his own land, *ed.*]. This conception was that the law of Justinian was *ius commune*, applicable everywhere in the absence of special regional sources of law (either traditional or statutory).

Third, the individual customs or statutes (*coutumes*, *ordonnances*, *Landrechte*, *Stadtrechte*) and, later, the regional or national codes were reformed in accordance with the Roman *ius commune*.

#### B. The Common Law Systems

The substantial reception of Justinian's law and the unrestricted dominance of the academically-trained jurist appointed by a sovereign did not, with certain exceptions, occur in the Anglo-American system. Accordingly, I shall not recount at this point the well-known details of this important development on the European continent. For an American audience interested in the importance of Roman law for the *general* outlook of western legal thought, those elements of Roman law which were significant in the genesis of the Anglo-American legal system are more important. That the doctrines of the glossators and even those of pre-Bolognese medieval Roman law influenced the intellectual organization of English common law, and especially equity, has been known since Vinogradoff and has been confirmed by recent research.<sup>3</sup> Common law and civil law did not wholly part company until after the Tudor period; that is, not until after the Inns of Court had definitely prevailed over academic legal education in the preparation of barristers, sergeants-at-law and judges.

The tradition of medieval Roman law had the following effects in England and in the former English colonies, including the United States of America:

(1) In the twelfth century in England, such Italian scholars as Vacarius and, somewhat later, native English scholars, began teaching and using the legal literature of the first Bolognese glossators. The doctrines and teaching of Anglo-Norman law began to assume intellectually disciplined forms and concepts at the same time. Glanvill's *Tractatus de legibus et consuetudinibus regni*

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3. P. VINOGRADOFF, *ROMAN LAW IN MEDIEVAL EUROPE* (1909, 3d ed. 1961). [For a survey of more recent work see Donahue, *The Civil Law in England*, 84 *YALE L.J.* 167 (1974). *Ed.*]

*Angliae*<sup>4</sup> and, especially, Bracton's *De legibus et consuetudinibus Angliae*<sup>5</sup> are works of learned men trained in medieval Roman law.

(2) Medieval *canon* law was a synthesis of ecclesiastical sources (such as Holy Scripture, the Fathers of the Church and the canons of ancient and medieval church councils) and of a medieval interpretation of Roman law. Canon law was applied in the medieval and early modern English church courts, whose wide jurisdiction included cases dealing with marriage, defamation, testaments and, in some periods, contracts. The chief and the members of the Court of Chancery were originally, and for a long time, clergymen. Consequently, many rules of equity which developed in this court can be traced back to the *aequitas canonica* and thereby, partly, if not completely, to Roman law.

(3) The separation of the Church of England from Rome diminished the importance of the ecclesiastical administration of justice. Similarly, the fierce reaction of the lawyers of the Inns of Court stopped a newly incipient romanization of the common law in the Tudor period. However, the Court of Admiralty, the Star Chamber and the ecclesiastical courts continued to apply the principles of the civil law (*i.e.*, a version of the *ius commune*) in decisions of maritime, penal and ecclesiastical matters. Civil law was also applied to questions of the conflict of laws and in certain other fields.

(4) The close contacts between the *Scots* law and the continental *ius commune*, which lasted beyond the Union of 1705, are of perhaps minor importance in this context. The same may be said with respect to the incorporation of such civil law jurisdictions as Quebec and the countries of Roman-Dutch law (such as the Cape Colony, Ceylon and British Guyana) into the British Empire and, later, the Commonwealth.

(5) On the other hand, a last wave of Roman law influenced the United States even more strongly than Blackstone's Great Britain and many countries of the European continent. I am referring to the enthusiastic acceptance in this country of the modern (*i.e.*, "secularized" and rational) form of the law of nature of the early Enlightenment period. This form of natural law was at the bottom of American constitutional theory and its concept of the law of nations and of general jurisprudence. The doctrines of Grotius, Pufendorf, Barbeyrac and others were adopted by Wise<sup>6</sup> and his followers. This philosophy was influential in Pennsylvania, Massachusetts and other colonies before and during the American Revolution to such an extent that the constitutional ideology of

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4. R. DE GLANVILL, *THE TREATISE ON THE LAWS AND CUSTOMS OF THE REALM OF ENGLAND COMMONLY CALLED GLANVILL* (G. Hall trans. 1965).

5. H. DE BRACON, *ON THE LAWS AND CUSTOMS OF ENGLAND* (G. Woodbine ed. S. Thorne trans. 1968).

6. [John Wise (1652-1725) was a New England Congregational clergyman and opponent of British colonial governor, Sir Edmund Andros; his works include: *The Churches' Quarrel Espoused* (1710), *A Vindication of the Government of New England Churches* (1717), and *A Word of Comfort to a Melancholy Country* (1721). *Ed.*]

this country may be considered to have grown out of it. This form of natural law was based on the moral theology and philosophy of the Middle Ages which had been transmitted by the late Spanish scholastics to Protestant north-western Europe where it merged with the new scientific theory of Galileo, Descartes and Hobbes. This law, however, remained basically Roman law — not so much in its medieval version but, rather, in the elegant humanist interpretation which the great French and Dutch jurists had given to it. Thus, to a continental observer, it seems that more Roman blood flows in the veins of the North American legal system than would be expected in light of the overpowering independence, vitality and progressiveness of this system.

Now we should examine the relevance that all of this has for us today to determine whether these historical developments enable us to understand modern law better. In order to do that, we should first consider the relevant characteristics of Roman law itself.

### III. PRIMARY AND SECONDARY EFFECTS OF ROMAN LAW

That we had to refer to “ancient” and “medieval” Roman law when we began suggests the necessary ambiguity of the expression “Roman law.” I will briefly explain the meaning of these terms.

The term “ancient Roman law” refers to the law of the Roman city-state and, later, to that of the ancient Roman empire. That law was an elemental phenomenon; it was an historical reality of great vital power. Ancient Roman law was at one time the living law of a powerful community.

The term “medieval Roman law” (as well as all other forms of Roman law) refers to a tradition, *i.e.*, to the vital effects certain surviving facts, or authoritative texts, of antiquity had on the life, society and legal systems of the medieval and modern Western world. Whether these new societies understood these surviving elements in their “proper” sense is not important. “Prolific misunderstanding” is a typical and perhaps necessary factor in the process of appropriating another civilization.<sup>7</sup> What I am referring to is simply the distinction between two specific objects of historical writing. On the one side, there is the reality of the ancient Roman world. On the other side, there is the conception which the jurists, historians and philologists of successive epochs had of this reality. I will illustrate this with a simple example: The well-known maxim *princeps legibus solutus* (meaning the Roman emperor himself is not bound by the law) can have at least three different meanings. According to the Roman jurist Ulpian (approximately 220 A.D.), its originator, it meant that

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7. Some modern German philosophers have proposed the suggestive term “*Wirkungsgeschichte*” [roughly, “the history of effects,” *ed.*] to describe those secondary effects of past events. But I shall not deal with the far-reaching implications of distinguishing, in this way, the primary existence and the secondary effects of historical phenomena in ontological, theological and even historical hermeneutics.

the emperor was exempt from a specific statute which disadvantaged unmarried or childless citizens.<sup>8</sup> In the *Pandects* of Justinian, three hundred years later, the statement acquired a more general meaning. There, it was placed under the general title *De legibus senatusque consultis et longa consuetudine*.<sup>9</sup> In this context, the statement should be understood to mean that the emperor is exempt from *all* statutes.<sup>10</sup> In the philosophy of European absolutism, this paroemia finally came to be the justification of the principle that the sovereign is not bound by law at all.

#### IV. THE RELEVANT CHARACTERISTICS OF ANCIENT ROMAN LAW

The remainder of this part of my lecture will be devoted to *ancient* Roman law. I will restrict myself to those elements which came to have a lasting meaning for western civilization and western legal thought. The lasting effect Roman law had on world history may be explained by: (1) the incorporation of the Mediterranean ecumene into one empire, which survived spiritually in modern Europe; (2) the Roman concept of political power as a legal order; (3) the strict isolation of this legal order from its social and economic background; and (4) the control of legal decision-making by means of a consistent system of cognitive principles.

Roman law and Roman jurisprudence are products of an ancient city-state. No other ancient city-state, however, produced a positive legal science or a legal system of equivalent significance. The lasting effects of Roman law must, therefore, be the result of certain unique conditions that prevailed only in the *Roman* city-state — their *civitas* or *res publica*, as they called it.

##### A. *The Autarchic Roman Polis*

The phenomenon of the ancient polis is principally confined to the occidental, Mediterranean cultures. The polis was Greek, Italo-Etruscan and western Semitic, *i.e.*, Phoenician (Tyre, Sidon, Arados, *etc.*) or Punic (Carthage, Utica, *etc.*). The archetype is the Greek polis, and Athens is the one we know best. To us, the polis is a remarkable and singular political organism. The polis was a basically agrarian community of landlords and peasants, cut off from the surrounding world by its city walls. Inside, there was generally a

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8. These legal disadvantages were a part of Augustus's program of "Moral Rearmament." The emperor, due to obvious dynastic grounds of expediency, was impliedly exempt from this statute, according to Ulpian. It is only consistent that Ulpian added: "the wife of Caesar is, however, not exempted."

9. DIGEST OF JUSTINIAN 1.3.

10. At least Justinian's compilers are honest enough not to conceal the old, more restricted context of this statement. The compilers, in DIGEST OF JUSTINIAN 1.3.32, do cite the original source: *Ulpianus libro tredecimo ad legem Iuliam et Papiam*, *i.e.*, Ulpian's thirteenth book on the matrimonial statutes of Augustus.

temple of the city deity, a citadel (ἀκρόπολις, *arx*) and a market place (ἀγορά, *forum*). The polis was an autarchic unit in three ways: (1) with respect to religion, the polis was a sacred precinct for its deities, *i.e.*, Athena Promachos or Jupiter Optimus Maximus; (2) the relationship of the polis to the rest of the world was defined by the absence of foreign rule (ἐλευθερία) and by the freedom to lay down its own laws (αὐτονομία); and (3) the *internal* structure of the polis was determined by its quality as a community of free men, *i.e.*, men who, enjoying full political rights, were all subject to the same law (ἰσονομία). This principle did not exclude slavery, however, nor did it mean that there was no gradation of political rights according to economic status (*census*).

In the fully developed polis, the constitution of the city and the legal relations among the citizens (νόμος ἀστικός, *ius civile*) were based on statutes. These statutes could either be the result of an act of "codification" by a *nomothete* who had been nominated by the city and vested with extraordinary powers (such as Solon or the Roman *decemviri*), or it could be resolutions of the popular assemblies (ἐκκλησία, *comitia*), as later became the rule. Similarly, leading officials (ἄρχοντες, *magistratus*) were elected by voting assemblies. Important legal issues were also resolved directly by the citizens' assemblies. Other matters were presented to large juries, and cases of minor importance may have been decided by single jurors.

"Law" in the developed polis was not conceived of as a divine gift or an immemorial custom, but rather as a man-made, autonomous institution. This conception played an important role in the formation of western legal thought; it was the beginning of a notion of a state founded in the free will of its citizens.

The strongest impulse for the development of this conception came from the necessity of defense. Defense required a heavily armed infantry (φάλαγξ, *classis*) which replaced — or, rather, pushed into the background — the old feudal cavalry. Consequently, this newly important infantry began to make political demands. As a result of these demands, the old tribal kingdoms, or feudal aristocracies, evolved into *poleis*.

#### B. *The Roman Nobility and the Expansion of the Roman Polis*

The general structures of the Greek polis are also characteristic of the Roman *res publica* from the fourth century B.C. Of all the *poleis*, however, Rome had three distinguishing features which led to the uniqueness of Roman law in world history. One element was of an *external* nature: the military success which brought this polis alone from a hegemonial position in an Italic confederation to a position as the ruling power in the Mediterranean world. Without this achievement, Roman law would naturally have failed to have historical importance lasting into modern times; and the legal systems and the science of law in the West would not be what they are today.

A second element was the way in which the Roman *res publica* deviated from



the regular model of the Greek polis. Economic and social changes in Greece frequently led to the development of democracy with full equality of all citizens. This development was cut off in Rome. On the other hand, unlike other great commercial city-states, such as Carthage or Massilia, the Roman *res publica* did not become, or remain, a closed oligarchy either. Both extremes were avoided by a happy compromise struck between the old patrician aristocracy and the rising upper stratum of the plebs. At first, the upper stratum of the plebs allied themselves with the economically endangered smaller landlords and with the landless population of the city. This alliance threatened to upset the old patrician state. But, the fusion of the patriciate and the leading plebeian families resulted in the stabilization of a new aristocracy. This so-called *nobilitas* led Rome in the next two centuries to dominance in the Mediterranean world. At the same time, the establishment of the plebeian tribunate and the integration of the *concilia plebis* into the constitutional framework, the democratization of the *census* and the popular election of the magistrates quieted the remaining lower stratum of the plebs. In this unusual, but very successful manner, "populistic" elements were blended with an old oligarchy. The magistrates were thus put under supervision, and the state was saved from usurpation by tyrants — a constant threat for most Greek *poleis*. On the other hand, the Roman nobility kept its ability to overcome internal and external setbacks — a typical virtue of a tradition-minded leading caste. The annual elections of the magistrates, who took seats in the Senate after finishing their term of office, brought about a constant "changing of the guard." At the same time, the Senate provided the *res publica* with a virtually inexhaustible reserve of experienced statesmen, military commanders and public administrators.

The third unique element of the Roman polis was the way in which this Roman nobility developed unprecedented methods of military, political and economic expansion during its classical period. A network of Roman and Latin settlements (*coloniae*) made possible the expansion of the city-state into vast regions. These settlements were independent in their sources of livelihood. With respect to the law, however, they remained sectors of the parent city, although they were geographically distant. Thus, the ground was laid for the urbanization and Romanization of the Iberian, Celtic, Germanic and Illyrian provinces which were to become the birthplaces of early medieval Europe.

### C. *The Unique Institutions of Roman Law*

The traditionalism, realism and authoritative attitude of the Roman nobility were the sources of the peculiarities of Roman law. Rome was the first polity to develop an independent and highly objective procedure to arbitrate social and economic conflicts. This development liberated the Roman legal system

from archaic ritualism and, later, kept it free from the too-immediate impact of changing political and moral ideologies.

One should emphasize that this development is, perhaps, the primary Roman contribution to western legal thought. The Roman contribution consists principally in the development of highly objective methods of conflict-resolution, not in the discovery of the concept of law as such nor in the reduction of law to general conditions and qualities of justice. These latter developments are glorious achievements of the Greek spirit. The Greeks' discovery and refinement of the concept of law was, of course, known to the Roman jurists, and it did indeed influence Roman legal thought after the second century B.C. Through Roman legal texts, these Greek achievements had considerable effect on European legal thought, as well. But the singular contribution of Rome to legal culture did not consist of this. This point requires some explanation, brief though it must be, because it is not obvious:

(1) In contrast to the role legislation played in the Greek *poleis*, Roman legislation remained somewhat "underdeveloped." In times of constitutional crisis, legislation was used by the conflicting parties to advance their position or it was used as a means of effecting a compromise. In matters of social concern, legislation was intended to bring about reforms or merely to appease the masses. In the field of private law, legislation was of minor importance — fortunately, one should like to say. Thus, legal progress was protected from the intrigues of the nobility, the demagoguery of the tribunes or of their promoters and the emotions of the metropolitan masses which so often corrupted Greek statutes.

(2) In a similar manner, the Roman constitution succeeded in protecting the administration of civil justice from misuse for political purposes. Large juries, or even the *comitia* themselves, were competent to try only exceptional *civil* cases, those of special political or social importance. Despite the dangers inherent in having only men of the senatorial class mete out justice,<sup>11</sup> this system proved beneficial to the continuity and security of *private* law. The speeches of the great Attic orators and of Cicero are evidence of how dangerous the emotionalism and the persuasiveness of rhetoric would have been to the justice of a decision.

(3) The place of legislation and of trial by popular courts in the field of private law was taken by a uniquely Roman institution, the praetor. One of the annually elected magistrates, the praetor supervised the decision-making of private judges (*iudices privati*). The praetor had coercive power to enforce judicial measures, *i.e.*, to issue summonses or subpoenas, to appoint trial judges or to grant execution by a judgment creditor. The praetor did not,

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11. Only men of the senatorial class had this responsibility prior to the crisis of the Republic, *i.e.*, in its last century.

however, hand down judgments himself. Instead, he appointed private judges and vested them with the authority to collect evidence and to decide the case in accordance with his instructions (*formulae*).<sup>12</sup> At the beginning of the praetor's year of office, he informed the public of his intentions and procedural programs by an edict.<sup>13</sup>

From the time of the later Republic, the praetor was no longer bound by statutory forms of action (*legis actiones*); he could devise procedural *formulae* for individual cases and include them in his general edict. Such measures were not restricted to the application of laws in force, but could be used to modify or replace existing law. When the praetor's successors adopted such innovations, as they did more often than not, the result was substantially the creation of new law (*ius honorarium*).

The tendency of these innovations was often similar to that of English equity. They were essentially progressive; like English equity, in contrast to the common law, the *ius honorarium* was likely to support ethical and technical change. As Max Weber observed, *Amtscharisma* (the charisma of an official) is more likely to tend toward social and moral innovation than traditionalistic judicature. Thus, the praetor eliminated, or reduced, the effect of antiquated rituals of the *ius civile*. He protected both minors and adults from cheating, intimidation or undue influence. He set up new ethical standards in *bonae fidei iudicia*. Similarly, he adapted the sluggish law of an agrarian tribal society to new needs of commerce. This development was necessitated by the advanced contract and credit system of the Hellenistic economy which Rome entered and finally absorbed after the third century B.C. Important innovations of the praetorian edicts were intended to serve the banking and credit system, a more highly specialized system of production and maritime commerce.

Although the praetor thus played an active part in "keeping the bloodstream in the body" of ancient Roman law, he was essentially uninterested in the intellectual and scientific development of law. Most praetors were ambitious competitors for the consulate, the highest office of the *res publica*. They were not, as a rule, legal experts, and some may have been legally illiterate. The experienced, and possibly able, clerks (*apparitores*) of the praetor's staff, who served beyond the one-year term of office, could not relieve the praetor from the burden of his creative tasks. Who was it, then, who showed the praetor the techniques by which he could realize his intentions? And especially, who suggested the innovative *formulae*? As one might expect, the responsibility for these advances belongs in large part to a group of legal experts. This brings us to the essence of Rome's contribution to all subse-

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12. The *formulae* of the praetors have been compared to the Anglo-Saxon writs, in spite of essential differences in origins and functions.

13. This "edict" was known as the *edictum praetoris* or the so-called *edictum perpetuum*.

quent legal thought, *i.e.*, the *iuris consultus*, the professional Roman jurist — a phenomenon almost unknown to the Greek world.

(4) The Roman jurists were a unique type of legal functionary. They were neither legislators nor judges; neither advocates nor prosecutors. They performed their crucial tasks as advisers without being public officials; their expertise was not tainted by the receipt of a payment. They could not have played their role if they had not enjoyed great social and intellectual prestige because the development and the improvement of the private law was almost completely in their hands. The social prestige of the Republican jurists derived from their membership in the ruling class of the *nobilitas*; this also made them economically independent and allowed them to work gratis. Nevertheless, these activities were rewarding in that they were a means of obtaining the favor (*gratia*) of the voting population. Thus, their chances to be elected to the higher magistracies were improved and election further helped them to maintain their public influence. The professional authority of the Roman jurists came from their monopoly of information and technical expertise. They alone were endowed with the highly specialized knowledge necessary to command the formalistic and traditionalistic *ius civile*.<sup>14</sup>

(5) The legal “monopoly” of the Roman jurists can be traced back to their original membership in the body of pontiffs (*collegium pontificum*). The *pontifices* were at one time the guardians of all written tradition and ritual techniques. The pontiffs alone knew all the laws, the forms of “writs” and documents, the court calendar and the *responsa*<sup>15</sup> which their predecessors had rendered earlier. In a traditionalistic society like old Rome, the dread of error concerning sacred or legal matters made the pontiffs indispensable. As time went on, an increasing number of *nobiles* turned to the practice of giving legal advice without being members of the *collegium pontificum* and a large part of the prestige of the pontificate passed to them. In addition, their greater independence from the directives of the *pontifex maximus* gave this new group greater liberties and greater flexibility.

(6) The last characteristic feature of ancient Roman law is that new law was created by giving legal advice (*consilia, responsa*) in contrast to the European way of creating law by legislation and the Anglo-American way of doing it by judicial decision. In this extremely closed society, the public actions both of private persons and of magistrates required the constant social backing of political, religious or legal authority. One might, for example, consult an

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14. The *ius civile* of the time of the Roman jurists was similar, in these respects, to the common law of bygone times — and maybe not only of bygone times.

15. [A technical term, virtually untranslatable, for authoritative opinions given by a pontiff or jurist. *Ed.*]

oracle. In legal matters, one consulted the oracles of the law (*oracula iuris*), the jurists, who offered counsel (*consilium*). The *consilium* was used to determine the appropriate form of action (*agere*) or the appropriate document for a transaction (*cavere*) or — in its noblest form — to frame a legal opinion (*respondere*) addressed to the praetor, a private judge (*iudex privatus*) or a client. By means of these advisory activities, the Roman jurist maintained constant contact with actual cases. The fact that legal development came out of actual cases makes ancient Roman law much more like Anglo-American law than the practice of deducing law from statutes (continental legalism) or from scientific legal concepts (as in the *Begriffsjurisprudenz* of German Pandectism).

(7) A unique quality of Roman jurisprudence is that it did not stop at a purely pragmatic and precise casuistry. On the contrary, the greatest achievement of the Roman jurists was their ability to “purify” the case of its accidental elements, of the *species facti* and, thus, to specify the essential legal problem as a *quaestio iuris*. The first occasion to do this was presented by the *disputatio fori*, i.e., the discussion held by the older jurist, who had been asked for a *consilium*, with his apprentices. This later developed into legal instruction and was finally set down in a legal literature. Under these conditions, legal science and literature were molded out of their original raw material; they were derived from the simple nature of the *formulae* and *responsa* which had been honed by practical experience, sorted and recorded. In this way, the decisions of a new science were reduced to common denominators, and the literary presentation of its professional knowledge became rationalized. A process of intellectual reasoning and the evolution of general propositions had begun.

The part that Greek theory of the formation of scientific concepts and systems played in the evolution of Roman legal science is controversial. Many of us believe it was of considerable importance, but not *the* deciding impulse. However, I cannot go into more detail on this question. The modern jurist, though, should be heedful of Scylla and Charybdis. He should not, especially as a European professor, imagine Roman jurisprudence as the model of a systematic or even axiomatic theory — as the law-of-nature school or the *Pandektenwissenschaft* was, for example. Similarly, he should not see it as a merely pragmatic, unprincipled case law or believe that Roman decision-making was based only on free and creative intuition.

## V. CONCLUSION OF PART ONE

In summary, all the factors that contributed to the glory and uniqueness of Roman jurisprudence for ages to come were present in the *iuris consultus* of the late Republic; the characteristic institutions, norms and concepts of this legal system were already developed at that time. The further development of

Roman private law between the early imperial period and the Justinianic codification was only a consequential result of those inherent elements. Admittedly, the codification was a unique and enriching development which gloriously overshadowed the older material from which it was made. For our present purposes, however, a short outline of the later developments will suffice:

(1) Our knowledge of Roman law is based almost exclusively on the “classical” legal literature of the Principate (first to third centuries A.D.). As far as we can tell, this literature is far richer and on a higher intellectual level than were the lost works of the Republican era.

(2) Classical jurisprudence absorbed all the questions which had arisen in the time of the late Republic. These questions were categorized, and often adequately answered for the first time, in the classical era. These questions were also enriched by the emergence of new issues. Undeniably, Roman jurisprudence came to its height at this time. It would only be nostalgic snobbery to deny that the Roman jurisprudence now had come to its height — just as it would be wrong not to trace this climax back to its older origins.

(3) The greatest jurists took a direct part in governmental tasks and the central imperial administration of justice from the time of the great adopted emperors of the second century A.D. Thus, the whole empire was within their area of interest. Responsibilities such as these liberated the jurist from city-state prejudices. Consequently, their sense of lawfulness was allowed to develop freely, and they were disciplined to care for the welfare of their imperial subjects.

(4) In the same spirit, the jurists assisted the emperors in the development of a new administrative law for the empire. This body of *ius publicum novum* was institutionalized and made more humanitarian by these jurists — perhaps one of their greatest achievements. Through the medium of Justinian’s codification, this *benigna interpretatio* gave the leaven of moral reason and common sense to the European *ius commune*, the *ius canonicum* and English equity.

(5) The survival of this great legacy was not prevented by the catastrophes of the later third century A.D. or by the Byzantine absolutism which began with Constantine the Great. To be sure, further imperial legislation became more of a manifestation of the woes of an empire which was under stress and partly dying — perhaps this legislation was the darkest and most oppressive legacy of ancient Roman law. This last epoch may boast, however, of one very different achievement: Byzantine legal science and the Justinianic codification which this new science made possible. Thus, the jurists of the Byzantine period rescued the bulk of Roman law and, in fact, they conveyed its most superior version, the Roman classical jurisprudence, to the new European era.

## Part Two: The Nature and Significance of Medieval Roman Law

### I. THE SECONDARY EFFECTS OF EARLIER CULTURES

#### A. *The Problem of Cultural Influence*

To aid our understanding of the effects of ancient Roman law on western civilization, let me offer a few preliminary thoughts on the ways in which an historian views the secondary effects of an earlier culture on a later one. Historians cannot avoid generalizing about this phenomenon. The innumerable social and psychological processes by which cultural structures are carried over from one era to another cannot be described individually. To discuss this phenomenon at all, we must systematize the ways in which it occurs. The simplest concepts, such as "influence" or "impact," are harmless but rather meaningless. For example, the proposition: "A has influenced B" means only that the fact "B" has been conditioned in some way by the fact "A." Equally harmless and meaningless is the metaphor of legal succession, *i.e.*, the proposition that the continental concept of the legal obligation is a Roman legacy. When the metaphor of biological descent is employed, the effect is more dangerous — implying that a new civilization can inherit characteristics from a parent civilization in the same way in which a child receives hereditary characteristics from its parents. In this case, the metaphor is ambiguous and misleading. In fact, individuals in a new civilization may be the biological descendants of individuals of the older civilization; but "the spirit wafts from where it wills" and may at times favor the sons of Hagar and not the legitimate children of Isaac.

When historians apply more complex patterns in their attempt to comprehend generally the relationships between two civilizations, the danger of unintended implication is even stronger. These dangers are evident in such metaphorical expressions as "a new culture *learns* from the parent culture"; or in speaking of the "continuity" or "survival" of an older cultural element; or in referring to the "renaissance" or the "revival" of past cultural hypostatizations in new cultures.<sup>16</sup> These three models of historical expression, should be discussed further so that the misunderstanding caused by their use can be better understood.

At first sight, the most realistic model for conceptualizing the relationship between temporally separate cultures appears to be that of "learning." In much the same way as a pupil learns behavioral patterns or acquires informa-

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16. The term "reception" will not be used here as it frequently is used to describe the adoption of the Roman law of antiquity in southern Europe in the early Middle Ages or its adoption in northern Europe at a somewhat later time. I believe that the term "reception" is most properly confined to the adoption by one legal order of the *existing* order of a contemporary legal system, *e.g.*, Turkey's "reception" of the Swiss Civil Code.

tion by observing a teacher, "the" early Middle Ages are thought to be pupils of "the" late antiquity. Leaving aside the fact that no teacher living in late antiquity ever taught an individual pupil living in the Middle Ages, this idea seems quite appropriate when speaking, *e.g.*, of handicrafts, Roman horticulture or glass fabrication. Similarly, we may speak of learning when we refer to the adoption of the seven-day or the planetary week, the script, the form of legal deeds, and perhaps, even the simpler legal institutions of late antiquity, such as earnest money (*arra*) in a sale. The more complex a cultural phenomenon, however, the more its assimilation requires intellectual productiveness on the part of the "pupil," and the more unsatisfactory is this model of the simple transfer of information. The further developments in the Middle Ages of the Christology of late antiquity, or of the Neoplatonic teaching on categories, are two forbidding examples of extremely complex processes. No less complicated was the process of adopting a legal ideology or a legal scientific method.

When an historian speaks of *continuity* (or *survival*), he is postulating, rather arbitrarily, that a certain cultural factor has remained constant. Thus, the cultural factor is said to have retained its identity despite the flow of time. Whatever specific surviving element the historian chooses,<sup>17</sup> its identity with the past element is, at best, only an initial working hypothesis. Thus, one cannot simply claim that the Roman municipal constitution more or less survived in the form of similar (but not identical) constitutions in the early medieval cities; one must *prove* it.

Lastly, there is the concept of *rebirth*, *revival* or *renaissance*, so popular among cultural historians. Since the time of the Italian *rinascimento*, the sublime paradigm of the rebirth of those redeemed by Jesus Christ has given this image its very special splendor. At the same time, it is a most imprecise analogy. For the exact description of a very complex and diffuse interplay, it substitutes the mystery of the pentecostal miracle — the pouring forth of the Holy Spirit, so to speak. Nevertheless, the comparison certainly thrives, not only because of its inner nobility, but also in response to the palable experience of historians. The encounter between a new culture and an old one may indeed be characterized as such a phenomenon. Such an encounter may in fact lead to a real spiritual initiation or initial "ignition" through which productive structures or ideologies may catch fire through the contact with the remains of a past civilization.

Thus, "survival," "continuity," "revival," "renaissance" and even the

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17. Sometimes the individuals of former cultures are considered the persevering element, when we speak, for example, of "Celtic" or "Iberian" continuity. At other times, the reference is to an objective phenomenon, when we speak, for example, of the continuity of the ancient form of a deed, or of the Roman municipal constitution, or, sometimes, even of the Roman law itself as a whole.



modest "learning" are not precise and documentable propositions concerning the interaction of social and psychological elements and effects. The historian cannot do without them, however, for two reasons. First, these models have a legitimate purpose; they provide working hypotheses, or tentative "sketches," for the explication of facts in the context of scientific research. Second, these models provide an indispensable means of communicating the results of research. The models should, however, remain as flexible as possible. Modern genetics may offer the most appropriate model for describing the means by which past elements are reproduced in a new civilization. As I understand it, genetics describes the passing of hereditary factors as a process of conveying information. Living beings are defined by a code — a biochemical matrix — according to which similar forms are reproduced. This pattern probably corresponds best to the legal historian's perception of the secondary effects of Roman law on the Middle Ages.

#### B. *The Two Phases of Roman Law in the Middle Ages*

These complicated reflections were necessary because the continuing existence of ancient Roman law in the western societies represents an especially complex and ambiguous process of transference. Legal systems are all-encompassing, psychological, social and intellectual structures. Legal systems are complexes of several elements, including social customs and behavioral patterns, organized social institutions, techniques of using public power, moral or ideological values and intellectual processes of perception.

In order to give an overview of the secondary effects of ancient Roman law, it is best to treat these effects in two phases. First, in the Early Middle Ages (fifth to tenth centuries), we have the immediate, continuing existence of Roman legal principles and institutions. Second, in the High Middle Ages (from the eleventh century onwards), we have the rediscovery of classical Roman legal science by the southern European law faculties. The cognitive models of "learning" and "survival" can be said to belong to the first phase, while the term "renaissance" belongs to the second phase. The second phase, or renaissance, was followed in countries north of the Alps by the so-called "reception" of the reborn legal science.<sup>18</sup>

These two eras represent different degrees of intellectual maturity in western civilization. In the Early Middle Ages, western civilization was still incapable of expressing its own identity and ideals; it was restricted to assimilating disparate antique elements. After the revival of the eleventh century, however, western civilization had matured to the point where it was capable of congenial and creative confrontation with the legacy of Roman classical jurisprudence, because it had created its own theological philosophical and political ideology.

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18. See note 16 *supra*.

## II. ROMAN LAW IN EARLY MEDIEVAL EUROPE

### A. *The First Western European States*

In western Europe, the earliest organizations resembling the modern state grew out of the collapse of the western Roman Empire: the Visigothic and Burgundian kingdoms within a still-existing Empire and the later and more promising Frankish kingdom in the northwestern territories of the former Empire. The Frankish Empire was also responsible for having forced the Roman inheritance upon the Germanic tribes of the European interior (such as the Alemannians, the Bavarians and, finally, the Saxons) and upon the western Slavic peoples. Later, the Franks exported the Roman inheritance to the Scandinavians as well. England — due to the high intellectual and spiritual standard of her clergy — had her own special standing in this process.

These “states” were able to constitute themselves only by taking advantage of the surviving Roman administrative organization. The Empire from which they arose, however, was no longer the principate, the Empire which the *principes*, from the time of Augustus, had forged on the base of the old Roman Republic. Instead, the new European communities succeeded to the “dominate,” the absolutistic and centralized monarchy which was shaped by the catastrophies of the third century and which ruled thereafter over a society in which horizontal class divisions were suppressed and vertical divisions enhanced.

A hierarchical and highly specialized bureaucracy was an instrument of constant tyrannical intervention by a thoroughly regimented state. The main purpose of the state had become the securing of the finances and military services necessary for its defense and, thus, the preservation of the bureaucracy itself. To accomplish these ends, the once-free tenants (*coloni*) were bound to their land, and the huge manorial estates were feudalized. All crafts which were relevant to the public interest were transformed into hereditary, compulsory guilds. Of greatest importance, the economic productivity of the wealthier classes in the cities, which was once the backbone of the Empire’s welfare, was sacrificed to a ruthless system of taxes, services and requisitions (*munera publica*).

### B. *The Legal Literature Which Influenced Early Medieval Europe*

In order to survive, the new Roman-Germanic societies had to continue managing within the existing bureaucratic structures. These included the laws and decrees of the late Empire. This “immaterial baggage” had, however, shrunk considerably in the interim between the fall of the Empire and the establishment of the western kingdoms. By far, the most important legal sources in the Early Middle Ages were the enactments of the Byzantine emperors together with some relics or epitomes of elementary legal literature.

These epitomes included an excerpt from an elementary legal handbook dating from around 300 A.D. (the *Sententiae Pauli*); a crude adaptation of Gaius' famous textbook (the *Epitome Gai*); various late commentaries originating from the elementary instruction of provincial functionaries (*interpretationes*); and, lastly, a few collections of specimen deeds.<sup>19</sup> The law contained in this meager assortment is referred to as "Roman vulgar law."

Nevertheless, the command of even these humble leftovers required the mastery of some basic intellectual skills. Included among these skills were reading and writing, the organization and preservation of documents, and the drafting of statutes, court decisions, protocols (*gesta, acta*), wills and contracts of sale. These skills could only be passed on to a new generation where antique elementary education, especially the *trivium* (grammar, logic and rhetoric), had been preserved. Only those who were taught in these schools were literate and, thus, capable of writing down the statutes, administrative acts and decisions that were necessary to establish an organizational framework for the new communities.

Thus, those who were literate possessed a monopoly of all those positions in government, secular and ecclesiastical administration and the administration of justice which required the ability to read and to write and to perform basic bureaucratic tasks. These literates, in other words, had the exclusive control of the drafting of laws and of all records concerning accounting, taxes and fees and control of all those transactions which required notarization either for reasons of expediency or because notarization was legally required. While the leading literates and functionaries were originally recruited from the class of Roman provincial landlords (*possessores*), most of whom had senatorial rank, these tasks were ultimately left almost entirely to the higher functionaries of the Church. These churchmen became the backbone of the new Roman-Germanic states after the extinction of paganism and Arianism.

### C. *Fundamental Roman Legal Concepts in Early Medieval Europe*

Of prime importance in this discussion are the ideas of law and state which were adopted in early medieval Europe along with the basic intellectual skills. These ideas were to play an essential role in the forming of western Europe.

One influential idea was the Roman concept of *public office* (in the sense of organized authority) with its corresponding functional competencies. The permanent administrative body, first established by the classical *principes*, had been enlarged by the absolute monarchy into a hypertrophic bureaucracy.

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19. [Convenient editions of the *Sententiae Pauli* and the *Epitome Gai*, and some of the other works mentioned may be found in 2 FONTES IURIS ROMANI ANTEJUSTINIANI (J. Baviera ed. 1968). For the English-speaking reader the best edition of Gaius's *Institutes*, his famous textbook, is 1-2 THE INSTITUTES OF GAIUS (F. de Zulueta ed. 1953). Ed.]

The Germanic conception of office as a personal relationship between the vassal and the king left little room for either an objective concept of public office or for the consequent development of set competencies. Thus, the only models for the latter type of organization available to the early medieval states were to be found in the imperial administration or in the ecclesiastical office organized on similar lines.

A similar process took place with the concept of *statutory law*. The Germanic tribes did not originally perceive law as a volitional act of free men, as did the ancient city-states, or as an imperative act of the ruler, as did Rome under the emperors. To the Germanic tribes, law was conceived of as a body of unwritten customs and traditions. All written law in the Early Middle Ages, therefore, must have been based on the absolutistic notion of law developed in the late principate and the Byzantine monarchy. The Germanic kings, however, for the sake of their own tribesmen, formally maintained the idea that the laws were made by the great men of the realm (*proceres, etc.*) and only drafted and promulgated by the king's staff.

Beyond the ideas of public office and statute law, the Church made the Early Middle Ages conscious of a *universal concept of law*. For the Christians unified under the Roman Empire, the powerful tradition of *ius romanum* evidently existed above and beyond the old tribal laws and the decrees of the new rulers. This universal law was connected by Augustine with the idea of the *ius divinum*; it remained a powerful living idea and continued to guide the thoughts and public actions of the literate staffs of the new rulers.

The carryover of political, literary and legal traditions from late antiquity to the Early Middle Ages remained for a long time only a sign of *survival* and not a *revival*. In many respects, what we refer to as the early medieval "states" were not much more than provinces which had outlived the fallen Empire. They were not new, original creations which had adopted the norms and institutions of a former world by their own free choice.

### III. ROMAN LAW IN THE HIGH MIDDLE AGES AND IN EARLY MODERN EUROPE

#### A. *The Studium Civile*

The western world did not begin to comprehend its own "identity" before the eleventh century. This process of comprehension was brought about by the emergence of new ideologies among the ruling ecclesiastical elite. In the religious sector, this new ideology took shape in the reform movement of Cluny. In the political sector, the process occurred through the idea of *translatio* and *renovatio imperii*. Finally, in the intellectual sector, the new ideology followed the reception of the new Platonic and Aristotelian dialectics by the early scholastics. In the sphere of legal thinking, this process found expression in the

rediscovery, in a spiritual more than a literal sense, of the great heritage of the Roman classical jurists which had been collected in Justinian's *Digest*, study of which was revived by the end of the eleventh century. The European science of law evolved from this rediscovery, and that science formed the basis of the legal systems of modern continental Europe.

The *studium civile* blossomed in Bologna around the beginning of the twelfth century. Soon afterwards, the phenomenon appeared in other Italian and French cities. One must ask, what led to this unique intellectual explosion?

One prerequisite to the establishment of the *studium civile* was a political ideology, the so-called "Rome-Idea." The "Rome-Idea" was expressed in three versions. One was the imperial idea of the Hohenstaufen emperors and their rivals among the monarchs of western Europe. A second was the curial concept of the reform popes after Cluny. A third was the national version of the Italian city republics. In all three forms, the "Rome-Idea" encouraged a general recognition of Justinian's law.

Also favoring the establishment of the *studium civile* was a new scholarly enthusiasm for the texts of antiquity. This scholarly enthusiasm had captured the scholastics and was echoed in the Latin literature of the High Middle Ages. Finally, there was the impact of economic expansion in northern Italy. This expansion required a rationalization of legal intercourse and legal conflicts which could be accomplished through rules which had been made more predictable by a professional systematization. Significantly, the *studium civile* was established in Bologna by order of the municipal authorities.

### B. *The First European Jurists*

Under these conditions, the instructional method of the liberal arts (*trivium*) which was used in schooling the clergy, the secular *consules* and *sindici*, the *defensores* and the notaries was now applied to Justinian's *Digest*. In so doing, the Bolognese fathers of legal science discovered a complete new spiritual world. They became aware of the unique, free and superior mastership of the great Roman jurists. One of the wonders of our civilization is that the Bolognese glossators responded to the challenge of the Roman jurists with an understanding of equal rank. Their understanding was not historical, but they showed the same ability to assimilate their material that the school of Chartres showed with Plato, or Thomas Aquinas showed with Aristotle. For the Bolognese jurists Justinian's *Digest* was not a mass of lifeless texts. They made the timeless problems the texts posed their own concern.

These glossators became Europe's first jurists in the strictest sense. They did not deal with social conflicts merely within the bounds of accepted tradition or the dictates of moral ideology. Instead, they dealt with social conflicts by *discussing* each case as an independent juridical problem, as only the

Roman jurists had done before.<sup>20</sup> Thenceforth, there was in Europe a third authority to rival the actual political powers and the spiritual authority of Holy Scripture and contemporary theology (including the works of the Fathers of the Church). This new authority independently claimed the right to settle conflicts between individuals, groups and public powers. The jurists' demand that matters of a public nature be under the rule of law remains a living principle today. *This* feature is more a characteristic of our Western world than it is of any other past or contemporary civilization.

These great accomplishments would have been unthinkable if the rediscovery of ancient Roman jurisprudence had remained the privilege of a few. In fact, hosts of professional jurists were taught by the law faculties of Italy, France and, later, of every major European country. After the twelfth century, the youth of the ruling classes and the clergy streamed to these faculties from every part of Europe. Eventually, even talented and ambitious commoners were admitted to study at these faculties. These law students returned home with a technical knowledge of administration, politics and diplomacy. Later, this knowledge was extended to the administration of justice.

North of the Alps at least, the diplomatic, political and administrative activities of these new professionals always preceded developments in the administration of civil justice. The jurists first attained their public positions by rising through the large administrative apparatus of the Church or that of the Holy Roman Empire, the western European kingdoms, the greater feudal territories or the larger cities. Only through these channels did they advance to key positions in the central courts of the sovereigns and eventually to the common and local courts. The unschooled decision-makers of the Estates — the prelates, knights and representatives of the cities — resisted the encroachment of the jurists for a long time. This resistance was due in part to political mistrust of the sovereign and in part to their own material interests in their financially lucrative privileges. However, as the political power of the Estates began to crumble, the jurists began to occupy these positions as well. They made advances even in places like northern France, the Netherlands, the cities of the German *Hansa* and in Switzerland: in short, in regions where national or local law had been maintained.

### C. *The Role of Ecclesiastical Legal Science*

To omit mention of the simultaneous development of an *ecclesiastical* legal science would leave this outline incomplete. Until the Reformation, the Church was not only universal in Europe but was also by far Europe's largest

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20. The exegesis of legally relevant texts by Rabinnic or Islamic scholars — which was in some ways similar — had confined itself to religious texts which originally did not belong to a specially *legal* subsystem.

institution. The Church, which had always been a pioneer in promoting more objective and rational decision-making, began organizing its scattered legal sources into a corpus of canon law. This work was done under the influence of, and in competition with, the masters of the *ius civile*. When great canonists ascended to the papal throne at the end of the twelfth century, they transformed the Church into a *legalistic* Church, a universal body vested with a central legislation, administration and jurisdiction. The system of codified ecclesiastical law occupied a parallel position to that of the *ius commune*, and the "canonist" paralleled the "legist."<sup>21</sup> Since ecclesiastical law also governed many secular claims, thereby serving to develop a complementary relationship between the *ius commune* and the *ius canonicum*, both legal systems were increasingly seen as expressions of one universal legal order, the *ius utrumque*.

#### D. Later Developments in the Growth of European Law

These developments led to an intensified legalization and rationalization of public life in Europe. The jurists in the service of the ruling powers were gradually able to supplant the use of violence in the settling of conflicts and to eliminate private or community feuds — something which the Church and the monarchs had never fully achieved by the earlier medieval peace movements (*treuga Dei Landfrieden*, etc.). Thus, the jurists prepared the ground for economic expansion and for the gradual humanization of the European modern age.

While I cannot discuss the brilliant history of legal science and the expansion of the learned Roman law in detail,<sup>22</sup> it is appropriate to mention the outstanding landmarks in the further history of this process. These would include: (1) the elegant jurisprudence of the French and Dutch Humanists; (2) the newer school of natural law which was greatly influenced by Roman law; and (3) the revival of ancient Roman law in Savigny's historical school and in Pandectism. In some parts of Europe, in many regions of Germany, for example, the direct application of Roman law did not terminate until 1900. Even today, however, Roman law is alive; the continental codifications are based so much on Roman law that interpretation of them would remain incomplete or superficial without recourse to the *Corpus Iuris*. For an American audience, these events on the continent are of less consequence. In the Anglo-American legal system the immediate influence of Roman law is restricted to a relatively small body of civil law.<sup>23</sup> Rather than continuing with a history of the specific influences of Roman law, I would like to comment in conclusion on the general outlook of contemporary western legal thought.

21. "Legist" was the term used by medieval churchmen in referring to an expert in Justinianic law.

22. Further discussion of the subsequent expansion of the schooled Roman law in modern times is omitted for the same reason I did not pursue the later development of antique Roman law earlier. See Part One, §§ IV, V of text, *supra*.

23. See Part One, § II.B of text, *supra*.

#### IV. ROMAN LAW IN THE MODERN WORLD

##### A. *Modern Historical Consciousness*

In western, southern and central Europe, Roman law has always been a subject taught by our faculties of law because it provides the necessary background for interpreting our own civil law. But the present crisis in matters of historical consciousness has had negative effects on the study of Roman law. The reasons for that crisis are obvious. We have entered an era of greater control of nature and futurist social planning. The Atlantic-European civilization has been transformed into a world civilization of "older" and "younger" nations. Similarly, there is the educational explosion which has made it necessary for many nations to offer the opportunity of elementary and specialized education to millions of young people; this development has led to a critical questioning of classical education. The humanistic study of the ancient languages, the classical systems of philosophy, idealistic historiography and even classical Newtonian physics are undergoing a new evaluation. Roman law belongs to this classical tradition.

I will not elaborate, however, on this educational and social trend for two reasons. First, growing criticism of one-sided technical specialization everywhere has brought forth a stronger interest in history. Thus, apologies for Roman law which I found necessary ten years ago before German and other European audiences would sound anachronistic today. Second, an apology of this kind is of minor interest in this country where Roman law was never in force, and was therefore not cultivated in connection with law but in connection with the classics, because of its obvious relevance to the economic and social history of antiquity. Consequently, I will simply point out the value which the study of Roman law can have for the student and graduate.

##### B. *The Uses of Roman Law in the Modern World*

In the continental countries, ancient and medieval law belongs to the "prehistory," so to speak, of current law. The knowledge of Roman law is often a prerequisite to a basic understanding of the legal norms in force. An understanding of Roman law is also important for the critical evaluation of present or proposed legislation. Indeed, the battle against the historical misunderstandings of older or contemporary legislators is frequently won by a better appreciation of the Roman legal sources. One need only think of how much the appreciation of the continental doctrine of unjust enrichment might be advanced by greater understanding of its Roman underpinnings.

These general reasons for studying Roman law do not directly apply to students of the Anglo-American legal system. Other considerations, however, of a more general nature make the knowledge of Roman law worthwhile to an American audience.



In certain matters, one must frequently rely on the terminology, definitions and norms of a basically Romanistic civil law. This is so with international business transactions, in the field of conflicts of law whenever foreign law is applied by courts as the *lex fori* and in questions of the unification of legal norms among countries of the Anglo-American and the continental legal orders. Due to the common fundamental principles of western legal thought, the terminology of Roman law still provides a universal language.<sup>24</sup> In a more technical sense, Roman law terms are also the general vocabulary for comparative law and for one of the major problems of conflicts of law, the problem of "characterization" of a legal norm or institute. This *ius commune*, moreover, often constitutes a common set of values in conflicts between citizens of different nations. Thus, in such situations, Roman law facilitates agreement in principle. Similarly, one should recall the great part the *ius commune* played in the development of modern public international law.<sup>25</sup> This code of communication has become even more important because of the modern trend toward unification of laws. The common language of Roman law has facilitated the attainment of a certain uniformity of statutes which, in turn, has become a decisive factor in the advancement of international organizations.

The utility of Roman law, however, is not restricted to its direct effects on the *content* of modern legal systems. There is another significant contribution of Roman law to the training of the law student, including those in America. I am referring to the "classical" law in its original form. The Roman jurists' exemplary method of decision-making still has relevance for the modern jurist.<sup>26</sup> The decision-making method of these old masters contributes to the appeal they can still have for the modern jurist. He can learn the Roman jurist's method of clearly distinguishing legal issues and making those issues precise — an exercise which is essential for the objectification of social and political conflicts. Similarly, he can try to develop their sure instinct for the reality and practicability of legal solutions. He can, moreover, observe how they arrived at new and elegant solutions through the disciplined use of legal imagination. Even today, nothing develops the ability to discover the underlying legal issue in statutes or precedents more than the study of the casuistry of the classical jurists. The exegesis of Roman legal texts, which is customary for many law students in my country, often fascinates my practical-minded students even more than those who are interested in legal history. To observe this has always been a very enlightening personal experience for me.

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24. Roman law provides, in the words of Sir Henry Sumner Maine, a *lingua franca*. To use a more modern term, it is the key code to understanding among jurists all over the world.

25. The *ius commune* has played a great part in the development of modern public international law since the times of the Spaniards in the sixteenth century and of Selden, Grotius and others in the seventeenth century.

26. See Part One, § IV.C of text, *supra*.

There is yet one more way in which familiarity with classical Roman law is of value in the modern world. The decisions of the classical jurists are a touchstone for testing many issues affecting the general theory of law today. The high "specific density" of their concentrated situational analysis provides an ideal test. In this way, the most eminent achievements of Roman jurists enable us to verify propositions and models, *e.g.*, of "legal axioms," of "logical empiricism," of "realism," of the so-called *topica iuris* and of the *nouvelle rhétorique*. Above all, their achievements offer an ideal paradigm for the theory of decision-making and of legal reasoning which is debated so heatedly even in this country. I believe that it is this paradigm which could prevent the present debate in legal theory from degenerating into one-sided or sterile dogmatism. The talent of the classic Roman jurists for providing answers can still be put to use in our society today — not only for the contemplative researcher but especially for the practical jurist who is confronted with new tasks daily. *Fabula et de te narratur*; this old story also applies to us today.