

SECTION 1. THE LEGACY OF THE ANCIENT WORLD

A. THE CIVIL LAW IN ENGLAND

C. Donahue, in 84 YALE L.J. 167-81 (1974)

The Civil Lawyers in England 1603-1641: A Political Study. By Brian P. Levack. Oxford: The Clarendon Press, 1973. Pp. x, 311. £5.00

Reviewed by Charles Donahue, Jr.[†]

As is the case with so many controversies, the controversy over the influence of the civil law on the development of English law is one in which the polemical has often preceded the descriptive, in which questions are answered before they have been precisely stated. Anglo-American legal writers have long emphasized the uniqueness of the English legal experience. Pride in the common law, coupled with a contempt for the continental legal tradition (bred, at least in some cases, by ignorance), has made these writers want to find that the contributions of the civil law to our own legal system were small.

The historical reasons for this attitude may be inferred from Professor Levack's book.¹ In the 17th century the civil law became associated in England with royal absolutism, with the Court of Star Chamber and High Commission, with the enforcement of religious orthodoxy and the denial of civil liberty. The effects of this association can be seen today in those opinions of our Supreme Court which define the meaning of the Bill of Rights by contrast to the practices of the "civilian" Stuart monarchy.²

Beyond the specific objections to the civil law there lies a characteristic strain of anti-intellectualism in common law thinking:

The great American jurist, Holmes, has said that the life of the law is not logic but experience. This is bred in the bone in English law. A bench of medieval judges once sneered at a barrister for using the "sophisticated reasons" of the philosophers at the ancient English universities. Law was taught, till the eighteenth century, only in legal practice at the Inns of Court, a workaday "tough" law in Maitland's view. Inherent in this law is the distrust of philosophical analysis which still survives.³

The view that English law is exclusively a home-grown product of the British Isles has produced a reaction, perhaps equally silly, that purports to see Roman law in every Anglo-American legal doctrine and institution for which a Roman law analogy can be found.⁴ Although there have been occasional attempts at a balanced appraisal,⁵ scholarship has suffered from not having many of the basic documents available in an accessible form and has lacked the necessary monographic foundations on which a definitive appraisal could be erected.

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¹ B. LEVACK, *THE CIVIL LAWYERS IN ENGLAND 1603-1641: A POLITICAL STUDY* (1973) [hereinafter cited to page numbers only].

² See, e.g., *In re Oliver*, 333 U.S. 257, 266-71 & nn.21-31 (1948) (Black, J.); *Brown v. Walker*, 161 U.S. 591, 596-97 (1896), cf. *Ullman v. United States*, 350 U.S. 422, 445-47 (1956) (Douglas, J., dissenting). See also R. POUND, *THE DEVELOPMENT OF CONSTITUTIONAL GUARANTEES OF LIBERTY* 27-54 (1957); Moreland, *Historical Background and Implications of the Privilege Against Self-Incrimination*, 44 KY. L.J. 267 (1956).

³ Kiralfy, *English Law*, in *AN INTRODUCTION TO LEGAL SYSTEMS* 157, 159 (J. Derrett ed. 1968).

⁴ See, e.g., Sherman, *The Romanization of English Law*, 23 YALE L.J. 318 (1914).

⁵ See, e.g., J. BARTON, *ROMAN LAW IN ENGLAND (Ius Romanum Medii Aevi pars V, 13a, 1971)* (leans toward emphasis of civil law); Plucknett, *The Relations Between Roman Law and English Common Law Down to the Sixteenth Century: A General Survey*, 3 U. TORONTO L.J. 24 (1939) (leans toward de-emphasis).

On the basis of the work that has been done, we may now safely begin with the proposition that in England the Roman law did not survive the Germanic invasions, as it did in some places on the Continent.⁶ When the Normans arrived in England, therefore, they found a legal system almost totally devoid of Roman influence. From this starting point the traditional view then focuses on three periods of contact between the English legal system and the civil law.

First, and perhaps most controversial, is the period of the precocious development of centralized royal justice in the 12th century. Roman law, some of which was probably derived at second hand through the academic canon law, may have played some part in that development.⁷ The earliest English treatise on the common law, known as Glanvill,⁸ shows considerable acquaintance with the Roman law, and Bracton, writing in the middle of the 13th century, displays so much knowledge of the Roman law that the accuracy of his description of English law may at times be called into question.⁹

After Bracton the traditional focus of attention shifts to Maitland's thesis that a reception of Roman law was threatened in the 16th century.¹⁰ Research since Maitland's time would indicate that Maitland may have overstated the seriousness of this threat, and one respected legal historian has recently suggested that there was no threat at all, at least not in the terms in which Maitland conceived of it.¹¹ But precisely what did happen during this period and what role civilian learning played in it are questions that have, as yet, no definitive answers.

A final period of civilian influence comes in the late 17th and early 18th centuries. At this time, particularly under the leadership of Lord Mansfield, the common law courts absorbed much of the law merchant, and with that law some civilian ideas.¹²

For all this, the traditional view would emphasize the uniqueness of the English legal experience. England, alone among the Northern European countries where the Roman law had not survived the Germanic invasions, did not "receive" Roman law in the 16th century. It did not, so this view would have it, because its centralized courts had developed early, because it had learned the Roman analytic methods through Bracton without accepting the Roman law itself, and because it had developed a system for recording precedents, the year books, and centralized institutions for training lawyers, the Inns of Court, which enabled it to resist the onslaughts of Romanism in the 16th century.¹³

More careful proponents of the traditional view do not suggest that all the law in England from the 12th to the 19th centuries is to be found in that applied in the King's superior common law courts. They have a tendency, however, to look at the non-common-law courts as oddities—"eccentric tribunals," Blackstone called them¹⁴—forerunners of what they became in the 19th century, the Probate, Divorce, and Admiralty Divisions of the High Court.

Despite the importance of the common law courts, it is easy to overemphasize their importance if we look at English legal history from the vantage point of the common law courts' ultimate triumph. If we instead take the point of view, say, of a sophisticated 14th century litigant, the picture is considerably

⁶ The analogies to Roman law which may be found in the scanty surviving legal material from the Anglo-Saxon period can confidently be attributed to the influence of the Church and not to any native survival of Roman law. See J. BARTON, *supra* note 5, at 4–6.

⁷ For a relatively strong but defensible statement of the influence, see R. VAN CAENEGEM, *ROYAL WRITS IN ENGLAND FROM THE CONQUEST TO GLANVILL 360–90* (Selden Soc'y Pub. No. 77, 1959).

⁸ *THE TREATISE ON THE LAWS AND CUSTOMS OF THE REALM OF ENGLAND COMMONLY CALLED GLANVILL* (G. Hall ed. & transl. 1965). Glanvill's "Romanism" is discussed in *id.* at xxxvi–xl.

⁹ See J. BARTON, *supra* note 5, at 13–24 & n.62.

¹⁰ F. MAITLAND, *ENGLISH LAW AND THE RENAISSANCE* (Rede Lecture 1901), *reprinted in* 1 *SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY 168–207* (Ass'n of Am. Law Schools ed. 1907).

¹¹ Thorne, *English Law and the Renaissance*, in *ATTI DEL PRIMO CONGRESSO INTERNAZIONALE DELLA SOCIETÀ ITALIANA DI STORIA DEL DIRITTO, LA STORIA DEL DIRITTO NEL QUADRO DELLE SCIENZE STORICHE 437* (1966).

¹² See generally C. FIFOOT, *LORD MANSFIELD 82–117* (1936); 5 W. HOLDSWORTH, *A HISTORY OF ENGLISH LAW 102–54* (3d ed. 1945); 6 *id.* 519–22 (2d ed. 1937); 12 *id.* 524–40 (1938); Sutherland, *The Law Merchant in England in the Seventeenth and Eighteenth Centuries*, 17 *TRANS. ROYAL HIST. SOC'Y* 149 (4th ser. 1934).

¹³ See, e.g., F. MAITLAND, *Outlines of English Legal History*, in 2 *COLLECTED PAPERS 417, 438–45* (H. Fisher ed. 1911); see also F. MAITLAND, *supra* note 10.

¹⁴ 3 W. BLACKSTONE, *COMMENTARIES* *86.

different. True, if the litigant is not a serf, he will be advised that the common law courts have taken over much of what had formerly been feudal jurisdiction.¹⁵ But he still has a bewildering variety of courts in addition to the superior common law courts open to him, depending on who he is and what kind of claim he has. His claim, for example, may be heard in a county court, in a church court, in a borough court, or in a merchant court. He may try the as yet ill-defined jurisdiction of Chancellor. Indeed, certain cases may be heard before the High Court of Parliament itself. From what is now known of the county courts, we would expect to find little penetration of the learned law in them.¹⁶ On the other hand, in the church courts our litigant will find the academic Romano-canon law being applied. The importance of this law for the development of English law can only be determined when more of the records of the medieval ecclesiastical courts are published, when we have a clearer idea of the extent of these courts' jurisdiction. The work that has been done would indicate that if our litigant's case concerns a promise, a marriage, a will, a piece of ecclesiastical property, defamation, or a group of offenses which might roughly be described as morals offenses, he may well find himself in an ecclesiastical court.¹⁷ In the merchant courts, where our litigant may go if he is a merchant, the law applied will be the custom of merchants, a diverse body of rules that will become a transnational body of law with substantial civil law underpinnings.¹⁸ Some influence of the law merchant can be seen as well in the borough courts.¹⁹ The civil law element in the law applied in Chancery and in the High Court of Parliament is more problematic. There can be little doubt, however, that the shape of the procedure before these bodies displays the influence of the learned law.²⁰

If we move to Professor LeVack's period, the reigns of James I and Charles I, shortly after the period in which Maitland perceived a threat of reception, the situation is even more confused. At the local level, our hypothetical litigant will still find county and borough courts and local ecclesiastical courts, with ultimate appeal from these latter now to the High Court of Delegates, instead of to the Court of Rome. In addition, if he lives in the right part of the country, his case may be heard before the Council of the North or the Council of Wales and the Marches. At Westminster he will find that the superior common law courts have lost some business to the newer conciliar courts, the Court of Star Chamber and of Requests, and to the Privy Council itself, as well as to the increasingly active jurisdiction of the Chancery.²¹ In addition, the High Court of Admiralty and local admiralty courts are seeking to expand their jurisdiction over mercantile matters, while an offshoot of the Council, the High Commission (Commissions for Ecclesiastical Causes), is tending to draw business away from the regular ecclesiastical courts.²²

Of this multiplicity of courts only the ecclesiastical and admiralty courts are distinctly civil law courts, applying civil law and dominated by civil lawyers. In the conciliar courts and the Chancery, the civilians filled some but by no means all of the positions.²³ As in the medieval Chancery, civil law influence can be seen in the shape of the procedure of these courts; how much its influence goes beyond that is a difficult question.

In summary, current research forces us to discard any notions we may have had of the total isolation of English legal development from the academic law. It also indicates that if we want to have a full

¹⁵ See S. MILSOM, *HISTORICAL FOUNDATIONS OF THE COMMON LAW* 8-12, 376 (1969).

¹⁶ See W. MORRIS, *THE EARLY ENGLISH COUNTY COURTS* (14 U. CALIF. PUB. IN HIST. No. 2, at 89-230, 1926); S. MILSOM, *supra* note 15, at 6-8, 376.

¹⁷ See Donahue, *Roman Canon Law in the Medieval English Church: Stubbs vs. Maitland Re-examined after 75 years in the Light of Some Records from the Church Courts*, 72 MICH. L. REV. 647, 658-70 (1974).

¹⁸ See W. MITCHELL, *AN ESSAY ON THE EARLY HISTORY OF THE LAW MERCHANT* (Yorke Prize Essay 1904). *But see* Sutherland, *supra* note 12, at 151-54 for the suggestion that the law merchant does not acquire a cohesive character until the Renaissance.

¹⁹ See, e.g., 2 *BOROUGH CUSTOMS* lxvii-lxxxv (M. Bateson ed., Selden Soc'y Pub. No. 21, 1906).

²⁰ See J. BARTON, *supra* note 5, at 28-71.

²¹ For a readable account of these developments with a strong point of view, see C. OGILVIE, *THE KING'S GOVERNMENT AND THE COMMON LAW 1471-1641* (1958). On the chancery, see W.J. JONES, *THE ELIZABETHAN COURT OF CHANCERY* (1967).

²² On the High Court of Admiralty, see 2 *SELECT PLEAS IN THE COURT OF ADMIRALTY* xii-xv, xli-lvii (R. Marsden ed., Selden Soc'y Pub. No. 11, 1897); on the High Commission, see R. USHER, *THE RISE AND FALL OF THE HIGH COMMISSION* 91-105 (1913).

²³ Pp. 21-30.

understanding of how the English legal system operated in the Middle Ages and Renaissance, the non-common law is worth further examination. That examination has already begun. Marsden and Senior have studied the admiralty jurisdiction.²⁴ More recently, Woodcock has given us a view of the medieval diocesan court of Canterbury;²⁵ Marchant has studied the ecclesiastical courts, particularly the York courts under Elizabeth I, James I and Charles I,²⁶ and more on the ecclesiastical courts is promised.²⁷ Squibb has studied the High Court of Chivalry,²⁸ Duncan the High Court of Delegates.²⁹ Usher's pioneering study of the High Commission will be considerably enhanced when Tyler's study of the Ecclesiastical Commission of York is published.³⁰ Jones has given us an excellent study of the Elizabethan court of Chancery,³¹ and there exist Selden Society volumes on the Council, the Court of Requests, the Star Chamber and the law merchant.³²

So far the studies have tended to focus on an individual court. Such a focus permits the scholar to work with relatively well-catalogued and well-defined archival material, to construct an institutional history and to keep his analysis of cases within jurisdictional bounds. Such studies are necessary, but they are confining. They lead, without their authors' intending that they do so, to associating a body of legal ideas, in this case the civil law, with a given set of legal institutions, the civil law courts. Further, they tend to make us look lineally at a given segment of the legal system rather than at how all the pieces of the system fit together at any given time.

Professor Levack boldly takes another approach. Rather than looking at any one court, he has chosen to look at the body of men who practiced before a number of courts—the doctors of civil law from Oxford and Cambridge who were active in England in a variety of roles during the reigns of James I and Charles I.

Levack's thesis unfolds carefully from chapter to chapter of the book. He begins by outlining the social and economic characteristics of the 200 men with whom he is dealing. By and large his civil lawyers rank lower on the socioeconomic scale than do the common lawyers of the same period. They are the sons of merchants and the second sons of gentry, not the heirs of landed estates.³³ They lived by their wits, and they needed professional positions in order to advance economically. At the beginning of the 17th century, when Levack's story begins, the profession is in trouble. From a high point in the decade of the 1580's, the number of doctors of civil law graduating from Oxford and Cambridge is on the decline. Perhaps as a result of the common lawyers' reaction to the loss of business to the civilian-oriented courts, James was not preferring civil lawyers in the way that Elizabeth had.³⁴

²⁴ 1 SELECT PLEAS OF THE COURT OF ADMIRALTY (R. Marsden ed., Selden Soc'y Pub. No. 6, 1892); 2 *id.* (No. 11, 1897); W. SENIOR, DOCTORS' COMMONS AND THE OLD COURT OF ADMIRALTY (1922).

²⁵ B. WOODCOCK, MEDIEVAL ECCLESIASTICAL COURTS IN THE DIOCESE OF CANTERBURY (1952).

²⁶ R. MARCHANT, THE CHURCH UNDER LAW: JUSTICE, ADMINISTRATION AND DISCIPLINE IN THE DIOCESE OF YORK 1560–1640 (1969).

²⁷ The Selden Society has announced volumes on the ecclesiastical courts of Canterbury in the 13th century and those of York in the 14th and 15th.

²⁸ G. SQUIBB, THE HIGH COURT OF CHIVALRY (1959). This court, which dealt with military and heraldic matters, was also a civil law court.

²⁹ G. DUNCAN, THE HIGH COURT OF DELEGATES (Cambridge Stud. in Legal Hist. 1971).

³⁰ R. USHER, *supra* note 22; P. Tyler, The Ecclesiastical Commission for the Province of York 1561–1641, 1967 (unpublished D. Phil. thesis on file in the Bodleian Library, Oxford).

³¹ W.J. JONES, *supra* note 21.

³² SELECT CASES BEFORE THE KING'S COUNCIL (L. Leadham & J. Baldwin eds., Selden Soc'y Pub. No. 35, 1918); SELECT CASES IN THE COUNCIL OF HENRY VII (C. Bayne & W. Dunham eds., Selden Soc'y Pub. No. 75, 1956); SELECT CASES IN THE COURT OF REQUESTS, A.D. 1497–1569 (I. Leadham ed., Selden Soc'y Pub. No. 12, 1898); SELECT CASES BEFORE THE KING'S COUNCIL IN THE STAR CHAMBER, 1477–1544 (I. Leadham ed., Selden Soc'y Pub. No. 16, 1903); 2 *id.* (No. 25, 1911), 1 SELECT CASES CONCERNING THE LAW MERCHANT (C. Gross ed., Selden Soc'y Pub. No. 23, 1908); 2 *id.* (H. Hall ed., No. 46, 1930); 3 *id.* (H. Hall ed., No. 49, 1932).

³³ Pp. 9–16.

³⁴ Pp. 60–66. There may not be any necessary connection between the civilians' perceived economic difficulties at the beginning of the 17th century, and the common lawyers' assault on their jurisdiction. For example, the analysis that has been done of the case loads of the local ecclesiastical courts shows no significant decline in the cases being heard. See R. MARCHANT, *supra* note 26, at 16 (Table 2, Norwich Consistory Litigation, 1509–10), at 20 (Table 3, Norwich Consistory Litigation, 1623–24,

The crisis, according to Levack, led the civil lawyers to seek help from their usual sources of preferment, the King and the Church. In the succeeding chapters he tries to show how the civil lawyers used their learning to defend the royal prerogative in the political arena,³⁵ to make use of their jurisdiction to further the purposes of the King and the Church,³⁶ and thus to become intimately associated with the prevailing ecclesiastical polity that was to collapse thunderously in the Long Parliament.³⁷

As a profession the civilians never regained the position that they had prior to the Long Parliament. Some of the positions which they had held, such as those in the Court of Requests and the High Commission, were abolished; the positions in Chancery became exclusively the province of the common lawyers; the positions in the Church courts never achieved the importance after the Restoration that they had had before. Doctors' Commons, the High Court of Admiralty and the Church courts continued, but the beginnings of their decline as independent and effective institutions can be seen as early as the Restoration.³⁸

Levack's thesis is an attractive one. It explains why the common law, which at one time might almost be described as a partner in England of a number of other civil-law based systems of law, ultimately came to triumph. In the struggle between King and Parliament, court and country, the civilians of necessity backed the wrong horse, and the civil law was severed from English legal development when Charles I's head was severed from his body. The thesis also goes much of the way to explaining why the civil law is held in such bad odor in American legal circles, and why it comes out so badly in the peculiarly whiggish view of English history that is favored by our Supreme Court. If we can associate the civil law with absolutism, whether there is any necessary connection between the two or not, then we are against it because that is what the Founding Fathers were trying to get away from.

Levack's work in its broad outlines is a careful and helpful book. He has worked long and hard in the basic source materials and has assembled an impressive amount of information. The biographical dictionary of his 200 civilians appended at the end of the book is a labor of love which will serve scholars for many years to come.³⁹ He has shown us the political ideas and alliances of an interesting group of men in a critical period of English constitutional and political history. The book is not, however, and does not purport to be, a complete assessment of the role that the civil law played in the development of English law during this period.

Viewed as a study of the profession of civil law in England in the first half of the 17th century, the book is confined to the 200 lawyers who were at the very top of their profession from an academic point of view, and it is limited to the institution, Doctors' Commons, which many of them used as a base for their activities. But the bread-and-butter courts of the civil lawyers, the ecclesiastical courts, were not staffed exclusively by the doctors of the civil law. For example, relatively few of Levack's lawyers appear in the ecclesiastical courts of York during this period.⁴⁰ I do not know what an intensive study of all the personnel of the York Court would reveal. Certainly one would not be surprised to find that these men, too, espoused orthodox religious positions. On the other hand, since the York lawyers had their

1626-37), at 62 (Table 8, Cases Entering the York Consistory Court, 1561-1639), at 68 (Table 9, Cases Entering the York Chancery Court, 1571-1635), at 110 (Table 10, York Exchequer Litigation, 1592-93, 1637-38). (Dr. Ralph Houlbrooke's forthcoming study of the Norwich court during this period should be a considerable help in this regard.) Quite independent reasons may be found for the civil lawyers' economic difficulties. For one thing this is a period of increasing laicization of the civil law profession, and laymen, unlike clergymen, cannot rely on a benefice to provide them their basic income. Secondly, with an economic naiveté that is typical of the period, the Church, under parliamentary pressure, displayed great reluctance to raise the statutorily-fixed fees charged to litigants, while at the same time England experienced a 650 percent inflation between the years 1500 and 1640. On both points, see *id.* at 243-45; on the fees point, see *id.* at 21-31, 51-54, 111-12, 134-36, 140-45, 189-92. Levack also discusses fees. See pp. 66-72.

³⁵ Pp. 86-121 (ch. 3).

³⁶ Pp. 122-95 (chs. 4-5).

³⁷ Pp. 196-202 (ch. 6).

³⁸ For the depressing story of the state of the ecclesiastical courts just prior to reform, see Manchester, *The Reform of the Ecclesiastical Courts*, 10 AM. J. LECAL HIST. 51 (1966).

³⁹ Pp. 203-82. The book also contains a useful bibliography of both printed and unprinted sources, although the usefulness of the latter would have been enhanced if the publishers had allowed Levack the space to give at least short-titles and authors of the manuscript tracts and treatises.

⁴⁰ See R. MARCHANT, *supra* note 26, at 247.

roots deep in the countryside, we might find that the York lawyers were not as closely associated with the political positions of the court as their London contemporaries with greater academic qualifications.

Levack's omission of the civilians in the provinces has some substantive ramifications. First, it makes it easier for him to say that the civilians' political positions were influenced by their self-interest. If we could determine what the political views of the provincial civilians were, we would have a valuable check on Levack's thesis, since the provincial lawyers' self-interest was not nearly so closely associated with the King and the court. Second, Levack's book can give one the impression that the civilians were a considerably narrower group than they actually were. The doctors did not have a monopoly on civilian writing; indeed Henry Swinburne's treatises on wills and spousals⁴¹ were certainly among the most important pieces of civilian writing in this period. Thus, if we are trying to fashion an accurate picture of the 17th century legal system, we cannot ignore the men in the provinces, because a large number of cases were tried in their courts.⁴² Nor should we ignore them if we are trying to assess the impact of the civil law on the common law, since the practitioners of the common law may well have come to know the civil law through the local church courts or the writings of such men as Swinburne.

Although considerable work still needs to be done, the main outlines of the English civil law courts, as institutions, are now reasonably clear, and thanks to Levack's book we now have some idea of the civilians as men. We have gone beyond the narrow confines of specific courts, again thanks to Levack's book, but we are still in the realm of the institutional—the civil law courts as institutions, the body of lawyers who practiced before them as an institution. Further, because of the excellent work which has been done with civil law institutions, we are in danger of equating the history of civil law institutions in England with the history of the civil law itself, of seeing in the failure of the former to establish and maintain a significant position the ultimate insignificance of the latter.

As to the impact of the civil law on English political and constitutional ideas, Levack's answer—that it was a body of doctrine from which a group of men, driven by the pressure of circumstances, derived justifications for a position that ultimately lost in the political battle—must be accepted only as a partial one. Levack has discovered, as many law students have before him, that law is malleable stuff.⁴³ Two civilians, relying on the same texts of the civil law, could reach diametrically opposite political conclusions. John Cowell was proceeded against in Parliament for his extreme views of absolute monarchy, whereas Isaac Dorislaus became a regicide.⁴⁴

It is not Levack's view, then, that civil law necessarily leads to absolutism. Rather it was the civil lawyers' need for preferment that determined their association with royal absolutism, the Church, and the court, against the parliamentary party, the Puritans, and the country. Thus Levack's thesis is deterministic, and this political determinism is not really undercut by his one attempt at qualification in the concluding chapter.⁴⁵

By detailing the divergent stories of men such as Dorislaus and Cowell and by showing how others, such as Marten, could, despite views generally in accord with the prevailing ideas of the civil law tradition, support the Petition of Right,⁴⁶ Levack has demonstrated that all the conclusions of the writers in the mainstream do not follow ineluctably from the basic civil law texts. We should not conclude from his book, however, that the civilians' general position can only be explained by self-interest. Perhaps more importantly, Levack has not shown what there was about these texts of the civil law that gave them such power that men felt they had to come to grips with them in propounding their political ideas. Perhaps Levack's perception of the civilians' self-interest has led him to underestimate the role their ideas played in determining the course of English political and legal development. For example, the civilians have much to say about sovereignty, an idea which they borrow from Jean Bodin, himself a civilian, and a

⁴¹ H. SWINBURNE, *A BRIEF TREATISE OF TESTAMENTS AND LAST WILLES* (1590); H. SWINBURNE, *A TREATISE OF SPOUSALS* (1686). The former went through at least seven editions and was still being published as a practice book in 1803.

⁴² See generally R. MARCHANT, *supra* note 26.

⁴³ See pp. 86–95, 109–21, 152–54.

⁴⁴ Pp. 4, 224.

⁴⁵ P. 200.

⁴⁶ Pp. 117–21.

quality which they attribute to the King.⁴⁷ Ultimately English political thought is to keep the idea but reject the attribution, transferring the locus of sovereignty to Parliament.⁴⁸ There was obviously something about the idea of sovereignty that men, including the civilians who introduced it, found powerfully attractive, but Levack contents himself with a thorough description of what the civilians said and disappoints, at least this reader, by not applying his substantial body of knowledge to the question of what it was that gave the civilians' ideas such power.

The relationship between what goes on on the high level of theory and what actually goes on in the courtroom may be tenuous in the extreme, and it is at the level of the courtroom that Levack's book is most incomplete. The book is rightly subtitled a "political study." It is the work of a careful historian who is interested in lawyers, their political ideas and alliances, but it is not really a work of legal history, if we define "legal history" as the history of legal doctrine, of courts, and of cases.⁴⁹

The civil lawyers with whom Levack is dealing had received extensive university training in their discipline. He regards this training as highly impractical,⁵⁰ but did it have no effect on the judgments the civilians reached when they were daily confronted by social reality in their courts? Levack suggests, and he may be on the track of some thing quite significant here, that the civilians had a different style of judgment from the style professed by the common lawyers. Despite their more rule-oriented system, the civilians handled their cases in a less rigid way than did the common lawyers.⁵¹ Unfortunately, Levack pulls back from this suggestion after he makes it, without a systematic analysis of the types of cases and the law applied in the civil law courts.

As to the possible influence of the civil law on the practice of the common law courts, Levack tells us little; he is studying civil lawyers, not common lawyers. He does suggest, however, that the relationship between the two groups was not always as strained as when they opposed each other in Parliament. They served together, apparently amicably, on the High Court of Delegates, the High Commission, the Court of Requests, and in Chancery, and a number of civilians were admitted to membership in the Inns of Court, although none seems to have been called to the bar.⁵² All of this suggests a working relationship and at least the opportunity for exchange of ideas.

⁴⁷ Pp. 97–98, 101–02.

⁴⁸ See C. OGILVIE, *supra* note 21, at 152–55.

⁴⁹ 49. Indeed, it is in the minutiae of legal history that Levack makes the only errors or questionable statements which I found. For example: (1) The fact that Robert Newcomb was his great uncle's legatee did not give him "in effect" "control of the entire family estate" (p. 14), since the family was a landed one. The history of the family that Levack suggests, however, indicates that Newcomb may well have been his great uncle's heir, or he may have been his great uncle's devisee, both of which might have given him the family lands. (2) It is unlikely that "the emperors of Ulpian's time [early 3d c., A.D.] ruled by the classical *lex de imperio Vespasiani*" and Schulz does not say that they did (p. 94 & n.1). What Schulz says on the cited page is that "we know by the *lex de imperio Vespasiani* that only a strictly limited power was given to [the emperor]." The *lex* may have been a purely political document used on a one-time basis to still people's fears after the traumatic events of 69 A.D. (3) The Henrican Commission to revise the canon law did complete its assignment (p. 183). Professor Donald Logan of Emmanuel College announced the discovery of a manuscript of the commission's work at the International Congress of Medieval Canon Law in Toronto in August 1972 (perhaps too late for inclusion in Levack's work). (4) On pp. 33–34 we learn that Dr. John Burman, sitting as Judge of the Vice-Admiralty Court in Norfolk, when confronted with a Mayor who had ordered jurors that Burman had summoned not to perform their office, "*acquainted the said Mayor that he was about Her Majesty's service and told him that he greatly wondered how he durst offer such a disturbance in the execution thereof.*" While Levack suggests that this incident illustrates the peculiar attachment of the civilians to the central authority they served, I cannot imagine that a common law assize judge, confronted with the same act of contempt, would not have replied in language at least as strong. (5) On p. 156 Levack states that the "civilians' initial presumption that the accused was guilty serves as only one indication of their partiality." This just will not do. That the civil law has a presumption of guilt in criminal cases is a shibboleth that Merryman on the cited page (*id.* at n.1) is trying to dispel. Usher at the page cited in the same note makes quite clear how strict the civil law of proof applied by the High Commission was, and shows that the source of the problem is the civilians' statement that accusation creates a sufficient *praesumptio* that the accused must come forward and deny the charge, a shift of the burden of coming forward which was shifted back upon the denial of the charge. It is well to point out that at common law at this time a person who refused to plead to a felony charge was crushed with weights until he did plead or died. Compared to this, a shifting of the burden of coming forward seems quite civilized. It was not until 1827 in England that refusal to plead at common law was treated as a plea of not guilty rather than an admission of guilt.

These are counsels of perfection. As a whole the work is careful and well-written.

⁵⁰ Pp. 16–18.

⁵¹ Pp. 152–57.

⁵² Pp. 126–30.

What evidence can we find for influence of the civil law on the development of the common law? As I suggested before, the problem suffers from a lack of definition. While the citation of cases as authorities is at least as old as Bracton, the doctrine of precedent does not achieve its modern form until the 18th century.⁵³ When English courts in the 19th century cite Roman law (which they do more frequently than one might think),⁵⁴ it is clear that the citation is to an “academic” authority, an authority which will be followed only in the absence of domestic authority and only because it is persuasive, not because it is binding. Until the doctrine of binding authorities was developed, however, the distinction between “academic” and “binding” authorities was considerably fuzzier. Further, the absence of citation of civil law authorities in the year books is not conclusive, since those books are, by and large, concerned with the pleading stage of a case. Nonetheless, the general absence of citations to civil law in both the later year books and the earlier common law reports would seem to indicate that civil law was not “authoritative” in the common law courts in this period, at least in the sense that it was not a body of doctrine to which counsel regularly asked the judges to turn for the resolution of specific questions of law.⁵⁵

Failing discovery there, we must look for the influence of the civil law in the way in which English law in its broad outlines changed over the course of the 16th and 17th centuries. The common law at the end of the 15th century was in a sorry state. Narrowly confined to property and crime with a few rudimentary ideas of tort and contract, the system had declined to one that was procedurally unworkable for all but the richest and the most patient, and substantively incapable of handling the great commercial expansion that was to come. Somehow two centuries later, the system had withstood the challenge of the conciliar courts and had managed to incorporate enough new ideas that the cry for more radical reform died down.⁵⁶ Did at least some of the new ideas come from the civil law?

If we look for civil law influence in the specific rules that the common law or equity courts adopted, we quickly find ourselves in a hopeless morass. For every principle of common law alleged to have civil law ancestry, there is a case to be cited which explains it totally in common law terms, or a text from the Digest which suggests that the civil law rule was really quite different.⁵⁷

The problem with this kind of analysis is that it glorifies the specific rule by which the case is decided and underplays the basic principles underlying the rule and the methodology used to arrive at that rule. If it is true that the life of the law has not been logic but experience, it is equally true that that experience has been shaped by the power of certain fundamental ideas and methods of proceeding. And in the development of these ideas and methods in England, civilian influence may have played some part.

As an example of the type of elements in the English law which suggest the influence of civil law ideas, consider the limitation act⁵⁸ passed by Parliament in 1623, right in the middle of Levack’s period.

⁵³ 12 W. HOLDSWORTH, *supra* note 12, at 146.

⁵⁴ See Oliver, *Roman Law in Modern Cases in English Courts*, in CAMBRIDGE LEGAL ESSAYS WRITTEN IN HONOUR OF AND PRESENTED TO DOCTOR BOND, PROFESSOR BUCKLAND AND PROFESSOR KENNY 243 (P. Winfield & A. McNair eds. 1926).

⁵⁵ The situation in Chancery is considerably more difficult to assess, since the court throughout the 17th century was only gradually developing a system of precedents. See 1 LORD NOTTINGHAM’S CHANCERY CASES xxxvii–cxxxiv (D. Yale ed., Selden Soc’y Pub. No. 73, 1957). The question, then, is what was it that informed the Chancellor’s conscience when the decision turned on it, and what role did the learned law play in the hardening of the principles that were to become the rules of equity? Jones suggests that the connection between equity and the civil law is tenuous at best. W.J. JONES, *supra* note 21, at 266, 301. Others have suggested civil law influences on specific bodies of doctrine. See, e.g., T. SCRUTTON, THE INFLUENCE OF THE ROMAN LAW ON THE LAW OF ENGLAND 152–62 (Yorke Prize Essay 1885). The opportunity for civilian influence was there, both from the civilian-trained masters of the court and from the fact that the three great 17th century chancellors—Ellesmere, Bacon and Nottingham—were all men who had considerable acquaintance with continental learning. See 2 J. CAMPBELL, LIVES OF THE LORD CHANCELLORS 309–10 (4th ed. 1856) (Ellesmere); 3 *id.* 5–6 (4th ed. 1857) (Bacon); 1 LORD NOTTINGHAM’S CHANCERY CASES, *supra*, at xxxiv n.3 (Nottingham). But this leads us to the consideration of influence on principles and methodology rather than on specific rules, and to the point next developed in the text.

⁵⁶ On the situation of the common law in the 15th century, see C. OGILVIE, *supra* note 21, at 13–14, 19–24, 43–54; A. HARDING, A SOCIAL HISTORY OF ENGLISH LAW 119–39 (1966). For the suggestion that there were few changes in the 17th century and that the Interregnum was a great opportunity lost, see *id.* at 265–67; D. VEALL, THE POPULAR MOVEMENT FOR LAW REFORM 1640–1660, at 225–40 (1970).

⁵⁷ This is particularly characteristic of the debates concerning the influence of the civil law on the early development of the common law. See sources cited in notes 7–9 *supra*.

⁵⁸ 21 Jac. 1, c.16.

This act is the ancestor of our own statutes of limitations for actions to recover real property, and its history is known to every first-year property student. What is worded as a simple statute of limitations became the statutory basis of the doctrine of adverse possession with the familiar judicially engrafted requirements that the possession be actual, continuous, open and notorious, and hostile, with the frequent addition that it be under “(good faith) claim of right” and “color of title.”⁵⁹ A great deal has been written emphasizing how the common law system of limitation differs from the civil law system of acquisitive prescription.⁶⁰ The point is not often made, however, that adverse possession, in the hands of at least some judges, looks remarkably like acquisitive prescription, without quite the civilian emphasis on bona fides.⁶¹ Whether this result was foreseen by the framers of the 1623 statute is hard to know. The notion of prescription was, however, not unknown to them; it had been brought into English law by Bracton to compensate for the fact that the common law of his day had no system of limitation that applied to someone claiming a nonpossessory right to the land of another.⁶² The preamble to the 1623 statute states twin purposes “avoiding of suits” and “quieting of men’s estates.”⁶³ The former idea is clearly derived from the notion of limitation, but the latter certainly smacks of prescription.

The question which I am suggesting needs further exploration is not whether a “reception” of Roman law was threatened in the 16th or 17th centuries, nor whether the institutions of the civil law, their courts, and the body of civil lawyers themselves were stronger than recent research would suggest they were.⁶⁴ Nor am I suggesting that at least the main elements in the movement for law reform were motivated by a desire to abandon the “barbaric” common law for the more “elegant” civil law.⁶⁵ The evidence seems quite convincing that there was no real danger of reception, that the civil law institutions never posed a serious threat to the common law, and that the motivation for the most thoughtful of the reform writing was not an intellectual but a practical one. What I am suggesting needs more study is what role the learned law played in shaping the reactions of the English legal system, a system concededly dominated by common lawyers, to the felt need for reform.

In the latter part of the 17th century and in the 18th, the academic civilians on the Continent abandoned the idea of getting the Digest as such accepted as an authoritative body of law in the courts and began instead to use the civil law as a means for determining certain first principles of law—what we might today call fundamental Western legal ideas and what they called natural law.⁶⁶ The abrasive contact between the civil law taught in the academies, the non-civil law espoused in the courts, and the diverse human conflicts which call for resolution led thoughtful men to search for first principles. That contact occurred in England at many times, most notably in the 16th and early 17th centuries, and it is the effect of this contact that ought to be more fully explored.

⁵⁹ See generally 3 AMERICAN LAW OF PROPERTY §§ 15.1–15.14, at 755–831 (A.J. Casner ed. 1952).

⁶⁰ See, e.g., B. NICHOLAS, AN INTRODUCTION TO ROMAN LAW 120–30 (1962).

⁶¹ See, e.g., Taylor v. Horde, 1 Burr. 60, 97 Eng. Rep. 190 (K.B. 1757) (Mansfield, L.C.J.); cf. City of Rock Springs v. Sturm, 39 Wyo. 494, 273 P. 908 (1929).

⁶² See W. HOLDSWORTH, AN HISTORICAL INTRODUCTION TO THE LAND LAW 279–86 (1927).

⁶³ 21 Jac. 1, c.16, preamble.

⁶⁴ See, e.g., Ives, *The Common Lawyers in Pre-Reformation England*, 18 TRANS. ROYAL HIST. SOC’Y 145 (5th ser. 1968).

⁶⁵ See pp. 131–33, on the attitude of the humanists. See generally D. VEALL, *supra* note 56, for what the reformers were after.

⁶⁶ See A. PASSERIN D’ENTREVES, NATURAL LAW 51–64 (2d ed. 1970); B. NICHOLAS, *supra* note 60, at 50–51.

B. THE LETTER OF PAUL TO THE CHURCH IN ROME

1:1–3:31, 7:1–8:11, 12:1–13:14 in JERUSALEM BIBLE, NEW TESTAMENT (New York, 1966), pp. 267–91 [Footnotes omitted.]†

Address

1 ¹From Paul, a servant of Christ Jesus who has been called to be an apostle, and specially chosen to preach the Good News that God ²promised long ago through his prophets in the scriptures.

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³This news is about the Son of God who, according to the human nature he took, was a descendant of David: ⁴it is about Jesus Christ our Lord who, in the order of the spirit, the spirit of holiness that was in him, was proclaimed Son of God in all his power though his resurrection from the dead. ⁵Through him we received grace and our apostolic mission to preach the obedience of faith to all pagan nations in honour of his name. ⁶You are one of these nations, and by his call belong to Jesus Christ. ⁷To you all, then, who are God's beloved in Rome, called to be saints, may God our Father and the Lord Jesus Christ send grace and peace.

Thanksgiving and prayer

⁸First I thank my God through Jesus Christ for all of you and for the way in which your faith is spoken of all over the world. ⁹The God I worship spiritually by preaching the Good News of his Son knows that I never fail to mention you in my prayers, ¹⁰and to ask to be allowed at long last the opportunity to visit you, if he so wills. ¹¹For I am longing to see you either to strengthen you by sharing a spiritual gift with you, ¹²or what is better, to find encouragement among you from our common faith. ¹³I want you to know, brothers, that I have often planned to visit you—though until now I have always been prevented—in the hope that I might work as fruitfully among you as I have done among the other pagans. ¹⁴I owe a duty to Greeks just as much as to barbarians, to the educated just as much as to the uneducated, ¹⁵and it is this that makes me want to bring the Good News to you too in Rome.

The theme stated

¹⁶For I am not ashamed of the Good News: it is the power of God saving all who have faith—Jews first, but Greeks as well—¹⁷since this is what reveals the justice of God to us: it shows how faith leads to faith, or as scripture says: *The upright man finds life through faith.* [Hab 2:4]

God's anger against the pagans

¹⁸The anger of God is being revealed from heaven against all the impiety and depravity of men who keep truth imprisoned in their wickedness. ¹⁹For what can be known about God is perfectly plain to them since God himself has made it plain. ²⁰Ever since God created the world his everlasting power and deity—however invisible—have been there for the mind to see in the things he has made. That is why such people are without excuse: ²¹they knew God and yet refused to honour him as God or to thank him; instead, they made nonsense out of logic and their empty minds were darkened. ²²The more they called themselves philosophers, the more stupid they grew, ²³*until they exchanged the glory of the immortal God for a worthless imitation, for the image* [Ps 106:20] of mortal man, of birds, of quadrupeds and reptiles. ²⁴That is why God left them to their filthy enjoyments and the practices with which they dishonour their own bodies, ²⁵since they have given up divine truth for a lie and have worshipped and served creatures instead of the creator, who is blessed for ever. Amen!

²⁶That is why God has abandoned them to degrading passions: why their women have turned from natural intercourse to unnatural practices ²⁷and why their menfolk have given up natural intercourse to be consumed with passion for each other, men doing shameless things with men and getting an appropriate reward for their perversion.

²⁸In other words, since they refused to see it was rational to acknowledge God, God has left them to their own irrational ideas and to their monstrous behaviour. ²⁹And so they are steeped in all sorts of depravity, rottenness, greed and malice, and addicted to envy, murder, wrangling, treachery and spite. ³⁰Libellers, slanderers, enemies of God, rude, arrogant and boastful, enterprising in sin, rebellious to parents, ³¹without brains, honour, love or pity. ³²They know what God's verdict is: that those who behave like this deserve to die—and yet they do it; and what is worse, encourage others to do the same.

The Jews are not exempt from God's anger

2 ¹So no matter who you are, if you pass judgment you have no excuse. In judging others you condemn yourself, since you behave no differently from those you judge. ²We know that God condemns that sort of behaviour impartially: ³and when you judge those who behave like this while you are doing exactly the same, do you think you will escape God's judgement? ⁴Or are you abusing his abundant goodness, patience and toleration, not realising that this goodness of God is meant to lead you to repentance? ⁵Your stubborn refusal to repent is only adding to the anger God will have towards you on that day of anger when his just judgements will be made known. ⁶*He will repay each one as his works deserve.* [Ps 62:12] ⁷For those who sought renown and honour and immortality by always doing good there will be eternal

life;⁸ for the unsubmitive who refused to take truth for their guide and took depravity instead there will be anger and fury.⁹ Pain and suffering will come to every human being who employs himself in evil—Jews first, but Greeks as well;¹⁰ renown, honour and peace will come to everyone who does good—Jews first, but Greeks as well.¹¹ God has no favourites.

The Law will not save them

¹²Sinners who were not subject to the Law will perish all the same without that Law; sinners who were under the Law will have that Law to judge them.¹³ It is not listening to the Law but keeping it that will make people holy in the sight of God.¹⁴ For instance, pagans who never heard of the Law but are led by reason to do what the Law commands, may not actually ‘possess’ the Law, but they can be said to ‘be’ the Law.¹⁵ They can point to the substance of the Law engraved on their hearts—they can call a witness, that is, their own conscience—they have accusation and defence, that is, their own inner mental dialogue.¹⁶ ... on the day when, according to the Good News I preach, God, through Jesus Christ, judges the secrets of mankind.

¹⁷If you call yourself a Jew, if you really trust in the Law and are proud of your God,¹⁸ if you know God’s will through the Law and can tell what is right,¹⁹ if you are convinced you can guide the blind and be a beacon to those in the dark,²⁰ if you can teach the ignorant and instruct the unlearned because your Law embodies all knowledge and truth,²¹ then why not teach yourself as well as the others? You preach against stealing, yet you steal;²² you forbid adultery, yet you commit adultery; you despise idols, yet you rob their temples.²³ By boasting about the Law and then disobeying it, you bring God into contempt.²⁴ As scripture says: *It is your fault that the name of God is blasphemed among the pagans.* [Is 52:5 LXX]

Circumcision will not save them

²⁵It is a good thing to be circumcised if you keep the Law; but if you break the Law, you might as well have stayed uncircumcised.²⁶ If a man who is not circumcised obeys the commandments of the Law, surely that makes up for not being circumcised?²⁷ More than that, the man who keeps the Law, even though he has not been physically circumcised, is a living condemnation of the way you disobey the Law in spite of being circumcised and having it all written down.²⁸ To be a Jew is not just to look like a Jew, and circumcision is more than a physical operation.²⁹ The real Jew is the one who is inwardly a Jew, and the real circumcision is in the heart—something not of the letter but of the spirit. A Jew like that may not be praised by men, but he will be praised by God.

God’s promises will not save them

3¹Well then, is a Jew any better off? Is there any advantage to being circumcised?³ A great advantage in every way. First, the Jews are the people to whom God’s message was entrusted.³ What if some of them were unfaithful? Will their lack of fidelity cancel God’s fidelity?⁴ That would be absurd. God will always be true even though everyone proves to be false; so scripture says: *In all you say your justice shows, and when you are judged you win your case.* [Ps 54:4 LXX]⁵ But if our lack of holiness makes God demonstrate his integrity, how can we say God is unjust when—to use a human analogy—he gets angry with us in return?⁶ That would be absurd, it would mean God could never judge the world.⁷ You might as well say that since my untruthfulness makes God demonstrate his truthfulness and thus gives him glory, I should not be judged to be a sinner at all.⁸ That would be the same as saying: Do evil as a means to good. Some slanderers have accused us of teaching this, but they are justly condemned.

All are guilty

⁹Well: are we any better off? Not at all: as we said before, Jews and Greeks are all under sin’s dominion.¹⁰ As scripture says:

There is not a good man left, no, not one;

¹¹*there is not one who understands,
not one who looks for God.*

¹²*All have turned aside, tainted all alike
there is not one good man left, not a single one.* [Ps 14:1–3 (rearranged)]

¹³*Their throats are yawning graves; their tongues are full of deceit.* [Ps 5:9]
Vipers’ venom is on their lips, [Ps 140:3]

¹⁴*bitter curses fill their mouths.* [Ps 10:7]

¹⁵*Their feet are swift when blood is to be shed,*

¹⁶*wherever they go there is havoc and ruin.*

¹⁷*They know nothing of the way of peace, [Is 50:7–8]*

¹⁸*there is no fear of God before their eyes. [Ps 36:1]*

¹⁹Now all this that the Law says is said, as we know, for the benefit of those who are subject to the Law, but it is meant to silence everyone and to lay the whole world open to God's judgement; ²⁰and this is because *no one can be justified in the sight* [Ps 143:2] of God by keeping the Law: all that law does is to tell us what is sinful.

The revelation of God's Justice

²¹God's justice that was made known through the Law and the Prophets has now been revealed outside the Law, ²²since it is the same justice of God that comes through faith to everyone, Jew and pagan alike, who believes in Jesus Christ. ²³Both Jew and pagan sinned and forfeited God's glory, ²⁴and both are justified through the free gift of his grace by being redeemed in Christ Jesus ²⁵who was appointed by God to sacrifice his life so as to win reconciliation through faith. In this way God makes his justice known; first, for the past, when sins went unpunished because he held his hand; ²⁶then, for the present age, by showing positively that he is just, and that he justifies everyone who believes in Jesus.

What faith does

²⁷So what becomes of our boasts? There is no room for them. What sort of law excludes them? The sort of law that tells us what to do? On the contrary, it is the law of faith, ²⁸since, as we see it, a man is justified by faith and not by doing something the Law tells him to do. ²⁹Is God the God of Jews alone and not of the pagans too? Of the pagans too, most certainly, ³⁰since there is only one God and he is the one who will justify the circumcised because their faith and justify the uncircumcised through their faith. ³¹Do we mean that faith makes the Law pointless? Not at all: we are giving the Law its true value. [...]

The Christian is not bound by the Law

⁷ Brothers, those of you who have studied law will know that laws affect a person only during his lifetime. ²A married woman, for instance, has legal obligations to her husband while he is alive, but all these obligations come to an end if the husband dies. ³So if she gives herself to another man while her husband is still alive, she is legally an adulteress; but after her husband is dead her legal obligations come to an end, and she can marry someone else without becoming an adulteress. ⁴That is why you, my brothers, who through the body of Christ are now dead to the Law, can now give yourselves to another husband, to him who rose from the dead to make us productive for God. ⁵Before our conversion our sinful passions, quite unsubdued by the Law, fertilised our bodies to make them give birth to death. ⁶But now we are rid of the Law, freed by death from our imprisonment, free to serve in the new spiritual way and not the old way of a written law.

The function of the Law

⁷Does it follow that the Law itself is sin? Of course not. What I mean is that I should not have known what sin was except for the Law. I should not for instance have known what it means to covet if the Law had not said *You shall not covet*. [Ex 20:17] ⁸But it was this commandment that sin took advantage of to produce all kinds of covetousness in me, for when there is no Law, sin is dead.

⁹Once, when there was no Law, I was alive; but when the commandment came, sin came to life ¹⁰and I died: the commandment was meant to lead me to life but it turned out to mean death for me, ¹¹because sin took advantage of the commandment to mislead me, and so sin, through that commandment, killed me.

¹¹The Law is sacred, and what it commands is sacred, just and good. ¹²Does that mean that something good killed me? Of course not. But sin, to show itself in its true colours, used that good thing to kill me; and thus sin, thanks to the commandment, was able to exercise all its sinful power.

The inward struggle

¹⁴The Law, of course, as we all know, is spiritual; but I am unspiritual; I have been sold as a slave to sin. ¹⁵I cannot understand my own behaviour. I fail to carry out the things I want to do, and I find myself doing the very things I hate. ¹⁶When I act against my own will, that means I have a self that acknowledges that the Law is good, ¹⁷and so the thing behaving in that way is not my self but sin living,

in me. ¹⁸The fact is, I know of nothing good living in me—living, that is, in my unspiritual self—though the will to do what is good is in me, the performance is not, ¹⁹with the result that instead of doing the good things I want to do, I carry out the sinful things I do not want. ²⁰When I act against my will, then, it is not my true self doing it, but sin which lives in me.

²¹In fact, this seems to be the rule, that every single time I want to do good, it is something evil that comes to hand. ²²In my inmost self I dearly love God's Law, but ²³I can see that my body follows a different law that battles against the law which my reason dictates. This is what makes me a prisoner of that law of sin which lives inside my body.

²⁴What a wretched man I am! Who will rescue me from this body doomed to death? ²⁵Thanks be to God through Jesus Christ our Lord!

In short, it is I who with my reason serve the Law of God, and no less I who serve in my unspiritual self the law of sin.

The life of the spirit

8 ¹The reason, therefore, why those who are in Christ Jesus are not condemned, ²is that the law of the spirit of life in Christ Jesus has set you free from the law of sin and death. ³God has done what the Law, because of our unspiritual nature, was unable to do. God dealt with sin by sending his own Son in a body as physical as any sinful body, and in that body God condemned sin. ⁴He did this in order that the Law's just demands might be satisfied in us, who behave not as our unspiritual nature but as the spirit dictates. ⁵The unspiritual are interested only in what is unspiritual, but the spiritual are interested in spiritual things. ⁶It is death to limit oneself to what is unspiritual; life and peace can only come with concern for the spiritual. ⁷That is because to limit oneself to what is unspiritual is to be at enmity with God: such a limitation never could and never does submit to God's law. ⁸People who are interested only in unspiritual things can never be pleasing to God. ⁹Your interests, however, are not in the unspiritual, but in the spiritual, since the Spirit of God has made his home in you. In fact, unless you possessed the Spirit of Christ you would not belong to him. ¹⁰Though your body may be dead it is because of sin, but if Christ is in you then your spirit is life itself because you have been justified; ¹¹and if the Spirit of him who raised Jesus from the dead is living in you, then he who raised Jesus from the dead will give life to your own mortal bodies through his Spirit living in you. [...]

Spiritual Worship

12 ¹Think of God's mercy, my brothers, and worship him, I beg you, in a way that is worthy of thinking beings, by offering your living bodies as a holy sacrifice, truly pleasing to God. ²Do not model yourselves on the behaviour of the world around you, but let your behaviour change, modelled by your new mind. This is the only way to discover the will of God and know what is good, what it is that God wants, what is the perfect thing to do.

Humility and charity

³In the light of the grace I have received I want to urge each one among you not to exaggerate his real importance. Each of you must judge himself soberly by the standard of the faith God has given him. ⁴Just as each of our bodies has several parts and each part has a separate function, ⁵so all of us, in union with Christ, form one body, and as parts of it we belong to each other. ⁶Our gifts differ according to the grace given us. If your gift is prophecy, then use it as your faith suggests; ⁷if administration, then use it for administration; if teaching, then use it for teaching. ⁸Let the preachers deliver sermons, the almsgivers give freely, the officials be diligent, and those who do works of mercy do them cheerfully.

⁹Do not let your love be a pretence, but sincerely prefer good to evil. ¹⁰Love each other as much as brothers should, and have a profound respect for each other. ¹¹Work for the Lord with untiring effort and with great earnestness of spirit. ¹²If you have hope, this will make you cheerful. Do not give up if trials come; and keep on praying. ¹³If any of the saints are in need you must share with them; and you should make hospitality your special care.

Charity to everyone, including enemies

¹⁴Bless those who persecute you: never curse them, bless them. ¹⁵Rejoice with those who rejoice and be sad with those in sorrow. ¹⁶Treat everyone with equal kindness; never be condescending but make real friends with the poor. Do not allow yourself to become self-satisfied. ¹⁷Never repay evil with evil but let

everyone see that you are interested only in the highest ideals. ¹⁸Do all you can to live at peace with everyone. ¹⁹Never try to get revenge; leave that, my friends, to God's anger. As scripture says: *Vengeance is mine—I will pay them back*, [Dt 32:35] the Lord promises. ²⁰But there is more: *If your enemy is hungry, you should give him food, and if he is thirsty, let him drink. Thus you heap red-hot coals on his head.* [Pr 25:21–22] ²¹Resist evil and conquer it with good.

Submission to civil authority

13 ¹You must all obey the governing authorities. Since all government comes from God, the civil authorities were appointed by God, ²and so anyone who resists authority is rebelling against God's decision, and such an act is bound to be punished. ³Good behaviour is not afraid of magistrates; only criminals have anything to fear. If you want to live without being afraid of authority, you must live honestly and authority may even honour you. ⁴The state is there to serve God for your benefit. If you break the law, however, you may well have fear: the bearing of the sword has its significance. The authorities are there to serve God: they carry out God's revenge by punishing wrongdoers. ⁵You must obey, therefore, not only because you are afraid of being punished, but also for conscience' sake. ⁶This is also the reason why you must pay taxes, since all government officials are God's officers. They serve God by collecting taxes. ⁷Pay every government official what he has a right to ask—whether it be direct tax or indirect, fear or honour.

Love and law

⁸Avoid getting into debt, except the debt of mutual love. If you love your fellow men you have carried out your obligations. ⁹All the commandments: *You shall not commit adultery, you shall not kill, you shall not steal, you shall not covet*, [Ex 20:13–17] and so on, are summed up in this single command: *You must love your neighbour as yourself.* [Lv 19:18] ¹⁰Love is the one thing that cannot hurt your neighbour; that is why it is the answer to every one of the commandments.

Children of the light

¹¹Besides, you know 'the time' has come: you must wake up now: our salvation is even nearer than it was when we were converted. ¹²The night is almost over, it will be daylight soon—let us give up all the things we prefer to do under cover of the dark; let us arm ourselves and appear in the light. ¹³Let us live decently as people do in the daytime: no drunken orgies, no promiscuity or licentiousness, and no wrangling or jealousy. ¹⁴Let your armour be the Lord Jesus Christ; forget about satisfying your bodies with all their cravings. [...]

C. OUTLINES OF THREE LEGAL HISTORIES

Roman Legal History

<i>Period</i>	<i>Description</i>	<i>Politics</i>	<i>Sources of Law</i>
500–250 BC	Archaic	City-State	XII Tables
250–1 BC	Pre-Classical	Urban Empire	Statutes/Cases
1–250 AD	Classical	Principate	Cases
250–500 AD	Post-Classical	Dominate	Imperial Constitutions
550 AD	Justinian	Byzantine	Code

English Legal History

<i>Period</i>	<i>Description</i>	<i>Politics</i>	<i>Sources of Law</i>	<i>Roman Influence</i>	<i>Continental Contrast</i>
600–1150	Age of Tort	Tribal->Feudal Monarchy	Barbarian Codes, Custom	Almost non-existent	Weak
(1000?, 1066?) 1150–1300	Age of Property	Feudal monarchy	Custom, Case Law, Statute	Strong on Method	Same
(1250) 1300–1500 (1602)	Age of Trespass	National monarchy	Case Law	Weak	Quite Strong
(1375) 1500–1700	Age of Equity	Absolute Monarchy-> Const. Monarchy	Case Law, Statute	Strong in spots	Strong
1700–1900	Age of Reform	Const. monarchy	Case law, Some Codification	Submerged but there	Very strong

Continental Legal History

<i>Period</i>	<i>Description</i>	<i>Politics</i>	<i>Roman</i>	<i>Canon</i>	<i>Customary/National</i>
450–1100	Early Middle Ages	Barbarian Invasions,	Romano-barbarian Codes	Collections	Barbarian Codes
1100–1250	High Middle Ages	Feudalism, Feudal monarchy	CJC-glossators	Gratian->decretists Papal decretals	Coutumiers
1250–1500	Later Middle Ages	National monarchy	CJC-commentators, <i>Consilia</i>	Decretalists->encyclopedic jurists	Coutumiers and statutes
1450–1550	Renaissance	Absolutism	Humanists	Councils, <i>Consilia</i>	Codification of custom, Reception
1550–1750	Early Modern	Absolute monarchy	Natural law	Papal bureaucracy, Handbooks	“Institutes” and statutes
1700–1900	Modern	Revolution	Pandectists, Historical School	Codification	Codification

D. JUSTINIAN'S INSTITUTES

J.I.1.1pr-1

Justice is the set and constant purpose which gives to every man his due. Jurisprudence is the knowledge of things divine and human, the science of the just and the unjust.

J.I.1.1.3-4

The precepts of the law are these: to live honestly, to injure no one, and to give every man his due. The study of the law consists of two branches, law public, and law private. The former relates to the welfare of the Roman State; the latter to the advantage of the individual citizen. Of private law then we may say that it is of threefold origin, being collected from the precepts of nature, from those of the law of nations, or from those of the civil law of Rome.

J.I.1.2.12

The whole of the law which we observe relates either to persons, or to things, or to actions. And first let us speak of persons: for it is useless to know the law without knowing the persons for whose sake it was established.

J.I.2.1pr

In the preceding book we have expounded the law of Persons: now let us proceed to the law of Things. Of these some admit of private ownership, while others, it is held, cannot belong to individuals: for some things are by natural law common to all, some are public, some belong to a society or corporation, and some belong to no one. But most things belong to individuals, being acquired by various titles, as will appear from what follows.

J.I.2.6pr

It was a rule of the civil law that if a man in good faith bought a thing, or received it by way of gift, or on any other lawful ground, from a person who was not its owner, but whom he believed to be such, he should acquire it by usucapion—if a movable, by one year's possession, and by two years' possession if an immovable, though in this case only if it were in Italian soil;—the reason of the rule being the inexpediency of allowing ownership to be long unascertained. The ancients thus considered that the periods mentioned were sufficient to enable owners to look after their property; but we have arrived at a better opinion, in order to save people from being over-quickly defrauded of their own, and to prevent the benefit of this institution from being confined to only a certain part of the empire. We have consequently published a constitution on the subject, enacting that the period of usucapion for movables shall be three years, and that ownership of immovables shall be acquired by long possession—possession, that is to say, for ten years, if both parties dwell in the same province, and for twenty years if in different provinces; and things may in these modes be acquired in full ownership, provided the possession commences on a lawful ground, not only in Italy but in every land subject to our sway.

J.I.2.9.6

So much at present concerning the modes of acquiring rights over single things: for direct and fiduciary bequests, which are also among such modes, will find a more suitable place in a later portion of our treatise. We proceed therefore to the titles whereby an aggregate of rights is acquired. If you become the successors, civil or praetorian, of a person deceased, or adopt an independent person by adrogation, or become assignees of a deceased's estate in order to secure their liberty to slaves manumitted by his will, the whole estate of those persons is transferred to you in an aggregate mass.

J.I.3.1.13

Let us now pass on to obligations. An obligation is a legal bond, with which we are bound by a necessity of performing some act according to the laws of our State. The leading division of obligations is into two kinds, civil and praetorian. Those obligations are civil which are established by statute, or at least are sanctioned by the civil law; those are praetorian which the praetor has established by his own jurisdiction, and which are also called honorary. By another division they are arranged in four classes, contractual, quasi-contractual, delictal, and quasi-delictal. And, first, we must examine those which are contractual,

and which again fall into four species, for contract is concluded either by delivery, by a form of words, by writing, or by consent: each of which we will treat in detail.

J.I.4.1pr

Having treated in the preceding Book of contractual and quasi-contractual obligations, it remains to inquire into obligations arising from delict. The former, as we remarked in the proper place, are divided into four kinds; but of these latter there is but one kind, for, like obligations arising from real contracts, they all originate in some act, that is to say, in the delict itself, such as a theft, a robbery, wrongful damage, or injury.

J.I. 4.6pr

The subject of actions still remains for discussion. An action is nothing else than the right of suing before a judge for what is due to one.