LEGAL HISTORY: ROMAN LAW

Professor Donahue

December 1: 12:00 p.m. — December 17: 4:30 p.m.

GENERAL INSTRUCTIONS

This is a take-home exam. It will be available on December 1 at 12:00 p.m. on the course website http://www.law.harvard.edu/faculty/cdonahue/courses/rlaw/lectures/index.html#exam. The exam, together with the final draft of your short paper, should be sent by email to rspang@law.harvard.edu. Please note that this is different from the usual procedure. You do not turn in the exam to the Registrar's Office. The Registrar's Office regards this exam as a paper not as an exam; hence, you should put your name on the exam not your student ID number.

You may not discuss this exam with anyone between 12:00 p.m. on December 1 and 4:30 p.m. on December 17. If you have not downloaded the exam, you may, of course, discuss the course with anyone who has also not downloaded the exam.

This is an open-book exam. You may use any materials that you want. The exam is not, however, intended to be an exercise in the use of the library. You should be able to do it with just the materials assigned for the course and your class notes.

There is no limit on words, but conciseness will be rewarded and verbosity penalized. One way to be concise is not to recite at length material that was contained in the lectures. By and large, I know that material, and in a take-home exam we can assume that you do too. What I am interested in is your ideas, how you put the material together. If you find yourself writing much more than five or six double-spaced pages on either question, you're probably writing too much.

There are two questions on the exam. The first of which poses a problem, which is to be answered in traditional law-school fashion. The second calls for a general essay.

Technically, the two questions count equally and the paper counts equally with each question. In fact, ties get broken on the basis of the paper. Also, despite the fact that I say that Question I is harder than it looks, Question II actually takes more thought. It is easy to come up with vacuous generalities like Kiralfy's; it is much harder to say something convincing at that level of generality.

ROMAN LAW: QUESTION I

Marcus died on the Ides of March in the year 160 A.D. in Rome. His ashes were placed in the family tomb, and his testament was opened in the presence of his family: his wife, Cornelia, his daughter, Prima, his son, Secundus, his only domestic slave, Alexander, and his pet ox Bovinus. The pertinent parts of the testament read as follows:

> Let Prima be my heir. Let all others be disinherited. My slave Alexander and my ox Bovinus I give and legate to my son Secundus. Let Prima be bound to convey Alexander and Bovinus to him. Let Secundus manumit Alexander in his will.

Prima was not too pleased with this arrangement. She had gotten the better part of the estate, but she wanted Bovinus to be hers as well. Fearing that Prima would abscond with Bovinus, Secundus sends Alexander to the market with Bovinus with instructions to sell Bovinus to Secundus' friend Quintus Julius. Alexander finds a man named Quintus, but the wrong Quintus [Quintus Junius not Quintus Julius] and sells him Bovinus. Sensing that something is seriously wrong, Bovinus gores Quintus and races back home to Cornelia who refuses to release him to either child until they all consult you, a patented jurist. While they are consulting you Quintus Junius arrives, his ribs bandaged, and his head ringing from an old war injury which has been revived as a result of his encounter with Bovinus. He wants to sue everyone in sight.

(l) Who has what actions against whom for what? If facts are missing, explain why they are needed and outline the results under any reasonable assumptions. (Do not forget the law of persons.)

(2) Assume (for the purposes of this question only) that Secundus takes title to Alexander under the will. If Secundus dies without manumitting Alexander either during his life or in his tesstament, is there anything Alexander can do to become free?

(3) How much of "the law" that you outlined in your previous answers was in existence at the time of the XII Tables? Be sure to consider the evidence for each proposition.

(Note: This question is a bit harder than it may look. I wrote a sample answer to it, and it took five single-spaced pages. You can probably take less space because I traced out the possibility that Marcus' testament was void (assuming that the necessary formalities were complied with, why might it be void?) and that it was not (under the same assumptions, why might it not be?). If you take one of the forks, you can probably get it all in in 5–6 double-spaced pages. I also supported all my statements of law with citations, mostly to Gaius. You don't have to do that, but if you do and get something wrong or questionable, I can at least see how you might have gotten it wrong.)

CONTINUED ON NEXT PAGE

QUESTION II

Consider the following quotation from "English Law" by A.K.R. Kiralfy in *An Introduction to Legal Systems* 159 (D. Derrett ed. 1968):

> Every legal system essentially corresponds to practical demands, but the English common law is particularly responsive to the pressures of daily life through its lack of any broad rigid framework. It is a truism to say that it is a pragmatic system, like most Anglo-Saxon institutions, rather than an abstract, intellectually satisfying artifact. Dislike of "theory" is not based on a reluctance to understand and accept the reasons for one's own actions, but rather on an instinctive distrust of the broad generalisation which is felt to force subtle and complicated relationships on to a Procrustean bed of oversimplification. The English legal system is also generally described as "inductive" (as contrasted with the "deductive" systems), *i.e.*, gradually arriving at a rule from a consideration of numerous particular instances, as contrasted with the subsumption of situations under one or other of a limited number of unchanging and sometimes unchangeable prescriptions. . . .
>
> The great American jurist, Holmes, has said that the life of the law is not logic but experience. This is bred in the bone of 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. . . .

At the time when Professor Kiralfy wrote these generalizations about English law were commonplaces. They were intended to contrast English law with Roman law and the Continental European legal tradition more generally. Today, we doubt that Kiralfy and scholars of his generation got it quite right about English law (and, by implication, the Anglo-American legal tradition generally). That is not, however, your principal task, though you may say something about it if you want to. Your principal task is to ask whether these generalizations about English law might, in fact, be true of Roman law (without getting into the question about what happened to the Roman legal tradition after Justinian; that's the topic of another course). To what extent are they untrue? Illustrate with *specific* examples. Be sure to consider whether we need to change the generalizations to fit the different periods of Roman law from the XII Tables to Justinian.

THE END