

A COMMON LANGUAGE OF WORLD JURISPRUDENCE

TEACHING ROMAN LAW IN TWENTY HOURS

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NEARLY all American writers who have dealt with the problem of Roman-law teaching have supported its advancement in American law schools.¹ This unanimity, however, cannot be fully explained with a lack of opposition, but is partly due to the near-extinction of this teaching which has made it seem no longer worth a fight.

No attempt will be made to convince the reader that henceforth a knowledge of Roman law should be required of all American law students as an indispensable part of their education. The obvious discrepancy between endeavor and result has probably contributed to the current disinclination toward Roman law.² The purpose of this paper is to show that a short

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¹ The following books and articles whose authors favor the teaching of Roman law will be cited by the names of their authors: Auld, *Roman Law in Canadian Law Schools*, 11 *Can. B. Rev.* 530 (1933); Breen, *Need for the Roman Law in the Law-School Curriculum*, 23 *Ore. L. Rev.* 182 (1944); Buckland and McNair, *Roman Law and Common Law* (1936); Cassidy, *The Teaching and Studying of Roman Law in the United States*, 19 *Geo. L. J.* 297 (1931); Dicey, *The Extension of Law Teaching at Oxford*, 24 *Harv. L. Rev.* 1 (1910); Emmott, *Legal Education in England*, 54 *Alb. L. J.* 181 (1896); Foster, *The Study of Roman Law*, 7 *Yale L. J.* 207 (1898); Hanbury, *The Place of Roman Law in the Teaching of Law To-Day*, *J. Soc. Pub. Teach. of Law* 14 (1931); Hewart, *The Study of Roman Law, an Address*, 5 *Can. B. Rev.* 564 (1927); Jolowicz, *The Teaching of Roman Law*, *J. Soc. Pub. Teach. of Law* 22 (1926); Lee, *The Place of Roman Law in Legal Education*, 1 *Can. B. Rev.* 132 (1923); Leonhard, *American Remembrances of a German Teacher of Roman Law*, 18 *Yale L. J.* 583 (1909); Jones, *The Problem of the Law School*, 1 *Calif. L. Rev.* 1, 9 (1912); Lefroy, *Rome and Law*, 20 *Harv. L. Rev.* 606 (1907); Lobingier, *The Value and Place of Roman Law in the Technical Curriculum*, 49 *Am. L. Rev.* 349 (1915); Maine, *Roman Law and Legal Education, in Village-Communities in the East and West* 330 (3d ed. 1876); Marshall, *Roman Law: Its Study in England*, 26 *Law Mag. & Rev.* 288 (1901); McIlwain, *Legal History in American Colleges*, 7 *Am. L. Sch. Rev.* 1119 (1934); Pincoffs, *The Object and Value of the Study of Roman Law*, 15 *Am. L. Rev.* 555 (1881); Ramage, *The Value of Roman Law*, 39 *Am. L. Reg.* 280 (1900); Ramos, *The Roman Law in the Philippines*, 9 *Phil. L. J.* 185 (1929); Russell, *A Plea for the Study of Roman Law*, 2 *Intercoll. L. J.* 1 (1892); Sherman, *Roman Law in the Modern World* (3d ed. 1937); Sherman, *The Value of Roman Law to the American Lawyer of Today*, 60 *U. of Pa. L. Rev.* 194 (1911); Smith, *Roman Law in American Law Schools*, 36 *Am. L. Reg. (N.S.)* 175 (1897); Vanderbilt, *Law School Study after the War*, 22 *Can. B. Rev.* 68, 80 (1944); Notes, *The Study of Roman Law*, 6 *Alb. L. J.* 245 (1872), *The Study of Roman Law*, 51 *N.J. L. J.* 232 (1928). But cf. Holmes, *The Path of the Law, Collected Legal Papers* 197 (1921), condemning the recommendation of Roman law teaching as "high among the unrealities."

² "Some of the American law schools have dropped Roman law altogether, others retain it as an optional luxury, and others, again, have relegated it to the preliminary 'college' course, where it struggles for existence among a host of elective courses." F.P.W., *Professors of*

discussion of Roman legal concepts as part of an introductory law course would be highly useful. Without detracting from the necessarily non-systematic training in the common law, such a discussion would acquaint the student with the elements of a consistent and simple legal system and, at the same time, with the common basis and language of most foreign laws.

This investigation will be limited to the curriculum of the average American law school. It can exclude, therefore, from its scope the teaching of Roman law as a living law³ (South Africa, British Guiana, and Ceylon in its so-called Roman-Dutch modification⁴), and as the historical basis of the civil-law systems (e.g., Louisiana, Continental Europe, Central and South America,⁵ Canon law,⁶ Scotland,⁷ Quebec,⁸ the Philippines,⁹ and

Roman Law, Old Style and New Style, 11 J. Comp. Leg. (3d Ser.) 273 (1929). See also Reed, Present-Day Law Schools in the United States and Canada 559 (1928); Cassidy, *supra*, note 1, at 297 ff.; F.P.W., The Teaching of Roman Law in the United States, 13 J. Comp. Leg. (3d Ser.) 133 (1931).

Yale College under Ezra Stiles seems to have been the first American school to teach Roman law. The classic period of such teaching was, however, the middle of the nineteenth century, when Kent and Story had established it by their writings, and when Harvard and Oxford ratified another "reception" of the Roman law. See Cassidy, *supra*, note 1, at 298 ff.; Sherman, The Nineteenth Century Revival of Roman Law Study in England and America, 23 Green Bag 624 (1911). In 1895 eight in fifty-six law schools taught Roman law. Dolan, The Roman Law in Legal Education, 51 Alb. L. J. 183 (1895). Even a few decades ago, many writers still expected Roman-law teaching to grow in this country. See, e.g., Smith, Roman Law in American Law Schools, 36 Am. L. Reg. (N.S.) 175 (1897); Sherman, *supra*, note 1 at 197; Leonhard, *supra*, note 1, at 583. Kansas still requires knowledge of Roman law for its bar examination. Kansas, Gen Stat. § 7-123, Rule VI (1935).

³ Until 1900 Roman law in its so-called "common law" modification was in force in most parts of Germany. See, e.g., Dernburg, *Pandekten* (1900). That National-Socialism has made the destruction of all vestiges of this tradition a prominent part of its program is significant perhaps for the ethical and philosophical value of Roman law. See Preuss, Germanic Law versus Roman Law in National Socialist Legal Theory, 16 J. Comp. Leg. (3d Ser.) 269 (1934); Breen, *supra*, note 1, at 185.

⁴ For South Africa see, e.g., Wille, A Comparison of English and South African Law, 59 S. Afr. L. J. 124 (1942); Lee, The Teaching of Roman-Dutch Law, J. Soc. Pub. Teach. of Law 31 (1929); Lee, Roman-Dutch Law in South Africa, 40 L. Q. Rev. 61 (1924); Van Leeuwen, Commentaries on Roman-Dutch Law (2d ed. Decker, 1921); Wessels, The Future of Roman-Dutch Law in South Africa, 37 S. Afr. L. J. 265 (1920); Lee, The History of the Roman-Dutch Law, 10 J. Comp. Leg. (N.S.) 261 (1909); Bisschop, Modern Roman-Dutch Law, 24 L. Q. Rev. 157, 170 (1908); J.W.W., Notes on the History and Development of Roman-Dutch Law, 20 S. Afr. L. J. 23, 111, 224, 343 (1903); J. F. v. O., Some Remarks on the Study of Roman-Dutch Law, 10 S. Afr. L. J. 205 (1893). For Roman-Dutch law in other jurisdictions see, e.g., Bisschop, *supra*, at 157, 165; Hewart, *supra*, note 1, at 567.

⁵ Taylor, The Jurisprudence of Latin America: The Fusion of Roman and English Law in the New World, 1 Va. L. Rev. 1 (1913); Knowles, A Guide to South American Law, 1 J. Comp. Leg. (3d Ser.) 95 (1919); Lobingier, The Revival of Roman Law, 5 Corn. L. Q. 430 (1920); Trujillo Arrojo, *Lecciones de derecho romano, comparado con la legislación civil y procesal colombiana* (4th ed., 1938); Kirchberger, The Significance of Roman Law for the Americas and

the Canal Zone¹⁰). Nor is this paper concerned with the optional courses offered by a few great law schools.

Three main functions are claimed for Roman-law teaching by its American advocates: promotion of the historical understanding of the common law; preparation for the study of legal philosophy as well as of comparative and international law; and "methodological" training.

Acquaintance with the Roman law has been said to be as indispensable to the lawyer as is the knowledge of history to everybody.¹¹ But this claim, justified as it is where Roman law is taught as the actual or historical source of a living law, has lost much of its persuasive force elsewhere, since the abandonment of the study of law as a "science."¹² Moreover, the significance of the Roman law for the historical interpretation of common-law institutions¹³ has been found to be steadily decreasing¹⁴ and

Its Importance to Inter-American Relations, [1944] *Wis. L. Rev.* 249 (1944). The Roman law has also decisively influenced the formation of Mohammedan law (see Ramos, *supra*, note 1, at 186; Ion, *Roman Law and Mohammedan Jurisprudence*, 6 *Mich. L. Rev.* 44, 197, 371 [1907-8]) and Hebrew law (see Daube, *The Civil Law of the Mishnah: The Arrangement of the Three Gates*, 18 *Tul. L. Rev.* 351 [1944]). See also Gsovski, *Roman Law and the Polish Jurists*, 1 *Seminar* 74 (1943); Hermesdorf, *De vorhouding van Romeinsch tot oud vaderlandsch recht in geschiedinis en academische opleiding* (1939); Ciccaglione, *Il diritto romano nelle consuetudini delle città di Sicilia*, in *Mélanges Fitting*, vol. 1, p. 231 (1907); Dobinović, *Vestiges de legislation byzantine á Kotor* (1932); Bläse, *Bedeutung und Geltung des römischen Privatrechts in den baltischen Gebieten*, *Leip. Rechtsw. Stud.*, vol. 99 (1936).

⁶ See O'Connor, *The Origin and Development of Canon Law*, 4 *Jurist* 54 (1944); Roelker, *The Concept of Invalidating Laws*, 3 *Jurist* 32 (1943); Cicognani, *Canon Law* 118, 131 (1934).

⁷ See Gondy, *Roman Law, North and South of the Tweed* (1894); Note, *the Romanization of Scottish Law*, 22 *B. U. L. Rev.* 581 (1942); Muirhead, *Roman Law* (1937); Miller, *The Place of Scotland in the History of Roman Law*, 37 *Jur. Rev.* 162 (1925).

⁸ See, e.g., Mignault, *Le Code Civil de la Province de Québec et son Interprétation*, 1 *U. of Toronto L. J.* 104 (1935). In Michigan and Wisconsin the Custom of Paris (based on Roman laws) was in force until 1810. See Beach, *The Civil Law in America* (1903).

⁹ See Ramos, *supra*, note 1, at 185, 187; Gamboa, *An Introduction to Philippine Law* 59 (1939); Abreu, *The Blending of the Anglo-American Common Law with the Spanish Civil Law in the Philippine Islands*, 46 *Chicago Legal News* 408 (1914).

¹⁰ See Note, *The "Source of Law" in the Panama Canal Zone*, 17 *Mich. L. Rev.* 497 (1919).

¹¹ Thompson, *The Study of Roman Law*, 40 *Can. L. T.* 189 (1920). See also Allen, *Law in the Making*, 160 (1927); Sherman, *supra*, note 1, at 199; Russell, *supra*, note 1, at 153; Hanbury, *supra*, note 1, at 16, 19.

¹² See, e.g., Smith, *supra*, note 2, at 182; Auld, *supra*, note 1, at 532, 534. Regarding the "science" argument in general, see the writer's *The American Casebook: "Cases and Materials,"* 32 *Geo. L. J.* 224, 226, 230 (1944).

¹³ See, e.g., Cocke, *A Treatise on the Common and Civil Law, as Embraced in the Jurisprudence of the United States* (1871); Plucknett, *The Relations between Roman Law and*

[Footnote 13 continued on following page]

¹⁴ See Auld, *supra*, note 1; Harrison, *On Jurisprudence and the Conflict of Laws* 87 (1919). But cf. Witmer, *Why Study the Civil Law*, 8 *Marq. L. Rev.* 93 (1924), who stresses the increase in the number of references to civil-law sources in American decisions.

in any event to be greatly exceeded by the importance of English and American source material which cannot now be taught effectively for lack of time.¹⁵ And finally, it has been pointed out that with the development of the theory of interpolations¹⁶ the Roman law itself has become a subject of speculation and uncertain hypothesis. No wonder, therefore, that the study of Roman law, both in civil- and common-law countries,¹⁷ has become tantamount to "mastering a set of technicalities more difficult and less understood than our own, and studying another course of history by which even more than our own the Roman law must be explained."¹⁸

Similar objections may be raised against the study of Roman sources as an introduction to international law¹⁹ or legal philosophy.²⁰ Nor should comparative law be taught as Roman law, in view of the far-reaching assimilation of Roman elements by modern legal institutions which enables "the ordinary student [to] get the results of the historical process

English Common Law Down to the Sixteenth Century: A General Survey, 3 U. of Toronto L. J. 24 (1939); Scrutton, *The Influence of the Roman Law on the Law of England* (1885); Gueterbock, *Bracton and His Relation to the Roman Law* (1866); Ramos, *supra*, note 1, at 185, 188; Lobingier, *supra*, note 1, at 352; Woodbine, *The Roman Element in Bracton*, 31 Yale L. J. 827 (1922); Sherman, *Salient Features of the Reception of Roman Law into the Common Law of England and America*, 8 B. U. L. Rev. 183 (1928); Lobingier, *The Modern Expansion of the Roman Law*, 6 U. of Can. L. Rev. 152 (1932); Pringsheim, *The Inner Relationship between English and Roman Law*, 5 Camb. L. J. 347 (1935); Burdick, *The Influence of Roman Law upon English and American Law*, 3 J.B.A. Kan. 181, 306 (1935); Friedmann, *A Re-examination of the Relations between English, American and Continental Jurisprudence*, 20 Can. B. Rev. 175 (1942); Dorsey, *Roman Sources of Some English Principles of Equity and Common Law Rules*, 8 Am. L. Sch. Rev. 1233 (1938). For the converse influence of Anglo-American law on the development of the civil law see Grünhut, *English Law and the History of Continental Legislation*, 20 J. Comp. Leg. (3d Ser.) 165 (1938).

¹⁵ See, e.g., Borchard, *Some Lessons from the Civil Law*, 64 U. of Pa. L. Rev. 570, 582 (1916); Chafee, book review, 48 Harv. L. Rev. 523, 532 (1935); Lee, *supra*, note 1, at 134.

¹⁶ See F. P. W., *The Teaching of Roman Law, etc.*, *supra*, note 2; F. P. W., *Professors of Roman Law, etc.*, *supra*, note 2, at 274.

¹⁷ See Gutteridge, *Comparative Law as a Factor in English Legal Education*, 23 J. Comp. Legisl. (3d Ser.) 130 (1941); Henry, *The Teaching of Law at Oxford*, 5 Am. L. Sch. Rev. 135 (1923); F. P. W., *Professors of Roman Law, etc.*, *supra*, note 2; Emmott, *supra*, note 1; Marshall, *supra*, note 1; Wenger, *Der Heutige Stand der Römischen Rechtswissenschaft* (Munich, 1928), cited by F. P. W., *The Teaching of Roman Law, etc.*, *supra*, note 2; Lee, *supra*, note 1, at 134.

¹⁸ Holmes, *The Path of the Law*, *Collected Legal Papers* 197 (1921).

¹⁹ See Maine, *supra*, note 1, at 351; Lee, *supra*, note 1, at 136; Hewart, *supra*, note 1, at 566; Sherman, *supra*, note 1, at 201; Russell, *supra*, note 1, at 5; Hanbury, *supra*, note 1, at 17; 1 Austin, *Jurisprudence*, § 378 (1832).

²⁰ During the eighteenth century Roman law seems to have been studied in this country as the law of reason. See Cassidy, *supra*, note 1. See also, note, *On the Roman Civil Law*, 3 L. Rev. and Q. J. of Br. and For. Juris. 85, 89 (1846); Gilmore, *Argument from Roman law in Political Thought, 1200-1600* (1941); Sherman, *supra*, note 1, at 195; Maine, *supra*, note 1, at 337.

without going back to its beginnings."²¹ Acquaintance with modern civil-law systems will thus more aptly be gained by the study of any living European or Latin-American law, particularly since Roman law was never codified in a modern sense, and is, therefore, in many respects more similar to common-law sources than to a civil code.²²

Occasionally, advocates of the Roman law will also mention its unique value for the students' "methodological" training, and recommend the study of this "monument to the Roman genius of organization"²³ as a "legal propaedeutic"²⁴ in the first year of law school²⁵ or even in college.²⁶ Since, however, "methodological" training has always been considered as a mere by-product of Roman-law courses serving other ends, such as the study of legal history or of comparative law, no teaching technique has ever been devised to develop the methodological merits of Roman-law teaching. And since the historical texts²⁷ used by the classical teaching technique are, of course, not teachable as a "system" and will, at best, impart a "working knowledge of Roman law,"²⁸ the "methodological"

²¹ Auld, *supra*, note 1, at 531. But see, e.g., Burdick's Report on Roman-law teaching in Kansas, as quoted by Cassidy, *supra*, note 1, at 303; Auld, 532; Smith, *Problems of Roman Legal History*, 4 *Col. L. Rev.* 523, 524 (1904); Vanderbilt, *supra*, note 1, at 81; Koschenbahr-Lysowski, *Le rôle de droit Romain pour le droit comparé*, in Lambert, *Introduction à l'étude du droit comparé* vol. I, p. 257 (1938).

²² See Buckland and McNair, *supra*, note 1, at p. xii (stressing the casuistic character of the Roman law); Jolowicz, *Academic Elements in Roman Law*, 48 *L. Q. Rev.* 171 (1932); Deák, *The Place of the "Case" in the Common and the Civil Law*, 8 *Tul. L. Rev.* 337 (1934); Leonhard, *The Vocation of America for the Science of Roman Law*, 26 *Harv. L. Rev.* 389 (1913); Rheinstein, *Common Law and Civil Law, A Comparison*, 12 *Pa. B. Ass. Q.* 7 (1940).

²³ Witmer, *supra*, note 14, at 94. See also Lefroy, *supra*, note 1.

²⁴ Lee, *supra*, note 1, at 135; Lobingier, *supra*, note 1, at 371. See also Smith, *supra*, note 1, at 177.

²⁵ See Lobingier, *supra*, note 1, at 371; Hanbury, *supra*, note 1, at 21 f. (recommending first-year Roman law as an antidote to the case method). But cf., e.g., Redlich, *The Common Law and the Case Method in American University Law Schools* 42 ff. (1914); Borchard, *supra*, note 15, at 582; Vanderbilt, *Law School Study after the War*, 20 *N.Y.U.L.Q. Rev.* 146, 160, 161 (1944); Breen, *supra*, note 1, recommending a Roman-law course at a later stage. The writer's experiences with the latter system in England and Germany have not been too favorable. The Austrian program providing for Roman-law study both at the beginning and at the end of the law course is obviously indefensible.

²⁶ See Lee, *supra*, note 1, at 139.

²⁷ The digest as teaching material has also been criticized as consisting of decisions rather than of briefs, and thus furnishing a better training for the judge than for the attorney. Auld, *supra*, note 1, at 531. Moreover, any attempt to go back to the Latin original will be rejected as an idea from which this country is "divided by three thousand miles of stormy ocean traversed by our illiterate forefathers." Chafee, book review, 48 *Harv. L. Rev.* 523, 531 (1935). Reading of the sources in Latin is urged by Hanbury, *supra*, note 1, at 23; Lee, *supra*, note 1, at 138; Jolowicz, *supra*, note 1, at 24.

²⁸ Kocourek, as quoted by Cassidy, *supra*, note 1, at 304. See also Auld, *supra*, note 1, at 537; Buckland, as quoted *ibid.* at 305, regarding the teaching of Roman law at Cambridge

argument, which, however formulated, will stress the "systematic" character of the Roman law, has never been put to the test.

The question, whether a course in Roman law could and should be commended for its methodological value, will, therefore, be investigated in this paper with reference to a hypothetical teaching technique, rather than to past experience—a technique which would be adopted primarily to the development of such value. This investigation presupposes the determination of the desirable scope of methodological education.

The common law is not conceivable and, therefore, not teachable as a conceptual "system." For this very reason it has become superior to any civil law under which judges, teachers, and writers have been compelled, over and again, to renew a hopeless fight against such rules of law as owe their recognition to nothing but temptingly systematic concepts.²⁹ Efforts to "systematize" common-law learning will and should, therefore, be only partly successful. And, since good textbooks are few and necessarily voluminous, "systematic" study will in general be limited to misleading "dope sheets," "canned briefs," and "cram books";³⁰ and the digest system of American law, unsatisfactory as it may be in many respects, will remain its only reliable guide.

Thus (while the resulting "crisis" of first-term law teaching has been frequently described and lamented³¹) the student's initial confusion is justly considered as a valuable and, indeed, indispensable first step on the road to a full understanding of the nature of the common law. On the other hand, the need for a "system" will always appear at later stages of the course in various attempts to substitute a rounded body of knowledge for a conglomeration of disconnected pieces of information.³² It is here, in this search for a systematic comprehension of the law, that common-law teaching must necessarily fail when pursuing its primary task of training the common lawyer; and it is here that Roman-law teaching would, if submitted, fulfil a vital function.

and Oxford universities: "The students are required to have a general knowledge of the private law [Roman] as set forth in the ordinary manuals, and of the texts of Gaius and Justinian. . . . They are also required to study a special title in the Digest in the original." See also *supra*, note 18.

²⁹ This tendency has often been attacked as "jurisprudence of concepts" ("Begriffsjurisprudenz").

³⁰ See the writer's *The American Casebook: "Cases and Materials,"* 32 *Geo. L. J.* 224, 231, 234, n. 61 (1944).

³¹ See Moorhead, *A Student's View—and Later*, 43 *Col. L. Rev.* 466 (1943); and the writer's *The American Casebook: "Cases and Materials,"* 32 *Geo. L. J.* 224, 232 (1944).

³² See, e.g., Vanderbilt, *Report of the Dean of the School of Law for the Year 1943-1944.*

Roman legal concepts are meaningful even if isolated from particular rules and may be used in varying relationships like the elements of an algebraic system. In their simplicity, consistency, and completeness, they are capable of embracing even many an irregular growth of the common law; and, by their remoteness and universality,³³ they are, as teaching tools, superior to those of any modern civil law. Moreover, Roman concepts, used as a "shorthand of jurisprudence,"³⁴ can serve to abbreviate the language of judicial opinions and, most important, can furnish a badly needed "legislative dialect."³⁵

These arguments for Roman-law teaching have found their classic expression in a celebrated essay by Sir Henry Maine, who, after a critical analysis of English legal usage, recommends that terminology be made a "distinct department of legal education."³⁶ In this education Maine sees the following "uses of the Roman jurisprudence to the student of Legislative and Legal Expression":

First, it serves him as a great model. . . . Next, it is the actual source of what has been here called the popular part of our legal dialect; a host of words and phrases of which "Obligation," "Convention," "Contract," "Consent," "Possession," and "Prescription" are only a few samples, are employed in it with . . . precision. . . . Lastly, the Roman jurisprudence throws into a definite and concise form of words a variety of legal conceptions which are necessarily realized by English lawyers, but which at present are expressed differently by different authorities, and always in vague and general language.³⁷

In fact, Roman legal terminology could, in many cases, aid in clarifying certain common-law institutions which now resist a consistent judicial analysis because of the lack of a consistent terminology. Thus, substitution of the doctrine of *negotiorum gestio* for the casual conglomeration of rules regarding the "voluntary" agent could assist the courts in their attempts to formulate a theory of the principal's liability for benefits conferred upon him against or without his volition.³⁸ The civil-law theory and

³³ "Only by virtue of this universality was Roman law able to penetrate the closed circles of natural law." Burns-Lenel, *Geschichte und Quellen des Römischen Rechts*, 1 Holtzendorff's *Enzyklopaedie der Rechtswissenschaft*, 305 ff. (7th ed.; translated Auld, *supra*, note 1, at 533).

³⁴ Hanbury, *supra*, note 1, at 17.

³⁵ Dolan, *supra*, note 2, at 187. See also Harrison, *op. cit. supra*, note 14, at 97. As to the value of a Roman terminology for future codificatory attempts, see Sherman, *supra*, note 1, at 195; Russell, *supra*, note 1, at 5; Maine, *supra*, note 1, at 361 ff. On the need for training of law students in the proper use of legal concepts, and the usefulness of Roman law in this respect, see also Rheinstein, *Education for legal craftsmans life*, 30 *Iowa L. Rev.* 408, 420 (1945).

³⁶ Maine, *supra*, note 1, at 349 f.

³⁷ *Ibid.*

³⁸ See Heilman, *The Rights of the Vountary Agent against his Principal in Roman Law and in Anglo-American Law*, 4 *Tenn. L. Rev.* 34, and 76 (1925).

terminology of specification may help in drawing the line of traceable property which the courts have so long been groping for.³⁹ Similarly, the Roman system of *condictiones*, which has been partly adopted in the advancing doctrine of unjust enrichment,⁴⁰ and the theories of impossibility and of *conditio* and *modus* may be found capable of filling gaps in the common-law structure which have long been felt.⁴¹ Another persuasive instance of a common-law problem which could probably be clarified with the aid of Roman legal concepts has been described as follows:

It is curious that our law, like our language, seems to have experienced more difficulty than the Roman system did in grasping the notion of *fungibility*. . . . Even to this day "we lend books and halfcrowns to *borrowers*." . . . We distinguish clearly between loan of money and gratuitous loan of specific goods, but where a fungible article, such as corn, is handed over on the terms that an equal quantity of like quality in its original or in an altered form shall be restored, we appear to regard the transaction as a sale (or at any rate as a transfer of property for value) and not bailment. . . . The Roman law distinguished clearly between *mutuum*, loan not for use but for consumption, the debtor being bound to return not the same thing, e.g., the same money, corn, or wine, but the same quantity of things of that kind and quality, and loan for use, the thing being returned, which, later, was recognized as a "real" contract and called *commodatum*. There is no sign that the two were ever confused.⁴²

If Roman-law teaching is to receive a place in the curriculum, the time to be allotted to it must be carefully considered in view of the aim pursued. Even the present teaching schemes with their ambitious programs must place the emphasis upon the law of "things" and obligations, while other fields, such as the law of testaments, are merely noticed, and the law of personal status and of family relations "relegated to the limbo of legal antiquities."⁴³ A Roman-law course, pursuing primarily pedagogical purposes, could and should, it is submitted, except for a general introductory survey of the whole field, be further limited to the law of obligations. Such a course, which may well be compressed into twenty class hours, could perhaps be based on the following outline:

³⁹ See Lorenzen, *Specification in the Civil Law*, 35 *Yale L.J.* 28 (1925).

⁴⁰ See Radin, *The Roman Law of Quasi-Contract*, 23 *Va. L. Rev.* 241 (1937).

⁴¹ See Buckland and McNair, *op. cit.*, *supra*, note 1, at 178, 187. See also Note, *Culpa in Contrahendo* in German, French, and Louisiana Law, 15 *Tul. L. Rev.* 87 (1940); Shain, *Presumptions under the Common and the Civil Law*, 18 *So. Cal. L. Rev.* 91 (1944).

⁴² Buckland and McNair, *op. cit.*, *supra*, note 1, at 209. For another important example ("obligatory" and "real" rights) see Kirchberger, *supra*, note 5, at 271.

⁴³ Auld, *supra*, note 1, at 535. For the selection of topics see also, e.g., Gutteridge, *The Teaching of International and Comparative Law*, 23 *J. Comp. Legisl.* (3d Ser.) 60 (1941); Rheinstein, *Teaching Comparative Law*, 5 *U. of Chi. L. Rev.* 615, 624 (1938) (as to comparative law in general).

- A. History (2 hours)
1. Rome: jus Quiritium; twelve tables (mancipatio and nexum); period of interpretation (in jure cessio, fiducia); jus civile and jus gentium (bona fide transactions); jus civile and jus honorarium, legisactio and Pretorian edict; Edictum Hadriani; jurisprudentes, jus respondendi; imperial decrees and constitutiones, senatus-consulta; the codification, Corpus Juris Justiniani (institutiones, digesta, codex)
 2. Post-Rome: Leges Romanae; Glossators and Post-Glossators; Commentators; Canon Law; "reception of Roman law in Germany"; Chancery in England; Kent and Story
- B. Elementary Concepts (one hour)
- Public and private law; custom and statute; dispositive and cogent law; strict and equitable law; interpretation and construction.
- C. The System of the Roman Law (three hours)
1. General part: types of legal transactions (executed and executory, mortis causa and inter vivos); conditiones and modus.
 2. Law of the person (juristic and natural person, capacity, vicarious relations) and of the family (obsolete).
 3. Intestacy and wills (obsolete)
 4. Law of the res:
 - a) Classifications: movables and immovables, res nullius, consumptibles and non-consumptibles, fungibles and non-fungibles, divisibles and indivisibles, appurtenances, fructus (naturales and civiles); derivative and original rights
 - b) Possession and ownership:

Modes of acquisition and protection (occupation, prescription, accession, specification, transfer, fructus, rei vindicatio)
 - c) Rights in another's property:

Servitutes (usufructus and usus), mortgage and pledge, hypotheca
 5. Law of Obligations, infra
- D. The Law of Obligations (14 hours)
1. Types of obligations (2 hours):

Species and genus; alternative, divisible, unilateral and bilateral, civil and natural obligations; damages (damnum emergens, lucrum cessans, fault and casus, vis major)
 2. Contracts (5 hours):
 - a) "Real" contracts (mutuum, commodatum, depositum, pignus, innominate contracts, e.g., exchange)
 - b) Verbal and literal contracts (obsolete)
 - c) Consensual contracts:
 - (1) emptio venditio (sale); warranty, risk
 - (2) locatio conductio (lease) operis and operarum
 - (3) societas (partnership)
 - (4) mandatum (agency)
 3. Quasi-contracts (2 hours)
 - a) Condictiones (unjust enrichment)
 - b) Negotiorum gestio ("voluntary agency")
 - c) Communio (tenancy in common)

4. Delicts (1 hour)
 - a) Furtum and rapina (theft)
 - b) Damnum injuria datum (injury to property)
 - c) Injuria (injury to the person) and dolus
5. Quasi-delicts (1 hour)

Judex qui litem suam facit; actio de effusis vel dejectis; innkeeper's liability; liability for animals
6. Transfer of obligations (1 hour)

Cession; vicarious liability
7. Termination of obligations (2 hours)
 - a) Ipso jure: contrary act, satisfaction, novation, subsequent impossibility
 - b) By exception: exceptiones pacti de non petendo, doli; setoff.

Obviously, the decisive test for the desirability of such or a similar course must be whether it would prove more valuable than that part of the introductory course which it would displace.⁴⁴

At present, a considerable portion of most introductory courses is devoted to a presentation of the "law in its generalized part."⁴⁵ While this phase of instruction, if limited to the common law, will easily turn into a collection of disconnected abstractions, which are neither correct nor systematic, it could, if based on Roman law concepts, present a consistent and workable system of legal terms. An introductory course on these concepts would, moreover, make the American lawyer familiar with a legal vernacular understood and, indeed, used by the lawyers of most countries, including those of Central and South America.

To sum up: a course in Roman law, which would be justifiable only as acquainting the student with "one of the greatest things in human history,"⁴⁶ may have to be rejected as one of "the luxuries of a liberal education."⁴⁷ But a course in Roman law, adapted to new aims, would, it is submitted, further legal progress in three ways: it would promote legal education by offering to the teacher a conceptual system of unique methodological value; it would promote legal practice by furnishing legislator, judge, and attorney with a precise tool of expression; and it would promote mutual understanding by acquainting the common lawyer with that ancient legal language which has long become the *lingua franca* of the jurisprudence of the world.⁴⁸

⁴⁴ See Chafee, *supra*, note 27, at 532.

⁴⁵ Holmes, *op. cit. supra*, note 18, at 195. As to another essential part of the introductory course, i.e., "the science of the judicial, the legislative and the administrative processes," see Vanderbilt, *Judicial Administration in the Law School Curriculum*, 27 *J. Am. Judic. Soc.* 179, 182 (1944).

⁴⁶ Lee, *supra*, note 1, at 136.

⁴⁷ McIlwain, *supra*, note 1, at 1121.

⁴⁸ Maine, *op. cit.*, *supra*, note 1, at 361. See also Lobingier, *supra*, note 1, at 370; Lee, *supra*, note 1, at 136; Hanbury, *supra*, note 1, at 17; Dolan, *supra*, note 2, at 187.