

ROMAN LAW IN AMERICAN LEGAL CULTURE

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I. INTRODUCTION

The history of American legal culture is little known to us today in spite of the fact that the past twenty years have seen a renaissance in the study of our legal history. I say this because there has been very little attention paid to the development of what I am here calling "legal culture."¹ American legal historians have focused primarily upon either the development of various doctrinal rules over time or they have examined the development and role of law in American society at its "grass-roots" levels, but there has been surprisingly little attention paid to the "high culture" of the law in the United States. I am borrowing this notion of high culture from the European literary historians, and by this term I refer to the development of an accepted body of work and concentration upon a specific universe of issues by an educated elite. Thus, in modern terms, our present legal high culture embodies the study of legal philosophy in its various forms rather than the study of case law and precedent. Legal philosophy is generally the preserve of academics,

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1. By "culture," I am referring to the nonpractice oriented but professional interests of lawyers. One of the most marked changes between the legal professional of the nineteenth century and that of the twentieth century is our own time's lack of interest in the law as a subject of study *apart from* its practical side. In part, this may well be due to the relegation of legal studies to a postgraduate, professional education. Anecdotally, it is my impression that very few lawyers read about law and the legal system in the course of their practices.

judges, and professional legal scholars rather than of practicing lawyers. At times, of course, high culture may have a profound impact upon the broader parameters of professional study. Thus, today much of the theoretical work on feminist legal theory is having a transformative effect upon the everyday workings of our legal system.² Other aspects of our present-day high legal culture may never have a serious impact upon everyday law. I doubt seriously that the brilliant analytic-philosophical work of H.L.A. Hart and Joseph Raz will ever have much effect upon or interest for most American lawyers.

Sadly, the study of the legal culture in the United States in the eighteenth and nineteenth centuries has been neglected by most mainstream American legal historians. Perry Miller and Robert Ferguson have done pioneering research, but both are literary rather than legal historians.³ This neglect is particularly troubling for those scholars of American legal history who are interested in the ways in which American lawyers of that period understood and were influenced by nontraditional materials such as religious works or other legal systems. My own work over the past decade has focused upon the influence of Roman and civil law upon the thinking of American lawyers and jurists during the eighteenth and nineteenth centuries. Inevitably I have been forced to consider the shape and extent of legal culture during this period, for Roman law was very seldom a part of the everyday law of the eighteenth and nineteenth centuries but was, however, an essential part of the legal high culture of this period.⁴

2. Some of the most interesting jurisprudential work being done in this country today is by feminists; for instance, the works of Professors Catherine A. MacKinnon, Patricia J. Williams, and Leslie Bender.

3. See generally ROBERT A. FERGUSON, *LAW & LETTERS IN AMERICAN CULTURE* (1984); PERRY MILLER, *THE LIFE OF THE MIND IN AMERICA FROM THE REVOLUTION TO THE CIVIL WAR* (1965) [hereinafter MILLER, *THE LIFE OF THE MIND*]. See also the works collected in *THE LEGAL MIND IN AMERICA FROM INDEPENDENCE TO THE CIVIL WAR* (Perry Miller ed., 1962) (providing a series of essays which portray the emergence, formulation, and inner divisions of the American legal mentality); *THE GLADSOME LIGHT OF JURISPRUDENCE* (Michael H. Hoeflich ed., 1988) (providing a collection of essays of legal literature from the eighteenth and nineteenth centuries).

4. See generally Michael H. Hoeflich, *Transatlantic Friendships & the German Influence on American Law in the First Half of the Nineteenth Century*, 35 AM. J. COMP. L. 599 (1987) [hereinafter Hoeflich, *Transatlantic Friendships*]; Michael H. Hoeflich, *John Austin and Joseph Story: Two Nineteenth Century Perspectives on the Utility of the Civil Law for the Common Lawyer*, 29 AM. J. LEGAL HIST. 36 (1985) [hereinafter Hoeflich, *John Austin and Joseph Story*]; Michael H. Hoeflich, *A Renaissance in Legal History?*, 1984 U. ILL. L. REV. 507; Michael H. Hoeflich, *Savigny & His Anglo-American Disciples*, 37 AM. J. COMP.

It was during the eighteenth and nineteenth centuries that legal high culture in the United States reached its apogee. The number of practicing lawyers (and not simply professional academics) who took a serious interest in legal philosophy and legal literature not specifically designed for pragmatic courtroom use was, I believe, higher in the nineteenth century than it is today. Many of the lawyers of this period considered themselves to be part of a philosophical and literary profession, one that was as focused upon the library as it was upon the court and the legislature. These were individuals who often could read languages other than English, who built large personal libraries, and who dedicated substantial amounts of time to the pursuit of nonrevenue-producing legal activities such as discussion groups and writing about law for general audiences.

Not surprisingly, for these individuals Roman and civil law were intriguing subjects for study and discussion. Roman and civil law were included as parts of the basic legal curriculum by the pioneers of legal education, such as David Hoffman, Joseph Story, and Daniel Mayes. The great law libraries of the period, those amassed by Chancellor Kent, Joseph Story, and Hugh Legaré, contained dozens of volumes on Roman and civil law. The great journals of the period, such as *The North American Review*, *The Southern Literary Messenger*, and *The Western Law Review*, contained numerous articles on these subjects.

As I have done research on this subject over the past decade, however, a number of important, and yet generally overlooked, sources and issues have come to my attention. This brief Article describes several of what I consider to be the most important of these issues. My goal is to further illuminate the influence of Roman law in the United States in the nineteenth century, as well as to begin to focus more attention on the general outlines of American legal high culture during this period.

II. SMALL CIRCLES OF FRIENDS

A. *The Boston Circle*

One of the most notable aspects of American high legal culture during the nineteenth century is the existence of small groups of active and highly literate individuals who shared an interest in jurisprudence and legal philosophy. Fred Konefsky

L. 17 (1989); Michael H. Hoeflich, *Edward Gibbon, Roman Lawyer*, AM. J. COMP. L. (1992) (forthcoming).

has already written about one such group centered at Boston during the first part of the century.⁵ Other such groups existed in New York, South Carolina, and New Orleans. As regards the study of Roman and civil law, each of these groups shared certain characteristics. Each consisted of individuals who had received high-level training beyond the normal apprenticeship system. Each was marked by individuals who had accumulated substantial libraries, often involving significant numbers of foreign volumes. Each had connections abroad, usually to Germany, where the most advanced work in Roman and civil law was being done, and to Scotland (long a center for southerners to obtain advanced legal training).⁶ Each of these groups was also affiliated with literary journals such as the *North American Review*, the *Southern Literary Messenger*, and the *Louisiana Law Review*.

The Boston-centered group was perhaps the most notable and sophisticated, no doubt because of its connection to Harvard. The members of this group, all of whom were interested in Roman and civil law, included individuals such as Joseph Story, John Pickering, and Simon Greenleaf. The appeal of Roman and civil law to these men was complex. All were devoted to the United States and its legal system, but also found that they had a profound interest both in the classical world and in the literature and law of contemporary Europe. The most important aspect of this circle, however, has to do with its perspective on the relationship between law and literature and the role assumed by Roman and civil law studies in this perspective. For these individuals, law and literature were not distinct subjects. Their intellectual horizons were much broader; they believed that the law was a genre of literature, that both served practical purposes, and ought to be studied and mastered. For them there was little dividing the study of a great book from the study of a great legal system. Their legal arguments, opinions, and treatises were written in what Llewellyn has called "the grand style" and the efficacy and appeal of these writings lie as much in their literary quality as in the coherence and elegance of their legal argument.⁷ This attitude towards the law as a literary

5. Alfred S. Konefsky, *Law and Culture in Antebellum Boston*, 40 STAN. L. REV. 1119, 1132-49 (1988).

6. See, e.g., Hoeflich, *Transatlantic Friendships*, *supra* note 4, at 600, 610-11.

7. See KARL N. LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* 62-72 (1960).

subject permeates the work of Joseph Story, for example.⁸ The surviving writings of John Pickering show an equal interest in the literary-legal mix.⁹ But it is in the works of Simon Greenleaf, which explicitly address these questions, that one finds the best expressions of this perspective.

Of all of the members of this Boston-centered bastion of high legal culture in the early nineteenth century, Simon Greenleaf was the one who wrote most often of this vision of the law as a part of broader culture. While Story's works embody this view, they do not explicitly address the issue. Greenleaf, in several of his published and unpublished works, however, did address the question of defining the cultural and broader context of the law.¹⁰ In his *Inaugural Address as Royal Professor of Law*, delivered at Harvard in 1834, Greenleaf set forth his vision of law.¹¹ Law, according to Greenleaf, pervades all of society; it is, in his words, "the very element of our social existence."¹² In a democratic society, the power of public opinion, by which the government must be commanded, is "expressed through the medium of law."¹³ In the international scene, law "is the only successful arbiter of the destinies of nations."¹⁴ Indeed, as Greenleaf quotes from Hooker's *Ecclesiastical Polity*: "[O]f law there can no less be acknowledge [sic] than that her seat is the bosom of God; her voice the harmony of the world; all things in heaven and earth do her homage . . ."¹⁵ In this world view, lawyers occupy a central role. They are the ministers of the law and, thus, at the very center of civilized society. Therefore, lawyers must be more than mere technicians, "pettifoggers" in the jargon of Greenleaf's day. They must be learned and conversant with all of human culture so that they can apply the law to solve

8. On Story, see generally, R. KENT NEWMAYER, *SUPREME COURT JUSTICE JOSEPH STORY: STATESMAN OF THE OLD REPUBLIC* (1985). On Story's use of Roman law, see Hoeflich, *John Austin and Joseph Story*, *supra* note 4, at 64-71.

9. On Pickering, see generally WILLIAM H. PRESCOTT, *MEMOIR OF HON. JOHN PICKERING, LL.D.* (Cambridge, Metcalf & Co. 1848). See also 14 *DICTIONARY OF AMERICAN BIOGRAPHY* 564-65 (Dumas Malone ed., 1934).

10. Fred Konefsky is currently writing a biography of Simon Greenleaf.

11. SIMON GREENLEAF, *A DISCOURSE PRONOUNCED AT THE INAUGURATION OF THE AUTHOR AS ROYAL PROFESSOR OF LAW IN HARVARD UNIVERSITY, AUGUST 26, 1834* (Cambridge, James Monroe & Co. 1834).

12. *Id.* at 5.

13. *Id.* at 7.

14. *Id.* at 5-9.

15. *Id.* at 11.

humanity's ills. In a ringing declaration, Greenleaf asserted his vision of the necessary scope of such learning:

I would not confine the education of a lawyer to the technical learning of his profession, or to the code of his particular state. He can with no propriety be considered as sufficiently instructed, whose learning is limited to the remembrance of a few dry maxims, common places and positive rules; and whose skill consists in the adroit practice of the mere technicalities of the law. Rules are of little value, without a knowledge of the principles on which they are constructed; and the principles of law are to be sought only at the fountains of jurisprudence. In this science, as in the comparative anatomy of a sister profession, we best understand our own system of laws by comparing it with those of other nations. Man is to be studied in every period of his social existence, from the savage to the civilized state, in order to perceive the great truth, that in every condition of freedom, of intelligence, of commerce, and of wealth, his habits, his virtues, his vices, the objects of his desires, and hence the laws necessary for his government, are essentially the same. But to us, as members of a family of sovereignties, it is peculiarly necessary, that we should understand something of the laws of the other states in the Union, under which we hold many of our own rights, and with whose citizens our intercourse is becoming daily more and more intimate and familiar. From the primitive ordinances and laws of New England, the refined and elaborated code of commercial and affluent New York, the equitable-common-law of Pennsylvania, and the staid and polished systems of the Carolinas and the Ancient Dominion, the accomplished jurist of every state will derive rich illustrations of the jurisprudence of his own. In that of Louisiana, he will recognise the living Institutes of Justinian, transmitted through the codes of France and Spain, and baptized, reverently so to speak, with the spirit of American liberty. In the statutes of the far West he will discern, as in a daily journal, the latest form and impress of modern law; while the national jurisprudence exhibits in bolder relief the great features common to them all.¹⁶

In an unpublished report prepared for the president and trustees of Bowdoin College in Maine, Greenleaf presented a plan for the foundation of a law school at Bowdoin. Here, confronted with the necessity of conceptualizing a university-based

16. *Id.* at 14-15.

law school de novo, Greenleaf once again affirmed his broad vision of the law and the necessity of having learned lawyers:

As an essential part of this teaching, the pupil should be instructed in the theory of our national and state governments, and in the practical working of their various departments. He should be made clearly to understand the nature of his allegiance, and where it ends, and the right of forcible resistance to law, or revolution begins. He should be guarded against mistaking the impulses of blind passion, or of morbid sentiment, for the suggestions of conscience, or divine command. He should learn that in a country, furnished with enlightened, upright and independent tribunals, authorized to decide upon the constitutionality or the obligatory character of any law, their decisions, in every case of doubt, furnishes the true rule of conduct and measure of duty, by the law of God as well as of man, and that to invoke the aid of any other rule in such cases is warranted by no principle, human or divine.¹⁷

A number of other items among Greenleaf's manuscripts, which are now located at the Harvard Law School library, further confirm this particular vision of the law and of the legal profession. There are, for instance, among these papers, Greenleaf's notes for his address to the law students at the close of spring term, 1846. One section, in particular, is quite interesting. It is headed "The character and idea of the Law School."¹⁸ Under this heading, Greenleaf expressed his belief that a law school is "an association of students" who are "gentlemen" whose object is to make "good lawyers out of good men . . . in order to advance the science" of the law and to "increase its influence [and] to give strength to institutions and to promote public security and peace and happiness." At the end of these notes he reminded himself to conclude by telling the law students that all were "brothers" in the law, as well as "fellow ministers at the altar of justice [and] joint administrators of a great trust."¹⁹

The essence of this broad view of the law and lawyers was that law was preeminent among the human sciences and as such must incorporate into its body of knowledge as much of the human experience as possible. Greenleaf, Story, Pickering, and

17. Simon Greenleaf, Harvard Law School Address at Close of Spring Term 1846 [p.1] (undated and unpaginated, transcript available at Harvard Archives).

18. *Id.*

19. *Id.*

others connected to the Boston circle who shared some or all of their views, saw the legal profession evolving into a broadly learned profession comprised of gentlemen, concerned not simply with success at the bar and profit, but rather with the broader and loftier goals of promoting social institutions and the public good. In this context, the attraction of Roman and civil law to these men is easily understandable. It was not for love of the esoteric or the pedantic that these men had so great an interest in Roman and civil law. The fact that Harvard first introduced the study of Roman law in 1829, coupled with the fact that Story, Pickering and Greenleaf were not only conversant with Roman and civil law but owned libraries in the subject, used Roman and civilian principles in their legal work, and wrote critically of the subject, is testimony to a very pragmatic approach to Roman and civilian legal learning.²⁰ Within the context of attempting to be almost "renaissance men of the law" so as to provide this new science with as broad a foundation as possible, their study of Roman law, far from being the idle occupation of wealthy pedants, was instead the very reflection of Yankee pragmatism. Members of the Boston circle studied Roman law much as they studied scientific works and religious works, as fodder for their understanding of human society and as inspiration for the legal and legislative work to which they devoted so much of their lives.²¹ Roman law, especially, as a product of the ancient civilization that they so admired and often copied, was attractive to them. But beyond the classical connection, I would suggest that Roman law was particularly attractive for two other important reasons, one internal to the system and one external.

Roman law is arguably the most pragmatic legal system, other than the common law, which we know much about. The source materials of Roman law are the product not of cloistered scholars or professors but of judges and working lawyers.

20. The introduction of Roman law studies at Harvard is quite fascinating. The first professor teaching Roman law was the Rev. Charles Follen, a German emigre, who had been appointed as Professor of German at Harvard College. His course in Roman law lasted only a brief period, as he died in a tragic accident soon after it began. On Follen, see WILLIAM E. CHANNING, A DISCOURSE OCCASIONED BY THE DEATH OF THE REV. DR. FOLLEN 27-29 (Boston, James Monroe & Co., 1840); Hoeflich, *Transatlantic Friendships*, *supra* note 4, at 605-06. See also 1 CHARLES FOLLEN, THE WORKS OF CHARLES FOLLEN *passim* (Boston, Hillard, Gray & Co. 1841).

21. See MILLER, THE LIFE OF THE MIND, *supra* note 3, at 165-85. On the use of civil law as a jurisprudential and principled source, see also Peter Stein, *The Attraction of the Civil Law in Post-Revolutionary America*, 52 VA. L. REV. 403, 416-25 (1966).

Roman-law materials are, at the same time, suffused with a well formulated jurisprudence, since, unlike common-law materials which are so predominantly case opinions that have not been reworked or organized generally other than chronologically or by broad topic, many of the Roman and civilian materials have gone through extensive editing and reworking by jurists. These jurists were concerned not only with resolving a particular dispute, but also with providing a systematic exposition of the law. Thus, Roman-law materials are, to some extent, a hybrid of case report and treatise. This pragmatism suffused by a jurisprudential approach must have fit perfectly with the aims of the members of the Boston circle who sought to use Roman-law sources to enrich their native jurisprudence while also providing pragmatic rules for judges and lawyers to use. I would argue that the very form and structure of the Roman and civilian materials to which these early nineteenth-century Yankee lawyers were exposed made this match inevitable.

The second reason why I believe that Roman legal materials were particularly appealing to the Boston circle, and to others in other areas as well, is the fact that this circle was centered not only in Boston, but also in Cambridge and Harvard. At the time Harvard was engaged in a daring experiment, attempting to create a model of university-based legal education in the face of a powerful native apprenticeship system and influential foreign university law schools.²² In the face of this competition both at home and abroad, the proponents of Harvard-based legal education needed to adopt a strategy, both for substantive pedagogical reasons and marketing purposes, that would set them apart from their established competitors. The model they chose to use, one which could not be countered by the apprenticeship system, was that of "scientific" legal education. This term, which appears countless times in the sources, was used to describe a philosophy of legal education focused not simply upon the nitty-gritty of how to run a law practice, that is the intricacies of special pleading or document drafting, but rather focused upon the broader vision enunciated by Greenleaf and his fellows. Only a university-based training program could provide both the practical skills training *and* the theoretical underpinnings of the practice. Once again, Roman and civil law

22. See Michael H. Hoeflich, *The Americanization of British Legal Education in the Nineteenth Century*, 8 J. LEGAL HIST. 244, 244-46 (1987); see also Stein, *supra* note 21, at 418-19, 423-25.

sources, by their very nature, were ideal for this purpose. The average practicing lawyer or judge who might take on apprentices would have neither the knowledge nor the materials to teach his students Roman and civilian rules. By incorporating these materials into their educational structure, the Boston circle was able to create a unique niche - and, therefore, a significant marketing advantage - for their university-based law school.

B. *The New York Circle*

The Boston circle, while arguably the most well known and most productive, was certainly not the only circle interested in Roman and civil law during the early nineteenth century. A second group of individuals with a serious interest in Roman and civil law existed in New York State and was energized by Chancellor James Kent. Kent was both practicing lawyer and judge as well as academic during his long career, and throughout his career he showed more than a passing interest in, although far from a mastery of, Roman and civil law sources.²³ In his writings and in his library collection, he showed a breadth of interest equal to that of the members of the Boston circle. He too had friends and proteges who also embraced this interest. Amongst the most interesting of these was William W. Campbell, a practicing lawyer and judge who had homes both in New York City and in upstate New York.²⁴

While Kent, Campbell, and their professional colleagues espoused a view of law and legal science similar to that of the Boston circle, I believe that the attraction of Roman and civil law to these men differed somewhat from the attraction it had to men such as Story, Pickering, and Greenleaf. Kent and Campbell were lawyers by profession, but they were antiquarians and historians by avocation. Their writings and their libraries reveal

23. On Kent's knowledge of Roman law, see Alan Watson, *Chancellor Kent's Use of Foreign Law*, in *STUDIES AND CONTINENTAL INFLUENCES ON AMERICAN LAW*, (Matthias A. Reimann ed., forthcoming 1992).

24. William W. Campbell, of Cherry Valley, New York, was of a prominent upstate legal family, and was best known for his efforts as an historian. See generally WILLIAM W. CAMPBELL, *ANNALS OF TRYON COUNTY* (New York, Baker & Scribner 1849) (providing a history of upstate New York during the Revolutionary period); WILLIAM W. CAMPBELL, *LIFE AND WRITINGS OF DE WITT CLINTON* (New York, Baker and Scribner 1849) (providing perhaps the best contemporary work on the New York governor). Campbell was also influential in the development of railroads in the upstate New York region. He amassed a large library of legal and literary works, of which I have been able to acquire the Roman and civil law volumes. His papers are in the Cooperstown Historical Society in Cooperstown, New York.

minds that reveled in the esoterica of historical research. Kent, in his *Address Delivered Before the Law Association of the City of New York* in 1836, outlines clearly his view of the appeal of Roman law studies:

The English common law is supposed to have struck its roots far deeper than the foundations of the feudal fabric, and to have imbibed the freer spirit and more popular genius of the German and Saxon institutions. The writings of Bracton afford decisive proof that it had also been nurtured and strengthened by touching the living fountains of the Roman law. We are then at liberty fondly to trace its descent in the collateral line, from the great civilians of the Roman forum, whose writings compose the immortal *Pandects*, the grandest monument extant of ancient wisdom, applied to the business of civil life. Those Roman lawyers flourished in corrupt and tyrannical ages, and yet they preserved their integrity and their virtue. Cicero was the last of the lawyers who breathed the free air of the Republic, and he is, undoubtedly, the most finished character in all antiquity, though he lived in disastrous times, amidst the struggles and horrors of an expiring Republic. We cannot contemplate, even at the distance of nineteen centuries, the numerous and splendid productions of his matchless industry, or his intrepid and illustrious devotion to the constitution and liberties of his country, without emotions of astonishment and admiration. Since we have mentioned a name worthy of the profoundest meditation, permit me to pause upon it for a moment and add, that Cicero was not only a most learned civilian, but equally a scholar, patriot, orator, and philosopher, of the most eminent accomplishments. His researches led him to penetrate the darkest recesses of Roman legal antiquities, and he knew all that was to be known of the legendary learning of Tuscan grandeur, the institutions of Romulus, the religious discipline of Numa, the constitutional innovations of Servius Tullius, and the government, laws, and spirit of the republic, as it was administered by the wisdom of the senate, the energy of the consuls, the equity of the praetors, the stern purposes of the tribunes, and the balanced and well tempered deliberations of the earlier popular assemblies. The twelve tables fixed his deepest attention, and he found in that code, as he asserted, the comprehensive grasp of civil polity, and the best spirit of ethical jurisprudence. He became master of the learning and wisdom of Greece, and he displayed it in all its excellence in his writings, his forensic orations, and his more retired and enchanting discourses. It is a familiar theme, but never recalled without profit, with what talent, fidelity, zeal, and success,

he discharged his professional duties and his great public trusts, and with what eloquence and intrepidity he rescued his oppressed countrymen and his beloved republic from the machinations and arms of tyrants and traitors. When he had exhausted all his efforts for his country, and was borne down along with the falling fabric of Roman freedom, he fled to the shades of retirement, and composed those immortal productions, political, ethical, and philosophical, which have been the delight and instruction of succeeding ages.²⁵

Another source that is quite revealing of Kent's antiquarian mindset is found in a set of Pierre de Charlevoix's *Journal of a Voyage to North-America* from 1761, which was once owned by Kent and contains his copious annotations.²⁶ The books themselves recount an early voyage throughout Canada and what was to become the United States. They are a classic of antiquarian and travel literature. Kent's annotations are detailed and learned and bear witness to his general antiquarian bent. Indeed, these annotations show particularly Kent's special interest in the history of the United States and of New York especially. This interest in the State of New York is important to an understanding of his interest in Roman and civil law and its antiquarian cast. This relationship becomes clear in his *Anniversary Discourse Delivered Before the New York Historical Society* in 1828. In this discourse, whose subject was the early history of New York, Kent paused to recount the Dutch heritage in New York history:

The Dutch discoverers and settlers of New-Netherlands, were grave, temperate, firm, persevering men, who brought with them the industry, the economy, the simplicity, the integrity, and the bravery of their Belgic sires; and with those virtues they also imported the lights of the Roman civil law, and the purity of the Protestant faith. To that period we are to look with chastened awe and respect, for the beginnings of our city, and the works of our primitive fathers — our *Albani patres, atque altae moenia Romae*.²⁷

25. JAMES KENT, AN ADDRESS DELIVERED BEFORE THE LAW ASSOCIATION OF THE CITY OF NEW-YORK, OCTOBER 21ST, 1836, at 9-11 (New York, G. & C. Carvill & Co. 1836).

26. This volume is contained in the collection of the Syracuse University College of Law Library.

27. James Kent, An Anniversary Discourse, Delivered Before the New York Historical Society (December 6th, 1828), in 1 COLLECTIONS OF THE NEW YORK HISTORICAL SOCIETY 11, 12 (2d Series, New York 1841).

The antiquarian nature of Kent's interest in Roman and civil law is further demonstrated by a fundamental difference between his approach to the subject and that of men such as Story and Greenleaf. Story and Greenleaf made efforts to stay abreast of developments in contemporary civil law through correspondence with European jurists such as Mittermaier.²⁸ As far as we know, Kent did no such thing. He showed very little interest in the "leading edge" of European legal scholarship. Indeed, this antiquarian approach, with its lack of emphasis on the practical utility of Roman and civil law, may help to explain a rather strange phenomenon that occurred in those instances in which Kent explicitly cited Roman law in his judicial opinions. Alan Watson, who has analyzed Kent's use of Roman law in his decisions, has discovered that in virtually all such decisions the citation to Roman law is inaccurate and that the Roman legal rule is badly misstated.²⁹ Such instances demonstrate that Kent had not mastered the intricacies of Roman legal science. At the same time, the fact he used these sources at all suggests that he found the *idea* of Roman law fascinating. I would suggest that this fascination came from his antiquarianism and that his use of these sources, however inaccurately, testifies to his desire to enliven his opinions with antiquarian tidbits to give them at least the *appearance* of learnedness.

C. The South Carolina Circle

The study of Roman and civil law was not confined to the northeastern United States during the early nineteenth century. There existed a strong southern movement as well, even in the common-law jurisdictions. South Carolina was particularly strong in this movement, which was centered at Columbia and Charleston. For centuries, high legal culture flourished in the South. The tradition of the cavalier gentleman epitomized by the life and works of Thomas Jefferson (who himself was somewhat learned in the Roman law) carried well into the nineteenth century.³⁰ Literary journals with strong legal components flourished, and a proposal for a legal university with a far broader literary component than the Harvard model originated in the

28. See Hoefflich, *Transatlantic Friendships*, *supra* note 4, *passim*.

29. See Watson, *supra* note 21; see also Stein, *supra* note 21, at 433-34.

30. On Jefferson, see generally NOBLE E. CUNNINGHAM, JR., *IN PURSUIT OF REASON—THE LIFE OF THOMAS JEFFERSON* (1987). On Jefferson as a lawyer, see FRANK L. DEWEY, *THOMAS JEFFERSON, LAWYER* (1986).

South during this period.³¹

Four men in particular may be taken as the best illustrations of the flourishing of this culture and the role that Roman and civil law played in it: Thomas Cooper, Francis Lieber, Hugh Swinton Legaré, and James Murdock Walker. All possessed libraries containing works on Roman and civil law. Cooper edited the most important American edition of Justinian's Institutes.³² Lieber and Walker wrote treatises rich in Roman and civilian references. Legaré wrote criticism in the periodical literature on Roman law and cited Roman law in his decisions during his brief tenure as Attorney General of the United States.³³ Like Story and Greenleaf, the southerners had strong European connections. Lieber was himself a German refugee. Legaré was trained in Scotland and was a self-proclaimed disciple of Savigny.³⁴ In many respects the activities and the scholarly and literary output of these men closely resembled that of the Boston circle.

In spite of these close resemblances, however, there were significant differences in the approach the southerners brought to the study and scholarship of Roman and civil law. For the Boston circle the study of these subjects was motivated both by a desire to raise the legal profession to a certain status, as well as a desire to help establish the model of university-affiliated legal education which they championed. In the South these two factors, while present, were less significant than a serious desire to integrate Roman and civil law into American legal practice. I would argue that men like Lieber, particularly in works like his

31. See *The Study of the Law*, 3 SOUTHERN LITERARY MESSENGER 25-51 (1837), reprinted in *THE GLADSOME LIGHT OF JURISPRUDENCE*, *supra* note 3, at 201-13. See also the comments of Daniel Mayes, Professor of Law at Transylvania University, in his, *An Address to the Students of Law in Transylvania University (1834)*, in *THE GLADSOME LIGHT OF JURISPRUDENCE*, *supra* note 3, at 145-64.

32. THOMAS COOPER, *THE INSTITUTES OF JUSTINIAN WITH NOTES* (New York, Halstead & Voorhies 2d ed. 1841). Thomas Cooper is one of the most interesting and least known legal scholars of this period. See 4 *DICTIONARY OF AMERICAN BIOGRAPHY* 414-16 (Allen Johnson & Dumas Malone eds., 1930).

33. On Legaré, see generally HUGH S. LEGARÉ, *THE WRITINGS OF HUGH SWINTON LEGARÉ* (Mary S. Legaré ed., Charleston, 1846); MICHAEL O'BRIEN, *A CHARACTER OF HUGH LEGARÉ* (1985). Legaré's writings on Roman law are reprinted in his writings. 1 LEGARÉ, *supra*, at 502-58. An interesting item to note is Joseph Story's *Tribute to Mr. Legaré*, published in the *Boston Daily Advertiser* on June 30, 1843, illustrating the links between the South Carolina and Boston circles.

34. See Hoefflich, *Transatlantic Friendships*, *supra* note 4, at 607-08.

Legal and Political Hermeneutics,³⁵ Legaré in his daily practice as a lawyer, and Walker in his attempts to reform American jurisprudence and the tangled skeins of the common law of property, went far beyond the efforts of the Boston circle to fully merge the learning of Roman and civil law into American law.

The reasons for this difference in approach are complex and several. First, the influence of lawyers and jurists from those states that had formerly been colonies of civilian jurisdictions, particularly, Louisiana, was not negligible. Second, traditionally, upper class southern lawyers went either to Scottish or European universities to study law as part of their training.³⁶ Legaré spent a formative year at Edinburgh and sent one of his proteges to Germany. The pervasiveness of this European training is all important in understanding the role of Roman and civil law in the high legal culture of the period. European legal training of this era was, of course, civilian, but it was also one which incorporated a substantial amount of Roman law, general legal history, and jurisprudence. The Europeans (and the Scots) trained their lawyers to be jurists as well as practitioners and inculcated a strong belief in their students in the value of high legal culture.³⁷ One need only look at the diaries of Legaré and other southerners of this period who trained abroad to see how influential this attitude was and how it carried over into their professional lives.³⁸ Finally, one cannot overlook the influence of the southern cavalier, scholar-gentleman model. Southern lawyers were southern gentlemen and part of the gentlemanly model was an easy scholarship. Indeed, it may well be that the influence of English and Scottish legal circles in the late eighteenth century, circles in which the study of Roman law was seen as part and parcel of the elitist nature of the profession, also played a significant part in the interest in the subject displayed

35. FRANCIS LIEBER, *LEGAL AND POLITICAL HERMENEUTICS* (Boston, Little and Brown 1839).

36. See JOHN T. KRUMPELMANN, *SOUTHERN SCHOLARS IN GOETHE'S GERMANY 1-5* (1965); see also Hoefflich, *Transatlantic Friendships*, *supra* note 4, at 600, 610-11.

37. On the Scots traditions, see the forthcoming article of John W. Cairns, (unpublished manuscript); and John W. Cairns, *The Formation of the Scottish Legal Mind in the Eighteenth Century: Themes of Humanism and Enlightenment in the Admission of Advocates*, in *THE LEGAL MIND: ESSAYS FOR TONY HONORE* 253, 253-77 (Neil MacCormick & Peter Birks eds., 1986).

38. Legaré's diaries from his tenure as American Chargé d'Affaires in Brussels are printed in 1 LEGARÉ, *supra* note 33, at 1-151. Legaré's diaries have never been printed in full. They are contained in the Caroliniana Collection at the University of South Carolina library in Columbia, South Carolina.

by these southern gentlemen.³⁹

III. ROMAN & CIVIL LAW IN AMERICAN LAW LIBRARIES

The other aspect of the study of Roman and civil law in the United States during this period that has elicited little scholarly comment is the distribution of specialized books on these subjects which can be found in American law libraries. It is quite interesting to discover that a fair number of such books were present in United States libraries, both private and institutional, from at least the late eighteenth century. This is all the more remarkable when one realizes that the vast majority of these books were not printed in the United States, but were published either in the United Kingdom or on the Continent.

One can approach this issue in two ways: First, one can identify those volumes that were most commonly found in American libraries of the period. Second, one can look at some representative libraries and assess the extent and depth of their holdings. In the discussion below, I will attempt to do both.

The most popular books on Roman and civil law were generally not collections of primary source materials, but were, instead, secondary works. Amongst the most popular were: the commentaries of the Dutch scholar Vinnius on the *Institutes* of Justinian, Gibbon's *Decline and Fall of the Roman Empire* (with its famous forty-fourth chapter on the Roman law), Pothier's various systematic works both on Roman and civil law, and various of the orations of Cicero. Savigny's works were known, though apparently it was difficult to obtain copies in the United States. Domat's systematic treatise on civil law, particularly in its English translation, was not uncommon and neither were Bynkershoek's works.⁴⁰ Among the primary sources that were found most frequently in American libraries, by far the most widely distributed were various editions of Justinian's *Institutes*.⁴¹ The full *Corpus Juris Civilis* was far from unknown, but

39. See Cairns, *supra* note 37.

40. This identification of the most popular volumes is based on several years' study of the extant library catalogues for over 100 public and private libraries of the antebellum period.

41. Amongst these, the most popular was Thomas Cooper's edition published at Philadelphia in 1812. See works cited *supra* note 32. This edition contains extensive notes relating the INSTITUTES' rules to American cases. On Cooper, see generally DUMAS MALONE, *THE PUBLIC LIFE OF THOMAS COOPER* (1926).

was found mainly in the libraries of law schools and those individual lawyers who were especially interested in the subject.

The composition of this group of most widely distributed Roman and civil law volumes tells us several important things about the study of these subjects in the United States during this period. The absence of most of the primary sources and the prevalence of secondary sources strongly suggest that the type of serious scholarship going on in the United Kingdom and on the Continent was quite rare in the United States at that time. The books that I have identified as being most common in American libraries tend to be either elementary textbooks designed to provide a superficial knowledge of Roman and civil law or systematic works designed to be used as resource materials by jurists looking to discover a particular rule on a particular issue. The absence of certain works is also quite interesting; for example, the works of the Dutch scholar Voet are rarely found in the library catalogues of this period, even in the South, even though Voet was considered to be the standard serious treatise on Roman law in Scotland.⁴² The works of the great French Romanist Cujas were hardly known, although routinely studied by Romanists and civilians on the Continent.

All of this is quite consistent with the interests and motivations of the various circles that I discussed earlier in this Article. By and large, Americans were not interested in Roman and civil law in a serious scholarly way on the model of Continental scholarship. Even the best American Romanists, like Legaré or Walker, were no match for even advanced students on the Continent. Instead, American interests were more superficial. They were not less serious, simply less intense.

When one looks at various representative library collections one can further see that the interests of Americans were serious, as the holdings of a number of American libraries in this field were extensive. The amount of funds that both individuals and institutions invested in these books was large. These volumes were expensive and often difficult to obtain. Therefore, the fact that there were large Roman and civil law holdings in a number of libraries is in itself quite significant.

The South Carolina Library at Columbia in 1807, for instance, contained copies of Domat's *Civil Law*, Wood's treatise on civil law, the works of Cicero, Brown's treatise on civil law,

42. I wish to thank Prof. Alan Watson for his information concerning Voet.

Gibbon's *Decline and Fall*, as well as several works of Puffendorf.⁴³ Among the holdings in Boston's Social Law Library were Browne's work on the civil-law doctrines of marriage, Browne's treatise, Bynkershoek's works, two copies of the *Napoleonic Code*, the *Codex Theodosianus*, a copy of the *Corpus Juris Civilis*, Domat's works, Gothofredus' works, Mittermaier's works on German criminal law, Noodt's works, Taylor's treatise on the civil law, as well as the works of Vinnius and Voet. All told, the library contained seventy-three volumes in this subject area broadly defined.⁴⁴

Books on Roman and civil law were even to be found in state public libraries. The Maine State Library in 1850 reported holdings of Justinian's Institutes, Mackeldy's treatise on the civil law, and the 1606 Lyons edition of Cujas' works.⁴⁵ By 1856, the library had added works by Bynkershoek, Domat, and Pothier, as well as the *Napoleonic Code*.⁴⁶ In 1837, the Maryland State Library reported holdings of works by Pothier as well as Perpigna's treatise on French Law. By 1857, the library had added a number of additional volumes including Browne's works, Cooper's edition of Justinian's Institutes, Domat's work on civil law, Wood's volume on civil law, and several of Pothier's treatises.⁴⁷

The most extensive institutional collection of Roman and civil-law books, however, was at Harvard. The core of the Harvard collection was comprised of two private libraries, that of Samuel Livermore, a Harvard graduate who practiced in Louisiana and wrote treatises on conflict of laws and agency which were much influenced by Roman and civil law, and that of Joseph Story.⁴⁸ In 1824 the library reported thirty-nine volumes

43. CATALOGUE OF BOOKS BELONGING TO THE SOUTH-CAROLINA LIBRARY (Columbia 1807). This catalogue is unpaginated.

44. CATALOGUE OF THE SOCIAL LAW LIBRARY IN BOSTON at v (Boston, Balles and Houghton 2d ed. 1849).

45. CATALOGUE OF THE MAINE STATE LIBRARY 137-40 (Augusta, Maine, Fuller & Fuller 1850).

46. CATALOGUE OF THE MAINE STATE LIBRARY 324-28 (Augusta, Maine, Fuller & Fuller 1856).

47. Compare CATALOGUE OF THE LIBRARY OF THE STATE OF MARYLAND 38-39 (Annapolis, 1837) with CATALOGUE OF THE LIBRARY OF THE STATE OF MARYLAND 173-74 (Annapolis, 1857). Two points about the Maryland collection are of particular interest: First, the books on Roman and civil law in 1837 are all Philadelphia imprints; second, Maryland was the home of David Hoffmann, the pioneer of legal education.

48. Samuel Livermore graduated from Harvard in 1804. See 11 DICTIONARY OF AMERICAN BIOGRAPHY 308 (Dumas Malone ed., 1933). On Story, see sources cited *supra* note 8.

on Roman and civil law in its collections.⁴⁹ By 1834, the library collection had grown astonishingly and attained first place among American collections, a distinction which it likely still holds today.⁵⁰

One of the most interesting facets of the Harvard library collection of volumes on Roman and civil law is the fact that many of the books came to the library as donations by local lawyers and alumni of the law school. The 1834 *Catalogue* reports the receipt of a major collection from Hollis.⁵¹ Also mentioned is a gift from J.H. Gardner of a copy of Taylor's work on civil law.⁵²

In addition to the public and institutional collections, a number of individuals also possessed extensive collections of Roman and civil law books in the first half of the nineteenth century. I have already mentioned the extensive collections owned by Livermore and Story. Kent, too, possessed a fair number of volumes.⁵³ Perhaps the most impressive collection, however, was owned by Hugh Legaré.⁵⁴ His collection was one of the best in the United States, second, perhaps, only to that of Harvard. He certainly possessed far more Roman and civil law volumes than, for instance, did the Library of Congress which had taken over Jefferson's collection.⁵⁵ The posthumous catalogues of his library list one hundred and forty-three Latin titles, seventy-seven Greek titles, fifty-three French titles, sixty-one German titles, and nine Italian titles, of which the vast majority (excluding the works in Greek which are literary) deal with

49. A CATALOGUE OF THE LAW LIBRARY OF THE LAW SCHOOL OF HARVARD UNIVERSITY (Cambridge, 1826).

50. A CATALOGUE OF THE LAW LIBRARY OF THE LAW SCHOOL OF HARVARD UNIVERSITY (Cambridge, Charles Folsom 1834).

51. *Id.* at v.

52. *Id.* at vii.

53. On Kent's library, see WILLIAM KENT, MEMOIRS AND LETTERS OF JAMES KENT, LL.D. 143-47 (Boston, Little, Brown & Co. 1898).

54. There are two printed catalogues of Hugh Legaré's library: CATALOGUE OF THE LIBRARY OF THE HON. HUGH LEGARE (Washington, 1843), which appears to have been prepared by his executors immediately after his death, and CATALOGUE OF THE RARE & VALUABLE PRIVATE LIBRARY OF THE LATE HON. H.S. LEGARÉ (Washington, 1848), which was prepared by the auction house. Copies of both are at the Caroliniana Collection at the University of South Carolina.

55. On Jefferson's library, see CATALOGUE OF THE LIBRARY OF THOMAS JEFFERSON (E. Millicent Sowerby ed., 1953), of which volume two contains the list of law books. On the Library of Congress, see THE 1812 CATALOGUE OF THE LIBRARY OF CONGRESS (photo. reprint 1982) (1812).

Roman and civil law.⁵⁶ Legaré owned most of the major primary sources published in the seventeenth and eighteenth centuries, as well as virtually all of the humanist commentators including Heineccius, Cujas, and Savigny. In addition, the collection was quite strong in the works of the modern civilians, and included the works of Pothier, Barbeyrac, Hugo, Grimm, Eichorn, and Dirksen.⁵⁷ It was obviously the library of a man with a most serious interest in Roman-law scholarship, an interest that exceeded that of virtually all of his contemporaries.

While it is interesting to note the existence of such an extensive library, it is equally interesting to look at the holdings of other lawyers not quite as dedicated as Hugh Legaré. What becomes clear is that many lawyers who took a broad interest in the law, what I have termed the high culture approach, also owned at least a few volumes. For instance, William Campbell, the friend of Kent's mentioned earlier, owned several volumes on Roman law including a work of Bude as well as the works of Noodt.⁵⁸ Benjamin Orr, a lawyer in Portland, Maine, and a friend of Greenleaf, owned a copy of Ayliffe's treatise on Roman law.⁵⁹ Of course, for many of these individuals some knowledge of Roman law or least ownership of a Roman law book not only appealed to their interest in legal culture but probably was useful if they handled, for instance, admiralty cases for which Roman law was often relevant.

Of course, it is important to understand how hard or easy it was to acquire Roman and civil law books during this period. The answer is that a lawyer, at least in the Northeast or South could do so if he wanted to. In many cases, books were obtained from England or the Continent. Story, Greenleaf, and Legaré all obtained books in this way.⁶⁰ Books could also be bought at auction or estate sales. They were not cheap, however. Orr's copy of Ayliffe, for instance, sold for \$1.00 in 1829 at a time when Blackstone's *Commentaries* in four volumes sold for \$4.00.⁶¹ Finally, some books on Roman law eventually began to

be published or reprinted in the United States. Thomas Cooper's edition of Justinian's Institutes was published in Philadelphia in 1812.⁶² Walker's *Inquiry into the Use and Authority of Roman Jurisprudence in the Law Concerning Real Estate* was published in Charleston in 1850. Perhaps most significantly, Grapel's *Sources of Roman Civil Law*⁶³ (itself a summary of Justinian's Institutes) was published in Philadelphia in 1857 as part of the *Law Library Series*, a set of collected treatises that was widely sold in the mid-nineteenth century.⁶⁴

IV. CONCLUSION

We have seen in the above discussion that the study of Roman and civil law during the early nineteenth century may be viewed as part of a general interest in high legal culture, connected to issues of status and professionalism as well as the growth of university-affiliated law schools. Circles of interested lawyers existed in a number of urban centers. The individuals associated with these circles wrote about Roman and civil law, occasionally used it in their professional activities, collected books on the subject, sometimes actively corresponded with Europeans about it, and generally included Roman and civil law in forming their intellectual perspective on the law and its foundations. Did Roman law have a widespread influence in the United States at this time? The answer to this depends on whether or not one believes that high legal culture can have a major influence on the profession as a whole. This is not an easy question. What is clear, however, is that the study and cultivation of Roman and civil law during this period did form an integral part of high legal culture, of what Greenleaf called the "liberal science" of the law, and thus must be taken into account by legal historians of this period.⁶⁵

56. See *supra* note 54.

57. The presence of these volumes on modern German civil law is quite interesting and strongly suggests the practical bent of Legaré's contemporary continental scholarship. In this area his collection was an equal of, if not superior to, Harvard's.

58. These volumes are now in my personal collection. All have Campbell's signature.

59. An annotated list of the sale of Orr's books is contained in the Greenleaf Papers at Harvard Law Library.

60. See Hoefflich, *Transatlantic Friendships*, *supra* note 4, at 604, 607-08.

61. See *supra* note 59.

62. See *supra* note 32.

63. WILLIAM GRAPEL, *SOURCES OF ROMAN CIVIL LAW: AN INTRODUCTION OF THE INSTITUTES OF JUSTINIAN* (Philadelphia, T. & J.W. Johnson & Co. 1857).

64. See ERWIN C. SURRENCY, *A HISTORY OF AMERICAN LAW PUBLISHING* 29, 167 (1990).

65. In a sense, this Article is a meditation and elaboration on themes first discussed by Peter Stein in his article, Stein, *supra* note 21, and therefore is properly dedicated to him.