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Schiller: An American Experience in Roman Law

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RECENT BOOKS

BOOK REVIEWS

AN AMERICAN EXPERIENCE IN ROMAN LAW. By *A. Arthur Schiller*. Göttingen, Germany: Vandenhoeck & Ruprecht. 1971. Pp. 256.

This collection of the author's articles written over nearly forty years of a scholarly career devoted in large measure to Roman law makes a sad book—not sad because the contents are in any way sad, but sad because no other fitting publication could be put together to honor the occasion of Professor Schiller's retirement from full-time teaching at Columbia Law School. In any major Western European country the retirement of that country's most distinguished Roman lawyer would have been an occasion for a *Festschrift*, a volume, or perhaps several volumes, of essays written by others in the field and dedicated to him. In America, however, who would write such essays? How many American law professors, much less students, even know that Arthur Schiller is the most distinguished living American Roman lawyer?

The study of Roman law in American law schools has probably never been at a lower ebb. Leaving to one side the Louisiana law schools, which, in deference to that state's civil law tradition, still manage to maintain some instruction in Roman law, hardly more than a handful of American law schools have courses or seminars in the field, much less support a faculty member who devotes even some of his scholarly time to its study. *Seminar*, the annual extraordinary number of *The Jurist*, in which four of the articles reprinted in this volume originally appeared, has ceased publication. The Riccobono Seminar of Roman Law, before which three of the papers in this volume were originally delivered, no longer meets. The modest revival of interest in Roman law, stimulated by the presence here during the Second World War of many foreign scholars with a knowledge of the field, seems to have run its course with the return of those scholars to Europe, or their death or retirement.

There are a few bright spots in this otherwise gloomy picture. A large private gift to the University of California Law School at Berkeley for a library in Roman and canon law has brought one of the world's leading Romanists to that school from England. There seems to be a revival of interest in Roman law among Classicists and ancient historians, and some funds are available for training young scholars in those fields to teach Roman law. After many years without any Roman law at all, the University of Michigan can now boast both undergraduate and graduate instruction in the field. But these glimmerings hardly dispel the general gloom.

All of this could be borne, perhaps with some nostalgic regret,

if it could be demonstrated that the study of Roman law is not worthwhile, at least, not worthwhile for lawyers. I do not believe, however, that this is the case.

The traditional argument for studying Roman law is based on the fact that it lies at the root of much of the law of the civilized world. Roman law shares with the common law the distinction of being one of the two basic legal systems in the world today. Since the modern American lawyer may come into contact with civil law systems, he must be prepared to deal with the Roman law principles and terminology that lie at the root of those systems. Furthermore, the argument continues, if one has little time to study the civil law, a study of the part of the system that the civil law countries have in common will enable one to go to the particulars of their codes when necessary.

While this argument has some force, it can be met with a counter-argument. If one's purpose is to learn something about the modern civil law, might it not be better to study the modern civil codes themselves, with occasional references to the Roman law to explain their common features? After all, the differences between, say, German and French law are almost as great as the similarities, and no one today could seriously claim any real grasp of either country's system simply on the basis of a knowledge of Roman law.

A more powerful argument, I think, for the study of Roman law lies in the fact that it is a fully developed system of law that treats many of the same problems as our own, but in a very different way. This fact has several ramifications: First, as private lawmaking through contract and public lawmaking through statutory change become increasingly important parts of the lawyer's job, it is well for the lawyer to have at his fingertips a stock of institutions and ideas that he can bring to bear on a legal problem. If the common law solution of a problem is inappropriate, something in the Roman law might be of help. Second, one of the most valuable parts of legal training is the experience it gives the student in manipulating fundamental legal ideas. What is a tort? How does an obligation in tort differ from one in contract? What is an estate in land? Does the concept of an estate in land serve any function today that could not be served in other ways? The fundamental legal ideas of Roman law are quite different from our own. A study of them helps us to penetrate our own system and to understand more precisely what our concepts mean and how we are using them. Third, the Roman law system was not static. It developed greatly over the period in which it was in effect, and a study of the course of that development permits the student to comprehend how and why legal systems change. Finally, no legal system operates in a vacuum. Roman law shaped Roman

society, and that society shaped Roman law. Roman society was sufficiently different from our own that a study of Roman law allows the student to begin to make meaningful generalizations about the relationship of law and society; yet Roman society was not so different from our own that there are insuperable barriers to understanding it.

I will attempt to illustrate the value of Roman law study from Professor Schiller's work. Schiller has had a long and fruitful career. Over twenty-five articles, innumerable book reviews, and several books bearing his name can be found through a casual examination of standard American bibliographic aids. A more thorough search would certainly reveal more. Schiller's career has not been devoted entirely to Roman law. He has always been intrigued by Egypt under the Romans and in the Coptic period.¹ During the Second World War he became interested in the then Dutch East Indies,² and recently he has published some articles on the law of modern East Africa.³ Like many American law professors, he has devoted a considerable amount of time to producing teaching materials, some in the Roman law area, and others only tangentially related to Roman law.⁴

Roman law, however, has provided not only the topic for the bulk of Professor Schiller's writings but also the springboard for his more broadly comparative work. That he should write about such disparate places as Indonesia, East Africa, and ancient and early medieval Egypt will not surprise anyone who has examined his treatment in this volume of the interplay between Roman law and Egyptian law in the late empire.⁵ Indonesia and East Africa, like Roman Egypt, were colonized countries in which native law existed side by side with the law of the colonial power. Just as Roman influence in Egypt declined during the Coptic period, so too has colonial influence declined in Indonesia and East Africa today. Similarly, Schiller's interest in tracing the modern counterparts of Roman institutions and doctrines in both civil and common law jurisdictions

1. See, e.g., Schiller, *Coptic Law*, 43 JURID. REV. 211 (1931); Schiller, *Prolegomena to the Study of Coptic Law*, 2 ARCHIVES D'HISTOIRE DU DROIT ORIENTAL 341 (1938).

2. See, e.g., Schiller, *Labor Law and Legislation in the Netherlands Indies*, 5 FAR EASTERN Q. 176 (1946); Schiller, *Conflict of Laws in Indonesia*, 2 FAR EASTERN Q. 31 (1942).

3. See, e.g., Schiller, *Draft Legislation and Customary Law*, 5 E. AFRICA L.J. 88 (1969).

4. See, e.g., A. SCHILLER, *MILITARY LAW* (1952); A. SCHILLER, *ROMAN LAW: TEXTS AND COMMENTARY FOR THE STUDY OF ROMAN LAW* (1936); F. DEÁK & A. SCHILLER, *INTRODUCTORY READINGS AND MATERIALS TO THE STUDY OF COMPARATIVE LAW* (mimeo. ed. 1932).

5. A. SCHILLER, *Sources and Influences of the Roman Law, III-VI Centuries A.D.*, in *AN AMERICAN EXPERIENCE IN ROMAN LAW* 10-23 (1971), at 20-22.

makes it predictable that he would undertake such a study as *The Counterpart of Consideration in Foreign Legal Systems*.⁶

The breadth of Professor Schiller's interests has not been without its costs. *An American Experience in Roman Law* contains a number of allusions to promised work that has not yet, at least to my knowledge, been published.⁷ Even greater are the number of times Schiller suggests lines of research that he himself has not been able to pursue.⁸ These are necessary, if unfortunate, concomitants of what, at least on the law side, has been largely a one-man scholarly career. The absence of a genuine community of Roman law scholars in America during most of Schiller's career and the lack of a group of advanced students to follow his suggestions have meant that Schiller has had to undertake the whole effort by himself—determining Roman law solutions to the problems he wants to study, pointing out analogies to contemporary problems, bringing significant foreign work in the Roman law field to the attention of American scholars, and trying to synthesize his own work and that of others.

Despite these handicaps, and confining ourselves to the essays in this volume, Schiller's is an impressive achievement. The sixteen essays reprinted here may be roughly divided into five categories: exposition of the work of others; document analysis; Roman commercial law; the development of late classical and post-classical law, especially the work of the jurists; and Roman legal method.

The first category is represented by three book reviews⁹ and a memorial lecture for Salvatore Riccobono.¹⁰ While some of these essays relate Schiller's ideas to those of the scholars about whom he is writing, their principal purpose is expository. Given the generally low state of knowledge of Roman law among the readers of American law journals and their general refusal to read any language other than English, these essays serve a necessary, if somewhat pedestrian, function.

The one example in this volume of document analysis is a careful and convincing treatment of the dating of the papyrus known as "BGU II 628."¹¹ At first glance this article appears to be far re-

6. In 2 N.Y. LAW REVISION COMM., ANNUAL REPORT, N.Y. LEG. DOC. NO. 65, at 183-286 (1936).

7. *E.g.*, A. SCHILLER, AN AMERICAN EXPERIENCE IN ROMAN LAW 2, 25, 181 (1971).

8. *E.g.*, *id.* at 23, 31, 47.

9. *Review of Fritz Schultz, History of Roman Legal Science* in *id.* at 219-25; *Review of Ernst Levy, Gesammelte Schriften* in *id.* at 226-30; *Review of Leopold Wenger, Die Quellen des Römischen Rechts* in *id.* at 231-40.

10. *Salvatore Riccobono—In Memoriam* in *id.* at 242-54.

11. *The First Edict of BGU II 628 Recto* in *id.* at 179-98. For other examples of this type of work, see W. WESTERMANN & A. SCHILLER, APOKRIMATA: DECISIONS OF STEPTIMIUS SEVERUS ON LEGAL MATTERS (1954); Schiller, *The Interrelation of Coptic and Greek Papyri: P. Bu and P. BM Inv. Nos. 2017 and 2018* in STUDIEN ZUR PAPYROLOGIE UND ANTIKEN WIRTSCHAFTSGESCHICHTE, FRIEDRICH OERTEL ZUM ACHTZIGSTEN GEBURTSTAG

moved from the type of scholarship that I have suggested makes Roman law relevant to lawyers today. What could be further from modern concerns than the question of whether an edict, written on a scrap of paper preserved for us by the dryness of the Egyptian climate, dates from the first or the third century, A.D.? Whatever interest, however, the piece may have for the general reader (I found it fascinating, but then again, I like future interests, too), this type of work provides the essential foundation for the study of the Roman law in its social context, since the papyri provide evidence of how the law was actually used. A significant conclusion of Schiller's article is that this papyrus is one of the few surviving examples of a document actually used in a Roman law suit. Further, if we are ever going to have a clear idea of how Roman law developed (as opposed to what Justinian's compilers in the middle quarter of the sixth century thought the law was in their day), we must know precisely the provenance of the scraps of Roman law that have come down to us independent of the *Corpus Juris Civilis*. BGU II 628 recto is a vital link in a long chain of evidence that tells us how procedure before administrative officers of the emperor, the *extraordinaria cognitio*, came to eclipse the earlier form of procedure before a magistrate and a lay judge. Not only is that process critical to an understanding of modern continental procedure, but it can also be instructively compared to the rise of the administrative process in America today.

Professor Schiller's essays on Roman commercial law¹² represent the beginnings of an effort that is still unfinished. Considering how his interests have changed since these essays were written, I suspect that someone else will have to complete the work. The problem that Schiller set for himself is formidable. We know that Rome had a highly developed commerce and that private initiative played a fairly important role in that commerce, at least during the Republic and the Principate. Roman commercial law, however, seems to lack many of what we would regard as requisites for successful private commercial development. Its law of contract was archaic and formal; it seems to have had little notion of agency and little in the way of a law of trade-mark or trade secrets. We may, however, have a very distorted view of the commercial law of the Republic and early Empire, because the law that comes down to us was compiled at a time when Roman commerce had been characterized by massive state intervention for over three centuries. We know little of the law applied by the *praetor peregrinus*, the magistrate who initially heard

GEWIDMET 107-19 (H. Braunert ed. 1964); Youtie & Schiller, *Second Thoughts on the Columbia Apokrimata* (P. Col. 123), 30 CHRONIQUE D'ÉGYPTÉ 327 (1955).

12. *Trade Secrets and the Roman Law; The Actio Servi Corrupti* in A. SCHILLER, *supra* note 7, at 1-9; *The Business Relations of Patron and Freedman in Classical Roman Law* in *id.* at 24-40.

law suits between citizens and noncitizens. With a few notable exceptions,¹³ we know even less about the law applied by the *curule aediles*, the magistrate who held court in the market place.

By carefully assembling pieces of the *Digest* and discarding later intrusions, Schiller attempts to show how the *actio servi corrupti*, the action against a man who corrupts a slave, may have taken the place of a formal law of trade secrets, and how in the absence of a formal law of agency the same function may have been served by, among other things, the status relationship between patron and freedman. There is an important lesson here for the type of comparative study that I have advocated. Even if the law that one is studying comparatively has no formal category corresponding to a category in one's own law, one cannot assume that the same job is not done by the other system in a different way. In this kind of study one must discard the legal category for a moment and look to the complex of laws surrounding the function that one wishes to study. One must also carefully examine the society under study to be sure that one knows precisely where the function is being performed. Ancient Rome knew little of wage laborers or salaried employees; slaves and freedmen performed analogous roles in the Roman commercial world, and it is to the law concerning them that one must look to find out how trade secrets were protected and agents authorized.

Even more can be obtained from this kind of study. It is one thing to say that Roman law had the functional equivalents of trade secrets and agency, but it is quite another to say that these institutions operated in the same way that ours do. Granted that the law was operating within very different categories, what was the effect of this on Roman commerce? This far Schiller does not go. Perhaps the evidence is simply not there. Roman commerce itself, however, has been the subject of some fairly detailed studies,¹⁴ and the surviving papyri and wax tablets do tell something about how it made use of the available legal institutions. We also know that the commercial law developed by the merchants in the Middle Ages (and largely incorporated by Lord Mansfield into our own commercial law) wrought radical changes in the basic Roman patterns that it had inherited. A study of the reasons for these changes might reveal a great deal about the fundamental interrelationships between law and commerce in any society.

We now come to the largest category of essays—those devoted to the topic broadly defined as the development of Roman law from the classical period to Justinian. The first of the articles shows

13. *E.g.*, the famous aedilician edicts implying a warranty against defects in the sales of slaves and beasts. See DIGEST 21.1.

14. *E.g.*, sources cited in A. SCHILLER, *supra* note 7, at 1 n.4. See also the works of Arnold H.M. Jones, particularly THE LATER ROMAN EMPIRE 284-602: A SOCIAL ECONOMIC AND ADMINISTRATIVE SURVEY (1964).

Professor Schiller getting his feet wet in the topic.¹⁵ It still relies heavily on the work of men older than himself, but it carefully outlines the two schools of thought existing at that time—the view of Collinet that the non-classical elements in the *Corpus Juris* are to be attributed to the influence of the law schools of Byzantium, and that of Riccobono that Roman law developed internally between the classical period and Justinian. Schiller cautiously suggests a middle course and adds one further element, the coexistence of Roman law with the native law of the provinces, as illustrated by the situation in Egypt.

A second essay, *Bureaucracy and the Roman Law*¹⁶ announces a theme that runs through the rest of the articles in this category: the decision-making process of the late classical jurists. Thanks to the *Digest*, more survives of the jurists' work than of any other source of Roman law, and, despite the problems with interpolation and the curious extracting system used by the compilers of the *Digest*, the jurists' methods can still be perceived. It is surprising, therefore, that more work has not been done with their methods of analysis. Schiller suggests in this article, and it is a theme to which he returns in a number of others,¹⁷ that the position of the late classical jurists as members of the imperial bureaucracy made them far more conscious of the public element—what today we would call the "social policy" element—in private law than their predecessors, who played a purely private role. In a later work Schiller expanded this notion and suggested that all the jurists' law, not only that of the later jurist-bureaucrats, was policy-oriented, so that the change to bureaucratic jurists was a change in degree and not in kind.¹⁸

This is heady stuff, for if Schiller is right, classical Roman law was not the beautifully arranged a priori system that some European writers would lead us to believe it was, but rather a law groping along on a case-by-case basis, relying on precedent, argument from analogy, and a few maxims that do not explain case results so much as they explain tendencies of the law. The implications of this thesis are crucial for the purposes of the study of Roman law that I have suggested above. If Schiller is right, then Roman law is an ideal paradigm for studying the interaction of law and society, and the closest modern analogy to the Roman law system is not the academic law of Western Europe, but Anglo-American case law.

But is he right? The corpus of the *Digest* is vast, and little attempt has been made to organize its contents along lines that would

15. *Sources and Influences of the Roman Law, III-VI Centuries A.D.* in A. SCHILLER, *supra* note 7, at 10-23.

16. In *id.* at 92-114.

17. Particularly in *Jurists' Law* in *id.* 148-60, and *The Nature and Significance of Jurists' Law* in *id.* at 199-218.

18. *Id.* at 159-60.

facilitate comparison with what we know about Roman economics and society. Schiller's support for his thesis rests, to date, not so much on the doctrines or decisions of the jurists as on the nature of the institution. The jurists kept together as a body; like a modern court, they were members of an ongoing institution. Their work was closely connected with day-to-day affairs. They gave advice on drafting instruments and conducting litigation, and, perhaps most important, they gave legal opinions both to private individuals and to government officials. These opinions were written down, disputed, and debated until one view finally emerged as the consensus of the group.¹⁹ These facts make Schiller's thesis plausible, for they show not an academic, but a highly practical group of men, deciding cases as they came to them in much the same way that the judges at Westminster developed the common law.

Schiller expands upon this institutional theme in two articles not included in this volume.²⁰ In them he demonstrates conclusively that at least some of the jurists were familiar with the extraordinary tribunals that were controlled by the prefects of Rome. The prefects were outside the complex system of magistrates that the early Empire inherited from the Republican period. They are significant not only because they took a great deal of jurisdiction to themselves but also because they used a very different type of procedure, the *extraordinaria cognitio*, mentioned earlier, in which both the law and the facts were determined by a government official, as opposed to the Republican procedural system in which the magistrate determined matters of law and laymen determined matters of fact. The jurists' interest in the system of the prefects illustrates their concern with the actual operations of the law of their day and their willingness to absorb new modes of law into the system of their predecessors. This last characteristic is also illustrated in a third essay which is contained in this volume.²¹ In it Schiller outlines all the cases concerning provincial matters that can be found in the known writings of the jurist Papinian.

The last group of essays, written over a period of time, concerns Roman legal method—specifically, the Roman notion of interpretation,²² the juridical force of custom,²³ and the *senatus consulta*, a peculiarly Roman type of legislation.²⁴ Comparative studies of legal

19. These elements are neatly summarized in *id.* at 153-57.

20. Schiller, *The Jurists and the Praefects of Rome*, 3 *RÉVUE INTERNATIONALE DES DROITS DE L'ANTIQUITÉ* 319 (1949) (in a collection of essays in honor of Fernand de Visscher), rewritten under the same title, 57/58 *BULLETTINO DELL'ISTITUTO DI DIRITTO ROMANO* 60 (1953).

21. *Provincial Cases in Papinian* in A. SCHILLER, *supra* note 7, at 126-47.

22. *Roman Interpretatio and Anglo-American Legal Construction* in *id.* at 56-91.

23. *Custom in Classical Roman Law* in *id.* at 41-55.

24. *Senatus Consulta in the Principate* in *id.* at 161-78.

method are most valuable, since it is in looking at *how* other legal systems operate, as opposed to the specific rules by which they operate, that the lawyer can free his mind from the straitjacket created by an exclusive focus on his own system. Of the three essays, perhaps the most difficult but also the most rewarding is the one on *interpretatio*. Interpretation is essential to any legal system. In a highly developed system like the Roman or the Anglo-American there will be interpretation of both private instruments (contracts, wills, and deeds) and public ones (legislation, opinions, and cases). The Romans used the term *interpretatio* not only to describe the interpretation of public and private instruments as we know it, but also to connote the development of the law, first by the pontiffs, later by the jurists, and finally by the emperor himself. Each of these groups may be associated with a different type of *interpretatio*: the pontiffs, with "literal interpretation," which exalts the words themselves over the intent of the instrument and leads to the use of fictions; the later jurists, with interpretation "*ex ratione legis*," which resolves ambiguities in a law by reference to its underlying principles and which sometimes expands the scope of a law by applying those principles to situations that the law does not specifically cover; and the emperor, with "authentic interpretation," described by Constantine as the function of mediating between law and equity, a function reserved to the emperor alone.

So far as the interpretation of instruments as we understand it is concerned, the Roman rhetorical writers developed an elaborate scheme of interpretative rules designed to allow intent to prevail over the written word (the *scriptum—voluntas* distinction). Schiller convincingly demonstrates, however, that the jurists did not adopt this system, although they were familiar with some of its distinctions, but rather, approached each case on an individual basis with the help of an agglomeration of principles and a strong sense of fact:

They had little use for hermeneutics: they preferred to attack each case involving interpretation on its own merits; they made use of all the techniques that came to hand (as well as their common sense), not to arrive at the intention of the writer, the meaning of the words, the reason for the law, or any one single factor, but to solve that particular question in accordance with the needs of the social and political life of their day. Roman law declined when hermeneutics triumphed, and although this is obviously not the prime reason, I believe that it is partly responsible.²⁵

If it is not too presumptuous, I would like to suggest one path, of the many possible paths, that Professor Schiller might explore in his retirement. His work up to now has shown a great capacity to

25. A. SCHILLER, *supra* note 7, at 91.

synthesize the large ideas of others and suggest new ones of his own; it has also shown great ability to construct a careful argument in the small, assembling and analyzing bits of data to form a link in a chain of argument. But few of his works published to date make the middle level argument, connect his detail work with the evidence to the larger scheme of ideas that he treats elsewhere. This gap, combined with the appalling state of Roman law teaching in the United States today, leads me to suggest that Professor Schiller could make a great contribution if he were to finish the revision, which I know he has begun, of his Roman law teaching materials. Such a vehicle would permit him to assemble the actual texts on which he relies for his views on the methods of the jurists. To illustrate Schiller's points, particularly for students, we do not need another textbook on Roman law or even another monograph, but rather a casebook of Roman law.

Such a book would be particularly valuable because some English scholars, heeding Professor Schiller's advice to look for the social and economic factors in Roman law, have recently produced what might be loosely described as a Marxian view of the Roman law.²⁶ The Roman law, according to this view, was designed at every turn to repress the lower classes and preserve the social status quo. I find this approach one-sided. Of course, there is some class bias in Roman law, as in any legal system, but I suspect that the policy motivations of the jurists were far more complex than the simple preservation of the status quo. If the truth is to emerge, however, the sources must be gathered in a more manageable form and reported sensitively and without bias. I can think of no one better equipped for this task than Professor Schiller.

A final word on the book itself: Books such as this are economically feasible only because of offset printing. It is useless to complain that the variety of type faces and footnote styles is annoying, because, had it not been possible to photograph the journals and books in which these articles were originally printed, the book could not have been produced. More, I think, could have been done with the arrangement of the essays. Rather than following the volume's generally chronological order, I would have grouped the essays by topic, as I have done in my discussion above. In particular, *Factors in the Development of the Late Classical Law*²⁷ should have appeared before *Bureaucracy and the Roman Law*,²⁸ since the former serves nicely as a general introduction to the latter and to the material that follows. Furthermore, although the book excludes material

26. See, e.g., J. KELLY, *ROMAN LITIGATION* (1966); J. CROOK, *LAW AND LIFE OF ROME* (1967); P. GARNSEY, *SOCIAL STATUS AND LEGAL PRIVILEGE IN THE ROMAN EMPIRE* (1970).

27. In A. SCHILLER, *supra* note 7, at 115-25.

28. In *id.* at 92-114.

published in Europe because it is designed for European readers who lack access to American materials, I would have included, in order to present a more balanced view of Schiller's work, his article on the jurists and prefects.²⁹ Finally, the value of the book could have been enhanced by a bibliography citing for each essay topic at least the principal works that have appeared since the essays were written. For example, there is much in Peter Stein's *Regulae Juris*³⁰ that is of direct relevance to what Schiller has to say about the use of maxims of interpretation in his article on Roman *interpretatio*.³¹ But these are counsels of perfection. The book serves its purpose well: It gathers from disparate and frequently inaccessible sources the work of one man and presents it in such a way that we can see the development of his thought. It should do much to enhance Professor Schiller's well-deserved reputation.

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29. See note 20 *supra*.

30. P. STEIN, *REGULAE JURIS* (1966).

31. See note 22 *supra*.