Roman Law for Undergraduates: The Case for Law Itself

by Bruce W Frier

In the early 1970s, when I began teaching Roman law to Michigan undergraduates, our department was in the midst of a transition. We had come to recognize that our continued insistence on the priority of language courses was endangering our viability, and that we needed to considerably expand our offerings in translation. Accordingly, each member of the department was asked to create and teach a new translation course that presented the ancient world in a new light. My course was an advanced one in Roman law.

For the first few years, I modeled my course on one I had audited years before, as a graduate student at Princeton, from Frank Bourne. The course was an amiable romp through R.E. Lee's *The Elements of Roman Law* (2d ed. 1949), based on Justinian's *Institutes*, with wide diversions into Cicero's courtroom practice, or the underlying values of Roman law, or this system's historical significance, and so on. Almost immediately, however, I came to feel that my students—though they seemed appreciative—were not learning much they would be likely to retain, either about the content of Roman law or about its intellectual methods. A semester was too short for real immersion.

Here, three lucky accidents intervened. First, back in the 1960s my section leader at Princeton had been a real lawyer, Ed Cohen of Philadelphia, who is also a Prnceton Ph.D.; Ed did not exactly subvert Frank Bourne's course, but he started to open very different vistas of the material we were studying. Second, in 1972/73, thanks to the ACLS, I spent a year in Boalt Hall, Berkeley's law school, where, besides conversing frequently with David Daube, I audited four full-year courses in Common and Constitutional Law; this experience profoundly altered my understanding of law itself, taking me away from the traditional formalism of European Romanists. Third, in 1976/1977 I spent a year on an NEH fellowship in Salzburg, Austria, where I studied with Max Kaser, but also became acquainted with the revolutionary *Casebooks* of Roman law that Herbert Hausmaninger had introduced.

When I returned to the United States, it was with a commitment to the view that I could not teach my undergraduate class as I had. Over the next year or so I reoriented the class away

from more usual presentations of Roman law as a facet of Roman civilization, and toward an adapted version of the "case law" method I'd seen in Berkeley. I have never looked back. My undergraduate class involves fairly detailed examination of an area of Roman law—usually, delicts or Roman family law, the subjects of my two casebooks; but in the past I have used property and contracts as well. Teaching is directly from ancient texts, almost always fragments of early imperial juristic writings from the Digest of Justinian. I do not lecture, but instead try to elicit viewpoints and then pose questions that strengthen the analytical powers of my students. Only as warranted do I bring in cultural, social, or economic background material.

For me, this form of class is deeply satisfying. My students, through their own questions, have taught me a good deal about the sources I use, so that I tend to approach these sources with constantly refreshed eyes. And as for the students themselves—a good many of whom have aspirations to attend law school—I can easily measure their improvement across the semester. At the start, few find it easy to formulate even a simple legal point; by the end, they are debating successfully both with me and with the Roman jurists themselves. Since most of my students are at least considering law as a career, the course appears to serve them well.

Today, however, I wish to turn away from the specific features of my own course, to consider two broader issues: Roman law's potential significance within the undergraduate curriculum in liberal arts, and the responsibility of Classics departments with respect to this curriculum.

We may start from American legal education as it is today. Since the late nineteenth century, the professional training of lawyers and access to the legal profession have been effectively controlled by law schools, which require an undergraduate degree for admission. This control is justified as ensuring the profession's quality, but it also restricts the number of lawyers.

Predictably, law schools have often discouraged the teaching of law at the undergraduate level, on the theory that, since undergraduate courses in law are usually both superficial and factually challenged, law students do better if they enter with a *tabula rasa.* To the extent that law schools envisage a "pre-law" curriculum, it is a hodgepodge mainly instrumental for future law students: a year-long course in basic American history, introductions to micro- and macroeconomics, perhaps a course in accounting, and so on. Courses in legal thinking, or even the philosophy of law, are not on the agenda. The official position of the American Bar Association is that it "does not recommend any particular group of undergraduate majors, or courses, that

should be taken by those wishing to prepare for legal education; developing such a list is neither possible nor desirable."

While this position is certainly defensible from a law school's perspective, it has two serious drawbacks. The first is that it results in students who enter law school with imprecise ideas of what they will find there; this is important in the case of students who may quickly discover that law school is not for them.

The second drawback is still more significant: law school exclusivism does nothing for undergraduates who do *not* go to law school. They usually graduate with extremely hazy notions both of what American law is and of the critical role it plays in modern society; and this, in turn, adversely affects the quality of civil discourse in contemporary politics and the media. I would not wish to go so far as to agree with an Ann Arbor undergraduate Dean who said: "For all the good the law school does us, it might as well be located in Chicago." But there is a problem here, one that even most of my law colleagues would concede exists, although, by and large, they have done little to address it forthrightly.

American ignorance of basic law is astonishing. A well-known 2002 survey by the Columbia Law School revealed that, while a majority of Americans knew that Supreme Court Justices serve life terms and that persons born or naturalized in the United States are citizens, more than two-thirds thought Karl Marx's famous maxim, "From each according to his ability, to each according to his needs," was or could have been written by the framers and included in the Constitution; and most believe that if *Roe v. Wade* is overturned, abortion would become illegal throughout the United States. A 2006 survey by the McCormick Tribune Freedom Museum revealed that, while more than half of Americans can name at least two members of the Simpson cartoon family, only one in four can name more than one of the five freedoms guaranteed by the First Amendment, and only one in a thousand could name all five. (Don't worry, there won't be a quiz.)

Plainly, high school civics courses do not cut the mustard. But what I am more concerned about is something different: an understanding of how lawyers think, and, more generally, how law operates as an analytical discipline. Admittedly, the very concept of "thinking like a lawyer" is controversial, as Fred Schauer has emphasized in his excellent book on that topic; lawyers rarely make use of intellectual techniques not found in other disciplines. And, in a sense, legal

analysis has always been present; fourth-century Attic speechwriters, for instance, already display considerable dexterity in manipulating legal rules, albeit in the narrow service of arguing particular cases.

Nonetheless, as the late Republican Roman jurists already perceived, there is something profoundly different that happens when basic analytical techniques are deployed systematically in relation to legal rules and institutions, and, in particular, when this is done on a persistent and intensive basis. As has long been recognized, this process commonly tends to alter its practitioners; in discovering and developing the law, they become willing to accept ambiguity, and to operate inside the parameters of uncertainty, not tying themselves emotionally to one position or another. But far more important are the historical consequences of having a body of such persons, sharing common skills and the ability to communicate, and then working within a polity as they strive to develop and defend the impersonal centrality of law as a self-regulating instrument of social control.

Even if law schools are granted a degree of exclusivity in teaching the law, I think it important that some understanding of their discipline be communicated more widely within the academic community. Movement on this front can be seen, for instance, at Stanford University, where the Dean, my former colleague Larry Kramer, has helped organize a course—titled "Thinking Like a Lawyer"—that is specifically designed to offer graduate students outside the field of law a window into core legal concepts. Taught by twelve Law School faculty with areas of expertise ranging from torts to intellectual property, the course draws graduate students from a wide cross-section of disciplines; for instance, one graduate student in Environment and Resources, who hopes to develop policies for sustainable land use, is eager to know how lawyers approach land disputes.

For Kramer, however, the payoff lies elsewhere, beyond the rules themselves. "Law is more art than science," he says. "It's like learning music. In music, there are a limited number of foundational notes and chords that one learns to combine in ever more complex ways to create different melodies and different styles of music. So, too, in law there are a limited number of concepts and forms of argument that law students learn to use and that make up the underpinnings of different fields of law."

The Environment and Resources student saw this immediately. "Coming from a science background, I'm looking for the answer," she said. "In law it's about making a case—not necessarily about right or wrong answers."

But development of courses such as Stanford's is time-consuming and resource-intensive, and even Stanford's is confined to graduate students. My own law school has a fair number of interdisciplinary connections, but most are more tightly focused: fourteen interdisciplinary degree programs in, e.g., Business Administration, Public Health, and Social Work; a considerable number of faculty members (like me) with joint appointments; several inter-unit working groups and lecture series; and so on. These accommodations are pitched entirely at the faculty and graduate student level, not at undergraduates; the University of Michigan has no official prescribed Pre-Law concentration or program, and its suggested on-line "4-year plan" for pre-law college education is nugatory.

Our attitudes in this matter contrast sharply with Europe, where law has long been a regular and popular part of undergraduate education. Oxford, for example, offers a three-year basic course in law that "aim[s] to develop in ... students a high level of skill in comprehension, analysis and presentation. Students are expected ... to think hard about what the law is, but also about why it is so, whether it should be so, how it might be different, and so on, drawing on moral, philosophical, social, historical, economic and other ideas." A large percentage of these Oxford students, it should be noted, do not go on to careers in law.

To put it bluntly, I cannot for the life of me understand why American undergraduates should not be challenged in a similar fashion and to a similar degree. On this side of the Atlantic, however, we suffer under the strong compartmentalization imposed by our law schools. The American compartmentalization is unfortunate, since it results in a bifurcated civil discourse, with most Americans finding the higher process of law—as represented, for instance, in Supreme Court opinions—almost incomprehensible; only lawyers find themselves truly at home with this process. The result we have before us, in madcap political demagoguery concerning the role of the judicial system in a modern society.

What I am getting around to, of course, is that undergraduate courses in Roman law can be justified in a way quite distinct from our normal practice: not as just another part of our usual attempts to expose undergraduates to various slices of the ancient world, but rather (or also) as a part of our educational duty within the broader context of the goals of the undergraduate curriculum. This is, obviously, not a mode of thinking that is alien to standard conceptions of Classical Studies in relation to the liberal arts.

But with regard to law the goal is quite concrete: to teach students about law—modern law!—through the relatively neutral apparatus of classical Roman juristic texts.

For it needs to be said that these texts are almost ideally suited to such a purpose, as has long been recognized. Roman law itself is of sustained interest when examined close-up, under an analytical microscope; juristic discussions of law are normally clear and relatively easy to understand (at least after one is acclimated to the kind of discussion they involve), but not at all overloaded with the wearisome rhetoric of modern judicial decisions. The preserved juristic opinions are rarely fully argued, a feature that is (perhaps unexpectedly) a source of considerable pedagogical value when one teaches the art of distinguishing cases; the very brevity of juristic decisions operates as a powerful incentive to the development of students' analytical skills. The cognitive mechanisms thereby developed serve to make general legal thinking much more accessible, even for students who eventually decide against going to law school. Further, Roman law operates against a social and economic background that, despite its exotic elements (above all, slavery), is still readily comprehensible precisely because of the absence of advanced technology and capitalist institutions; they operate within a much simpler technological and economic world that does not require extensive modern experience. Finally, Roman law is alien enough that it constitutes no major threat to subsequent law school teaching; on the whole, law school admissions offices welcome prior student experience with legal history, as I know from extensive personal experience.

The sort of civic duty rationale I have also developing is also pertinent, I think, to other departments of liberal arts colleges. However, I think that we, as classicists, have a special opportunity because of the sources at our command. On the other hand, it is certainly true that classicists often feel intimidated by Roman legal thinking, and that they therefore feel somehow unqualified to teach Roman law, or at any rate they feel uncomfortable doing so. Certainly legal sources are different from ordinary classical sources, and most classicists will feel a degree of initial unease in teaching law. We may justifiably regard ourselves as experts in explicating what Homer or Virgil is saying in a passage. Somehow it is a much different matter when we try to explain what Celsus or Julian means by a particular ruling; and far more so when we conjecture (as legal thinking obliges us to do) whether the rulings of Celsus and Julian are ultimately consistent, or whether they can at least be distinguished, or whether they ultimately stand in opposition.

To be sure, teaching law is hard, at least at first. It requires, for instance, a degree of classroom attention to student answers that is actually mentally exhausting. Still, the rewards are also great. And, in the end, I return to my favorite dictum:

It is far easier to teach a classicist law than to teach a lawyer classics.