

## CONTINENTAL LAW AND COMMON LAW: HISTORICAL STRANGERS OR COMPANIONS?

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Nineteen hundred and ninety-two is almost upon us. Students who follow the world of international finance will quickly recognize the significance, symbolic as well as real, of that date. It will bring further integration of European markets, including England's, and it will encourage the development of the means to make that integration effective and efficient. All sorts of projects that once would have seemed utopian or infernal are being proposed, and most of them seem likely to occur. Plans and work proceed. There will be a tunnel between Calais and Dover, and perhaps even a common unit of monetary exchange to facilitate trade. Before we know it, proposals that once would have startled will be realities.

The world of law will be touched by these great events.<sup>1</sup> Already European courts have struck daggers aimed at venerable principles of English parliamentary sovereignty.<sup>2</sup> The English Lord Chancellor has endorsed opening law practice in England to lawyers trained in the traditions of the civil law.<sup>3</sup> Soon the temples of the common law may be

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1. See Berlins, *Legal Profession in Britain: The 1992 Conundrum*, 15 COMMONWEALTH L. BULL. 293 (1988).

2. See, e.g., Case 804/79, *Commission v. United Kingdom*, 1981 E. Comm. Ct. J. Rep. 1045 (European Court of Justice of the European Community decision holding English statutes regulating fishing in violation of treaty obligations invalid); *Dudgeon v. United Kingdom*, 4 Eur. Hum. Rts. Rep. 149 (1981) (statutes against consensual homosexual acts committed by men over age 21 in private held to violate article 8 of the European Convention on Human Rights by European Court of Human Rights).

3. See LORD CHANCELLOR'S DEP'T, *THE WORK AND ORGANISATION OF THE LEGAL PROFESSION* 47-8, 56 (1989). For commentary from practicing lawyers, see Arnheim, *The Greening of*

crowded with lawyers and court decisions from across the English Channel. Common lawyers may be required, *volle nolle*, to pay attention to what strangers say and think.

When and if this change takes place, this Article contends that it will not be entirely an innovation. Such a change will constitute a return, albeit in an altered form, to a state of affairs that existed before the 19th century. Prior to the 19th century, absolute barriers between Continental law and the common law did not exist. The question raised in this paper's title—strangers or companions—was posed and answered with regularity. In most, although not all, situations companionship prevailed.

I should say at the outset that my reading of the evidence is contrary to the view held by the greatest historian of the common law, F. W. Maitland. The common lawyer, a man who still lives in Maitland's pages, was someone who "knew nothing and cared nothing for any system but his own."<sup>4</sup> He was wholly insular in outlook and was content to be so. I think that this characterization is mistaken. I believe that our ancestors, as lawyers, were familiar with international sources of law, that they borrowed from them, that they did so more than once in a great while, and that this borrowing has been important in the development of our common law.

The question of how much the men who fashioned our law knew about Continental sources of law and legal thought is well worth exploring. The answer may shed direct light on one of the several ways in which our law grew, and it may even shed some indirect light on the radical changes promised by 1992. The differences between the pre-19th century world and that of post-1992, of course, may be as important as the similarities. Initially, acceptance of Continental rules will, for the most part, be forced upon common lawyers. The obvious question will be whether local law will pass muster when measured against the treaties and conventions of the European Community. However, even grudging acceptance may lead in time to quite different attitudes. Common lawyers may become professionally comfortable with Continental ideas and may even grow to admire some of them. The increased attention paid to ideas from countries outside the common law sphere invariably will increase the possibilities for outside influence on the common law.

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*the Law*, 133 SOLIC. J. 527 (1989) (advocating the Lord Chancellor's proposals to eliminate the distinctions between solicitors and barristers).

4. F.W. MAITLAND, *Why the History of English Law is not Written*, in 1 THE COLLECTED PAPERS OF FREDERIC WILLIAM MAITLAND 480, 488 (H. Fisher ed. 1911). See generally R.C. VAN CAENEGEM, *THE BIRTH OF THE ENGLISH COMMON LAW* 85 (2d ed. 1988) (emphasizing the separate path taken by the English legal system as compared to Continental Europe).

In making the argument that such civil law influence on common law jurisdictions would not be unprecedented, this Article examines three important moments in the history of the common law: the granting of Magna Carta in 1215; the English constitutional struggles of the early 17th century; and (crossing the Atlantic) the formulation of American jurisprudence during the early years of the American Republic. Each example is meant to illustrate habits of legal thought in common law jurisdictions that have long existed, although with numerous variations and many ups and downs. The practice of utilizing civil law demonstrated an ability to survive vast changes in the Anglo-American common law, as well as enormous growth in Continental law itself.

### I. MAGNA CARTA

The story of Magna Carta is known in outline to all lawyers who take an interest in constitutional questions. A series of concessions wrung from King John by the English barons, the Great Charter survived all attempts to invalidate it and became the first and foremost enactment in the English book of statutes. It later served as both a rallying cry and a foundation for principles of the modern rule of law.<sup>5</sup> Surprisingly, it continues to serve that function in modern American cases.<sup>6</sup> A simple LEXIS search turns up over 600 separate references to the product of the fields at Runnymede in state and federal cases decided during the last twenty-five years. Reading some of these cases shows that Magna Carta's talismanic character still lives.

By 20th century standards, the original sixty-one chapters of Magna Carta have a distinctly miscellaneous quality. Great principles of constitutional moment jostle with rules about weights and measures. Some chapters seem to enshrine only baronial self-interest and would furnish grist for the mills of the grinders of public choice theory.<sup>7</sup> Others are

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5. For example, a copy of the Magna Carta is printed in its entirety directly before the American Declaration of Independence, in 1 WYOMING STATUTES ANNOTATED 21 (1977). This suggests that these two documents are regarded in the same inspirational fashion. The most recent full historical treatment of the subject is J.C. HOLT, *MAGNA CARTA* (1965). The standard guide to specific provisions of the document remains W. MCKECHNIE, *MAGNA CARTA: A COMMENTARY ON THE GREAT CHARTER OF KING JOHN* (2d ed. 1914).

6. See, e.g., *Polkey v. Phillips*, 86 Ill. App. 3d 677, 683, 408 N.E.2d 348, 352 (1980) ("right of trial by jury is recognized in the Magna Charta"); *State v. Cavallaro*, 274 N.C. 480, 482, 164 S.E.2d 168, 169 (1968) (right to speedy trial "guaranteed to Englishmen since Magna Charta").

7. The most famous is chapter 24, which protected baronial rights to hold court—a right that had been impeded by overuse of the writ *praecipe*. See W. STUBBS, *SELECT CHARTERS* 288 (H. Davis 9th ed. rev. 1913). There is an accessible English translation and commentary in S. THORNE, W. DUNHAM, P. KURLAND & I. JENNINGS, *THE GREAT CHARTER* 105 (1965).

more difficult to account for on theories of influence and self-interest.<sup>8</sup> It seems worthwhile to take three chapters that have a little of both and try to discover something about the origins of the legal rules they contain. This examination will show that some chapters of Magna Carta were related, in part, to Continental legal sources.

Chapters 26 and 27 of Magna Carta state that when a man dies leaving a last will and testament, his last wishes should be carried out according to the testament's directions, saving to his wife and children their "reasonable parts" of his goods. When a free man dies intestate, his goods should be distributed by his relatives under the supervision of the Church.<sup>9</sup> To anyone familiar with the subsequent history of probate jurisdiction, these principles seem reasonable, even inevitable. Nevertheless, the principles would have been debatable at the time. Testamentary freedom was not a given. With real property, testamentary freedom was not fully adopted by the common law until more than 300 years later.<sup>10</sup> As for chattels, in 1215 the claims of a vassal's lord were as strong as those of the next of kin.<sup>11</sup> Magna Carta's provisions on the subject represented a choice among competing rules of law.

If we look for contemporary statements of the choice that was in fact made, there can be little doubt that the choice derived from the canon law—the law of the Church. Papal letters, some of which were directed to English bishops, stressed the principle of testamentary freedom,<sup>12</sup> and they encumbered that freedom only with the identical concession of the share for a man's children that appeared in Magna Carta and that ultimately came from Roman law.<sup>13</sup> Contemporary canon law also provided for supervision by the Church of the distribution

8. Not impossible, I am sure. See, e.g., Ekelund, Hébert & Tollison, *An Economic Model of the Medieval Church: Usury as a Form of Rent Seeking*, 5 J. L. ECON. & ORG. 307, 328 (1989) (arguing that the enormous economic power wielded by the medieval church is explained through the theories of monopoly, rent seeking, and industrial organization as witnessed by a usury doctrine developed to suit its institutional interests).

9. W. STUBBS, *supra* note 7, at 296 ("*per visum ecclesiae*").

10. Statute of Wills, 1540, 32 Hen. 8, ch. 1. See generally J. BEAN, *THE DECLINE OF ENGLISH FEUDALISM 1215-1540*, at 40-103 (1968) (tracing the struggle to wrest control over the alienation of real property from the Crown in the 11th through 13th centuries).

11. See *TRACTATUS DE LEGIBUS ET CONSUECUDINIBUS REGNI ANGLIE QUI GLANVILLA VOCATUR* 89 (G. Hall ed. 1965); see also W. MCKECHNIE, *supra* note 5, at 326-29 (discussing the Magna Carta's shift of power over intestate succession from the feudal lords to the church); D. WILLIMAN, *THE RIGHT OF SPOIL OF THE POPES OF AVIGNON 1316-1415* (Transactions of the Am. Phil. Soc'y 1988) (discussing the right of the Pope to succeed to the goods of clerics except when the cleric died testate with a designated heir).

12. See, e.g., Letter from Pope Alexander III to the Bishop of Ely (between 1178 & 1181), reprinted in *QUINQUE COMPILATIONES ANTIQUAE*, comp. 2, lib. 3, tit. 14, § 1, at 84 (A. Friedberg ed. 1882).

13. See *Decretales Gregorii IX*, in 2 *CORPUS IURIS CANONICI*, lib. 3, tit. 26, ch. 16, at 544-45 (A. Friedberg ed. 1881) (adopting the rule found in Nov. 18.1). For an example of later enforcement

of the assets of intestate decedents.<sup>14</sup> Ecclesiastical supervision was designed to secure the orderly and fair distribution of those assets among the decedent's relatives, and also, it appears, to secure to the Church that share of the estate which ecclesiastics believed any reasonably pious decedent would have desired. Magna Carta did not claim that the Church should determine the validity of testaments or actually authorize the administration of decedents' estates, although this eventually was the solution worked out in England. But, as the canon law stood in 1215, no such right was then asserted on the part of the Church itself; all the Church claimed was a general right to supervise. Therefore, it is not at all surprising that Magna Carta's chapters 26 and 27 are institutionally imprecise. That is how the canon law read at the time.

A second example comes from one of the oddest of Magna Carta's provisions—chapter 61. According to this chapter, if the king should fail to abide by the Charter's provisions in any particular, a committee of four barons should refer the matter to a larger committee of twenty-five barons, who together would “distrain and distress [the king] by seizing his castles, lands, possessions, and in any other way they could until redress had been obtained.”<sup>15</sup> In other words, to enforce the Charter, this chapter legalized and provided an institutional framework for war between the king and his vassals.

Modern historians have regarded chapter 61 as unwieldy and lacking in imagination.<sup>16</sup> Perhaps it was; it was dropped from subsequent reissues of the Great Charter.<sup>17</sup> Chapter 61, however, was not just a bad baronial idea; instead it was an adaptation of a similar remedy found in the *Libri feodorum*,<sup>18</sup> the collection of feudal law compiled in Bologna during the 1150s and routinely added at the end of medieval copies of the *Corpus iuris civilis*, which contained the basic texts of Roman law. Chapter 61 thus seems to be an adaptation from a Continental source. The barons at Runnymede seized upon the concepts of the civil law when

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of this rule, viewing Magna Carta as merely stating customary practice, see *Cason v. Executor of Cason*, Lit. 324, 124 Eng. Rep. 268 (C.P. 1629).

14. See M. SHEEHAN, *THE WILL IN MEDIEVAL ENGLAND* 126 (1963) (bishop's interest in securing enforcement of pious legacies was being “extended in an imprecise manner to the institution as a whole”). See generally H. AUFFROY, *EVOLUTION DU TESTAMENT EN FRANCE DES ORIGINES AU XIIIÈME SIÈCLE* (1899).

15. W. STUBBS, *supra* note 7, at 301.

16. See, e.g., W. McKECHNIE, *supra* note 5, at 468 (“The procedure devised for enforcing the Charter was crude.”).

17. This chapter was excised in the reissues of 1216 and 1217. See 1 *STATUTES OF THE REALM* 14, 17 (Record Commission 1810).

18. Lib. II, tit. 21, § *Si vero*, in 5 *CORPUS IURIS CIVILIS* 374 (Venice 1598 ed.). For an English language introduction to the *Libri feodorum*, see W. ULLMANN, *LAW AND POLITICS IN THE MIDDLE AGES* 216-217 (1975); A. WATSON, *SLAVE LAW IN THE AMERICAS* 16-21 (1989).

they faced the problem of securing obedience to the law by the king's government.

Chapter 8 presents a third example of borrowing, which involves—or at least seems to involve—women's rights. It provided that no widow should be compelled to marry if she wished to remain unmarried, but added that if she did wish to remarry she should then provide a guarantee not to do so without the assent of the lord under whom she held her lands. The king's much resented practice of selling the hand of wealthy widows to the highest bidder prompted this provision.<sup>19</sup> Magna Carta provided that in the future widows should not suffer this particular indignity. The provision must, however, be regarded as a compromise, for some rights of the lords were expressly protected. The cause for wonder is that the barons protected widows' rights at all.

The explanation again points to a Continental source. A stated principal of the law of the Church was that marriages ought to be the product of free choice.<sup>20</sup> Provincial councils, the *Decretum Gratiani* (1140), and papal decretals all reiterated that rule. "Forced marriages lead to difficult outcomes,"<sup>21</sup> the canonical texts read, although some thought that what the misogynous authors of the texts really meant was that *all* marriages lead to difficult outcomes. Chapter 8 appears to reflect a compromise—a compromise struck between this canonical rule of freedom in marriage on the one hand and the interests of the Crown and feudal lords on the other. Widows should never be *required* to enter into a second marriage, but their liberty should not be used to the prejudice of the lord. There was undoubtedly opposition, both principled and practical, to outright adoption of the canon law on this subject,<sup>22</sup> and that opposition gave rise to this compromise. Whether the result should today be regarded as a statesman-like act or as a sell-out of women's rightful claims is open to question.

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19. W. MCKECHNIE, *supra* note 5, at 220.

20. See generally Noonan, *Power to Choose*, 4 *VIATOR* 419, 433-34 (1973) (discussing cases of parental coercion in which marriages were nullified).

21. See, e.g., *glossa ordinaria* ad X 1.40.2 (*Abbas*) s.v. *coactus*, in 3 *CORPUS IURIS CANONICI*, col. 443 (Lyons 1556) ("quia invitae nuptiae difficiles exitus consueverunt habere").

22. For an attempt to reconstruct the attitude of the laity towards some of the canonical principles regulating marriage, see G. DUBY, *LE CHEVALIER, LA FEMME ET LE PRETRE* (1981), translated as *THE KNIGHT, THE LADY, AND THE PRIEST: THE MAKING OF MODERN MARRIAGE IN MEDIEVAL FRANCE* (B. Bray trans. 1983). The best early English example of articulated opposition to the canonical position is the decision of the Council of Merton (1236), in which the barons refused to accept the Church's view on the legitimation of children born before their parents' marriage. See F. MAKOWER, *CONSTITUTIONAL HISTORY AND CONSTITUTION OF THE CHURCH OF ENGLAND* 422 (1895).

These examples of rules that appear to have been taken from the canon and civil law could be multiplied,<sup>23</sup> but of greater immediate relevance is how they could have come from the pens of the barons at Runnymede, men who were presumptively self-interested and certainly not international lawyers. We do not possess the same sort of information about the intentions of the framers of Magna Carta that we possess for our own Constitution, but there can be little doubt that some of these ideas came from the person or household of Stephen Langton, Archbishop of Canterbury and the leader by position of the English baronage.<sup>24</sup> Langton, a stranger to most students of English law, is an interesting figure in his own right, and his career provides an excellent example of one path by which Continental legal traditions were felt in England.

A native of Lincolnshire, in his early years Langton was a student and then a teacher at the University of Paris.<sup>25</sup> Summoned to the papal court and made a cardinal by Pope Innocent III in 1206, Langton subsequently became Archbishop of Canterbury as if by accident—after a disputed election by a divided and probably corrupted group of monastic electors. Even then, he had to wait several years before he could assume his new position because of the fury of and opposition by King John. Langton took possession of his see only in 1213, after the reconciliation between King John and the Church and the lifting of the papal interdict on England in 1213.<sup>26</sup> Langton was, in other words, one of the internationalist prelates well known to students of the Middle Ages, exerting the sort of influence that naturally led to the importation of ideas from the Continent.

Archbishop Langton played a major part in the events leading up to Runnymede, and his hand visibly appears in several provisions of the document that emerged out of that clash. This does not mean that he dictated the Great Charter out of the canon and Roman law: Many of

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23. I have not discussed the obvious cases of borrowing in Magna Carta: Magna Carta ch. 1 (freedom of the English Church); *id.* ch. 6 (safeguards against consanguineous marriages); *id.* ch. 22 (protection of clerical property). Several other provisions suggest the possibility of canonical influence—for example, *id.* ch. 38, requiring lawful witnesses against a man before he could be put to his oath. I hope to be able to return to this subject at a later time.

24. The fundamental work concerning Langton's influence is F. POWICKE, *STEPHEN LANGTON* (1928). Langton's influence is especially clear with respect to Magna Carta ch. 5. See F. POWICKE, *supra* at 102-28.

25. It is to Langton, incidentally, that we owe the modern form of the division of the *Bible* into separate chapters. See F. Powicke, *supra*, note 24 at 34-40.

26. *Id.* at 74-75. It is not my intention to deny or even to downplay the role of customary right or that of prior coronation oaths in the formulation of the Great Charter. My goal is simply to bring to light the influence of the canon and civil laws. Moreover, it seems unlikely that Langton would have made a rigid separation between lawful custom and the canon law.

Magna Carta's chapters do not contain the slightest connection with either. Still less could one argue that the incorporations from the incipient European *ius commune* were taken whole into the common law. Chapters 26 and 27, for example, underwent (and required) considerable development before they became a workable system of probate administration. Chapter 61 was a bad idea and was quickly discarded. Chapter 8's component in favor of freedom of marriage was far from a full application of canonical principles. What appears to have happened is that the barons, under some prodding by their Archbishop, seized upon rules drawn from Continental sources and inserted them, with appropriate modifications, into the Great Charter. In a moment of constitutional dispute and crisis, they turned to ideas that had been developed in the Roman and canon laws. They felt no shame in their action. Legal ideas were there for the seizing. The barons did what lawyers habitually do. In a tough spot, lawyers have not the slightest compunction about taking someone else's ideas, changing them a little to fit the circumstances, and seeing if those ideas will achieve the desired results.

## II. SIXTEENTH AND SEVENTEENTH CENTURY COMMON LAW

Moving ahead four centuries (to 1600 and the reigns of Elizabeth I and the early Stuarts) brings one into a very different legal world. The common law was vastly larger in scope and in sophistication. England was assertively Protestant in religion and had cut the ties that once connected it with the Roman Church. Moreover, common lawyers were self-conscious of the special role their law played in defining the rights and liberties of Englishmen. This was the age of Sir Edward Coke, the great English lawyer who (with Blackstone) probably did as much as any single individual to shape the common law. Not entirely coincidentally, it also was a time of constitutional conflict, and from this conflict emerged the first clear statements of some of our liberties. The question, then, is whether English lawyers in this time of growing sophistication and constitutional struggle made any use of or drew any inspiration from the *fontes* of the civil law. And, if they did, how did they use it?

Openness to influence from foreign sources on the part of the common lawyers is not what one would expect from a perusal of the most influential historical accounts of the period. Insularity is commonly thought to be a far more salient characteristic. J. R. Tanner's description of Coke as "a mind fanatically narrow"<sup>27</sup> only slightly exaggerates the

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27. J. TANNER, ENGLISH CONSTITUTIONAL CONFLICTS OF THE SEVENTEENTH CENTURY 1603-1689, at 41 (1962). Even the basic work presenting the case that fundamental or natural law principles played an important part in English development does not ascribe any role to the Euro-



widely held view that an unbridgeable gulf existed during this era between the English common law and the cosmopolitan traditions of the European *ius commune*.<sup>28</sup> According to this view, if there were supporters of the civil law, then they were likely to have been partisans of royal absolutism, whereas most common lawyers—the enemies of extensions of the royal prerogative—necessarily were enemies of the civil law itself.

I do not believe this position can be sustained. Catalogues of the libraries of early common lawyers show large numbers of Continental law books. Sir Edward Coke himself possessed a quite considerable collection.<sup>29</sup> Of course, owning a book is not equivalent to reading it. The real test must be whether common lawyers actually used books from the civil law tradition. And, the evidence demonstrates that such use did occur during the late Tudor and early Stuart periods. This openness to Continental sources of law appears from three examples taken from the common law reports: first, disputes about the prerogative rights and powers of the Crown; second, the origins of the privilege against self-incrimination; and third, the early history of the law of libel and slander. In all three examples, foreign law sources played a cognizable, although not necessarily determinative, role in the development of English common law.

The most conspicuous cases in which English common lawyers drew upon Continental sources for purposes of defining the powers of the Crown were those that dealt with powers that had been exercised by the medieval papacy, such as permitting clergymen to hold more than one benefice,<sup>30</sup> or granting dispensations for the marriage of men and women related by prohibited degrees of affinity or consanguinity.<sup>31</sup> There is

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pean *ius commune*. See J. GOUGH, *FUNDAMENTAL LAW IN ENGLISH CONSTITUTIONAL HISTORY* (1955).

28. See J. POCOCK, *THE ANCIENT CONSTITUTION AND THE FEUDAL LAW*, 30-55 (1957). Pocock seems not to have changed his mind on this question in response to critics who have shown that some common lawyers were acquainted with the civil law. See J. POCOCK, *The Ancient Constitution Revisited*, in *THE ANCIENT CONSTITUTION AND THE FEUDAL LAW* 255, 262-64 (2d ed. 1987).

29. A CATALOGUE OF THE LIBRARY OF SIR EDWARD COKE 38-41 (W. Hassall ed. 1950); see also Lincoln's Inn Library, London, Selden MS. 12, fols. 159-86 (alphabetical catalogue to the multi-volume *Tractatus universi iuris* containing received learning from the commentators on the *ius commune*).

30. See *Colt & Glover v. Bishop of Coventry & Lichfield*, Hob. 140, 144-46, 80 Eng. Rep. 290, 294-95 (K.B. 1612) (citing the Gregorian Decretals and treatises by Petrus Rebuffus (d. 1557) and Antonius Gomezius (d. 1562/72)). For other reports of the case, see 1 Rolle 451, 81 Eng. Rep. 600; Moore K.B. 1262, 72 Eng. Rep. 982 (1617).

31. See *William's Case*, Lit. 355, 124 Eng. Rep. 282, 282 (C.P. 1631) (judges decide to "oyer civillians & divines" on the point). See also *Thecar's Case*, Lit. 177, 124 Eng. Rep. 195 (Ct. of Wards 1628); *Whitton v. Weston, Jones*, W. 182, 82 Eng. Rep. 96 (K.B. 1628); *Jones v. Jones*, Hob. 185, 80 Eng. Rep. 332 (K.B. 1617).

something startling—at least at first—about seeing the powers of Protestant monarchs announced with the same rules Catholic jurists evolved to define the powers of the papacy. Nevertheless, that is exactly what one sees in the English law reports, and these definitions inevitably called for use of the Continental treatises found in English libraries.

Usage of civil and canon law sources was not, however, limited to cases that involved the Crown's inherited ecclesiastical powers, as two brief examples illustrate. The first, a 1628 case from the Court of Common Pleas, concerned the power of the Crown to grant a further commission of review from a final judgment at law.<sup>32</sup> Among other authorities, counsel cited the discussion on the point found in a treatise by Didacus de Covarruvias y Leyva.<sup>33</sup> Covarruvias was a 16th century Spanish jurist and a writer on various aspects of the *ius commune*, and it is of interest to note that his opinion actually was cited *against* the existence of this aspect of the royal prerogative. Reflexively, it is not what we would expect. Covarruvias' name, unfamiliar to most common lawyers today, does not figure in any account of the history of the English common law. Perhaps it should. Some English lawyers of his own time evidently were familiar enough with his work to make use of it in actual litigation.

*The Case of Mixed Money*, heard before a conference of the English judges in 1605, provides a second example of the use of Continental sources to define the powers of the Crown.<sup>34</sup> The question presented in this case involved the extent of the Crown's right to alter the coinage. Invoked in the course of argument and decision were texts from the Roman law *Digest*, and also opinions of Baldus de Ubaldis (d. 1400), Carolus Molinaeus (d. 1566), Jean Bodin (d. 1596), Covarruvias, and (most frequently) Renerus Budelius (d. 1597), the author of a standard civilian work on the subject of coinage.<sup>35</sup> Of course, Continental texts and opinions were not the only authorities cited in these cases—far from it. No one would argue that the civil law dominated such litigation. But these two cases are not alone in employing authority drawn from civilian treatises, and they are quite incompatible with a depiction of common lawyers as ignorant and uncaring of any but domestic law.

A second instance of Continental law usage during this era, the origins of the privilege against self-incrimination, also ties into the constitu-

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32. *Haver v. Thorol*, Lit. 228, 230, 124 Eng. Rep. 221, 222 (C.P. 1629).

33. *Id.* ("Corruvianus [sic] dit, que nest grant in Spain, & que apres Commission al Delegates ne poet estre Review grant . . .") ("Covarruvias says that [review] is not granted in Spain, and so after a Commission to the Delegates no review can be granted . . .").

34. *Davis* 18, 80 Eng. Rep. 507 (P.C. 1605).

35. Budelius, also known as René Budel, was born in the Low Countries, trained in law, and rose to become Director of the Coinage for the Duke of Bavaria. The treatise *De monetis, et renumaria, libri duo* (Cologne 1591) is his sole known work.

tional struggles, but it is a borrowing that left a more lasting imprint on our law. The widely accepted view, set forth by Leonard Levy, suggests that the origins of the privilege are found in a clash between rival systems of criminal procedure, specifically in the clash over the legality of the *ex officio* oath used in the prerogative courts, notably the Court of High Commission.<sup>36</sup> Fueled by antagonism between Laudian Churchmen<sup>37</sup> and Puritans, the controversy centered on whether the prerogative courts could put men on their oath and thereby require them to answer possibly incriminating questions before those taking the oath knew what the questions would be. The common law courts, using writs of prohibition and habeas corpus, determined to keep their rivals, the prerogative courts, from imposing this particular oath. Advocates of the common law courts' position argued that the practice violated a basic legal principle—that no man could be made to bear witness against himself. In so arguing, these common lawyers established the modern privilege against self-incrimination. Levy regards the privilege as a product of the common lawyers' struggle against an absolutist, and foreign, system of law.

There are several things wrong with this account. One of them is the difficulty of finding any support for antecedents of the privilege in the medieval common law. In addition, the account does not fit well with the way the argument was sometimes made at the time. The Puritans and the English common lawyers did not simply argue that the *ex officio* oath was contrary to principles of English liberty: They argued that it also violated the procedural rules of the prerogative courts themselves. Those rules rested on the principles of the Western legal tradition, the *ius commune* embodied in the canon and Roman laws. Thus, the Puritan James Morice argued that the *ex officio* oath was “repugnant to the rules and canons of the antichristian church of Rome.”<sup>38</sup> That is a peculiar sort of argument to come from the mouth of a man asserting ancient common law liberties of Englishmen or inventing new ones.

Most important, it turns out that Morice was at least half right. The rule he argued for could have been drawn directly from the Continental

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36. L. LEVY, *ORIGINS OF THE FIFTH AMENDMENT* (2d ed. 1986). See also Maguire, *Attack of the Common Lawyers on the Oath ex-officio as Administered in the Ecclesiastical Courts in England*, in *ESSAYS IN HISTORY AND POLITICAL THEORY IN HONOR OF CHARLES HOWARD MCILWAIN* 199 (1936).

37. The term “Laudian” refers to the followers of William Laud (d. 1645), the “high church” archbishop of Canterbury executed for treason. See N. TYACKE, *ANTI-CALVINISTS: THE RISE OF ENGLISH ARMINIANISM c. 1590-1640*, at 67-71, 85-86 (1987). For an account of the rise and fall of Laud and his followers and enemies, see C. CARLTON, *ARCHBISHOP WILLIAM LAUD* (1987).

38. *BRIEF TREATISE OF OATHS EXACTED BY ORDINARIES AND ECCLESIASTICAL JUDGES* 18 (1592); see also A. LEIGHTON, *AN APPEAL TO THE PARLIAMENT, OR SION'S PLEA AGAINST THE PRELACIE* 47-48 (1628) (arguing that the *ex officio* oath was “against the law of nature registered in the Civill law, *Nemo tenetur prodere seipsum*”).

*ius commune*. The principle that no one should be compelled to incriminate himself was found in the most basic guides to that law, the *glossa ordinaria* to the Gregorian Decretals,<sup>39</sup> and it also was stated prominently in many 16th and 17th century treatises on civilian procedure.<sup>40</sup> Sir Edward Coke and other common lawyers defended this principle when they argued that the oath was invalid because, “*nemo tenetur prodere seipsum*,”<sup>41</sup> they were not invoking a rule from the English Yearbooks. Instead, they were employing a maxim taken from Continental law. In one sense at least, the common lawyers were making the entirely reasonable argument that the ecclesiastical lawyers of the Court of High Commission were violating the procedural rules of their own system.

Ultimately, the rule that men and women should not be compelled to help convict themselves was brought into the common law itself. The full story is more complex than one of simple reception of a civilian rule.<sup>42</sup> But if there is any truth to Justice Frankfurter's characterization of the modern privilege as a subject in which “a page of history is worth a volume of logic,”<sup>43</sup> then surely we should be as accurate as possible about the role Continental law played in its development—instead of treating Continental law as a caricature villain, the view which emerges from Levy's account.

The law of defamation provides a third example of 17th century usage of civil law. It shows the range of possible usages and provides one instance in which the civil law was taken over and transformed into something it had never been. Perhaps “deformed” would be a better word; this example is the *mitior sensus* doctrine—the rule that in actions

39. See *glossa ordinaria* ad X 2.20.37 (*Cum causam*) s.v. *de causis*: “Sed contra videtur quod non teneatur respondere quia nemo tenetur prodere se.” (“But to the contrary, it seems that he is not bound to answer because no one is bound to betray himself.”). See also *glossa ordinaria* ad Sext 2.9.2 (*Si post*, s.v. *absque rationali causa*). The antiquity and ubiquity of the rule in a religious context is traced in Rosenberg & Rosenberg, *In the Beginning: The Talmudic Rule Against Self-Incrimination*, 63 N.Y.U. L. REV. 955 (1988).

40. E.g., SYNTAGMA COMMUNIUM OPINIONUM (Lyons 1608), Lib VII, tit. 19, no. 21 (“Positionibus criminosis aut captiosis per quas delictum aut periurium detegi posset, nemo tenetur respondere”) (“No one is bound to answer incriminating or captious *positiones* by which a delict or perjury might come to light”); JOACHIM MYNSINGER (d. 1588), SINGULARIUM OBSERVATIONUM IUDICII IMPERIALIS CAMERAE (1595), Cent. VI, Obs. 92 (“quia nemo se ipsum prodere tenetur”) (“because no one is bound to betray himself”).

41. See, e.g., *Rochester v. Mascal* (C.P. 1608), British Library, London, Stowe MS. 424, fol. 160v (“Quod per legem terrae nemo tenetur in causis criminalibus prodere seipsum.”) (“That by the law of the land no one is bound to betray himself in criminal causes.”).

42. See Gray, *Prohibitions and the Privilege Against Self-Incrimination*, in TUDOR RULE AND REVOLUTION 345 (D. Guth & J. McKenna eds. 1982) (discussing the early common law cases dealing with the privilege against self-incrimination).

43. *Ullmann v. United States*, 350 U.S. 422, 438 (1956) (quoting Justice Holmes in *New York Trust Co. v. Eisner*, 256 U.S. 345, 349 (1921)).

for libel and slander if the words uttered could possibly be construed in a non-defamatory sense, then they would be so construed and held not actionable.<sup>44</sup> To illustrate the effect of the rule, one only need examine any one of a long series of cases heard by the English common law courts. Under the rule, to say of a man that he "hath three living wives" might not be an actionable imputation of bigamy because it is *conceivable* that the man could have secured a legitimate annulment from each of the three wives in turn.<sup>45</sup> To remark to a married woman that a certain man, not her husband, had "had the use of your body," might not be an actionable imputation of adultery, because the man referred to might have been a dressmaker and merely measured the woman for a proper fit.<sup>46</sup> To say of a lawyer that he "hath as much law as a jackanapes" might not be an imputation of professional incompetence, because the words might mean that the lawyer had as much law as a jackanapes *and more*.<sup>47</sup>

The ingenuity of the distinctions and the absurdity of the results encouraged by the *mitior sensus* rule have long exerted a fascination on lawyers, although there seems to be only one jurisdiction—the State of Illinois—that still embraces it.<sup>48</sup> Yet how to account for the doctrine? It is easy to denounce, but harder to explain. The rule appears full blown almost as soon as slander cases appear in any significant numbers in the common law reports during the second half of the 16th century, and the most widely accepted suggestion has been that it was a judicial invention used to stem the flood of actions for slander then occurring and to control the propensity of juries to award damages for mere insults.<sup>49</sup> This

44. See W. KEETON, D. DOBBS, R. KEETON & D. OWEN, PROSSER AND KEETON ON TORTS § 111, at 781 (5th ed. 1984); see also 2 F. HARPER & F. JAMES, THE LAW OF TORTS § 5.29, at 245-47 (O. Gray 2d ed. 1986); L. ELDREDGE, THE LAW OF DEFAMATION § 24, at 161 (1978); J. BAKER, INTRODUCTION TO ENGLISH LEGAL HISTORY 368-70 (2d ed. 1979).

45. *Bridge v. Langton*, Lit. 193, 124 Eng. Rep. 203 (C.P. 1628).

46. See *Morison v. Cade*, Cro. Jac. 162, 79 Eng. Rep. 142, more fully reported in Cambridge University Library, MS. Gg.5.5, fols. 150-51 (K.B. 1607).

47. *Palmer v. Boyer*, Goulds. 126, 75 Eng. Rep. 1040, 1041 (K.B. 1601) (This argument, made here by Attorney-General Hobart, was ultimately rejected in the case.).

48. See Comment, *The Illinois Doctrine of Innocent Construction: A Minority of One*, 30 U. CHI. L. REV. 524 (1963). The Illinois rule has been both the subject of criticism and change; these changes have led to a divergence from the *mitior sensus* rule of the common law. See *Chapski v. Copley Press*, 92 Ill. 2d 344, 352, 442 N.E.2d 195, 199 (1982) (courts directed to apply the *natural meaning of words* and, "if, as so construed, the statement may reasonably be innocently interpreted . . . it cannot be actionable *per se*"). Illinois courts, however, have been loath to give up the rule. See, e.g., *Marczak v. Drexel National Bank*, 186 Ill. App. 3d 640, 644, 542 N.E.2d 787, 789 (1989) ("A defamation can never be *per se* if the words themselves are capable of an innocent construction;") such a reading endorses the view that *Chapski* merely added a "special gloss" to the rule.; *Parillo, Weiss & Moss v. Cashion*, 181 Ill. App. 3d 920, 537 N.E.2d 851 (1989); *Owen v. Carr*, 113 Ill. 2d 273, 497 N.E.2d 1145 (1986); *Fried v. Jacobsou*, 99 Ill. 2d 24, 457 N.E.2d 392 (1983); *American Int'l Hosp. v. Chicago Tribune Co.*, 120 Ill. App. 3d 435, 458 N.E.2d 1305 (1983).

49. See, e.g., L. ELDREDGE, *supra* note 44, at 161.

has always been only a partially satisfactory explanation, since contemporaneously the common law actually was *welcoming* actions for slander. The action, new in the royal courts, was just becoming accepted in the 16th century.<sup>50</sup> An apparently contradictory conclusion followed: English judges were discouraging these new actions through the *mitior sensus* doctrine at the very moment they also were welcoming them.

Schizophrenic attitudes are not unknown in legal doctrine, and there is something to be said in favor of this explanation. However, the explanation for the *mitior sensus* doctrine can be made more complete and ultimately convincing if one recognizes the civil law pedigree of the rule. The rule—that where spoken words were doubtful in their meaning they should be given a benign construction—was an established part of the *ius commune*, usually applied in criminal matters. The rule appears in the Roman Law Digest, in words identical to those used by the English common lawyers.<sup>51</sup> It also appears in many standard 16th century commentaries on the civil law,<sup>52</sup> commentaries that at least some common lawyers would have known. When one recalls that jurisdiction over defamation was being transferred from the ecclesiastical courts to the common law courts during the 16th century,<sup>53</sup> and that the civil law was a part of the law applied in the ecclesiastical courts, it becomes easier to account for the *mitior sensus* rule as a part of the tort's Continental inheritance. The common lawyers, therefore, appropriated a rule found in the law used in the courts of the Church, applied it within their own jurisdiction, and lifted it to new heights of ingenuity and perversity.

It is perhaps important to stress that the English common lawyers did not leave this transplanted rule as they found it. They used the rule outside the criminal law context in which the civilians had normally applied it, and they expanded its reach. As with the other two examples, the common lawyers took a source, civilian in origin, and used it for their own purposes. The result turned out to be quite different from what existed in the *ius commune*. Once planted in the common law, civil law

50. See R. HELMHOLZ, *SELECT CASES ON DEFAMATION TO 1600*, at lxvii (1985).

51. Dig. 50.17.56; compare *Stanhope v. Blith*, 4 Co. Rep. 15b, 76 Eng. Rep. 891, 892 (K.B. 1585) (maxim used verbatim in decision).

52. For examples of the *mitior sensus* doctrine, see JOHANNES GUTIERREZ (d. 1618), *PRAXIS CRIMINALIS CIVILIS ET CANONICA*, Quaest. 65, no. 2 (Lyons 1661) (“[I]nterpretatio sit facienda in meliorem partem, est regula iuris generalis.”); JOHANNES SCHNEIDEWEIN (d. 1569), *IN QUATUOR INSTITUTIONUM IMPERIALIUM JUSTINIANI LIBROS COMMENTARII*, Lib. IV, tit. 4, no. 11 (1592) (“Quod quando verbum aliquod profertur, quod est indifferens et potest sonare injuriam vel non, tunc debet in mitiorem partem accipi.”); Jacobus Menochius (d. 1607), *DE PRAESUMPTIONIBUS, CONJECTURIS, SIGNIS, ET INDICIIS*, Lib. V, Pr. 2, nos. 6-7 (Venice 1590) (“[Q]uando actus referri potest ad bonum et ad malum, in dubio refertur ad bonum, . . . in dubio, verba ita debere intelligi ne sonent in delictum.”).

53. See generally R. HELMHOLZ, *supra* note 50, at xlv.

doctrines quickly took on lives of their own. Reminiscent of the time of Magna Carta, civilian rules were seized upon and applied to current legal problems. The rules were changed in the process. The results in this formative era of the common law ranged from the legally fundamental to the ridiculous. However, the habit of mind that looked to Continental sources for ideas and help was common to both periods and to several areas of law.

### III. CIVIL LAW IN THE EARLY AMERICAN REPUBLIC

This acquisitive habit of mind crossed the Atlantic. Perhaps it was doubly likely that this should have occurred given the many admirers of ancient Rome in the new American Republic. The results of their admiration are all around. They dressed George Washington in a toga when they erected statues in his honor. There is in fact an excellent example of this statuary classicism in the North Carolina state capital building in Raleigh.<sup>54</sup> Ties of respect and affection also ran between some American lawyers and their counterparts on the Continent. The fourth volume of North Carolina reports, for instance, begins with a seventeen page encomium to the famous French jurist, a writer on both Roman and contemporary commercial law, Robert Pothier (d. 1772).<sup>55</sup> The statues and the fulsome encomiums seem very strange 175 years later. They were not thought incongruous at the time, and they demonstrate that in the early American Republic, lawyers were alive to the law of the European Continent. They possessed a familiarity with that law that only changes in our own day may reawaken, and they made use of what they found both in the texts of the civil law and in the huge treatise literature that grew up around them. For purposes of illustration, I have selected three examples in which American lawyers found European traditions useful in shaping the law.

The first occurred in situations in which the common law was deficient, and it brings to mind the scholarly and worthy man in whose honor this lecture series was established, Brainerd Currie. Conflict of laws takes pride of place among the fields of law Currie mastered and influenced, and as it happens conflicts is an excellent example of the way in which the civil law influenced our legal system. The purpose of any serious writer on the subject, Currie wrote, always has been to "provide[] the courts with a systematic method of analysis whereby the sound instincts employed by a sensitive court . . . can be fitted into the

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54. See 1 W. VANCE, *AMERICA'S ROME: CLASSICAL ROME* 19, 343 (1989). See generally Reinhold, *Survey of the Scholarship on Classical Traditions in Early America*, in *CLASSICAL TRADITIONS IN EARLY AMERICA* 1 (J. Eadie ed. 1976).

55. 2 Car. L. Rep. 1 (1815); see also *id.* at 145 (similar encomium for Montesquieu).

conventions and the terminology of the legal order."<sup>56</sup> In providing that method, the civil law played a pivotal role.

The principal, but not the sole, actor in this process was Joseph Story, whose *Commentaries on the Conflict of Laws* dominated the subject from 1834 until the days of Joseph Beale and the first *Restatement*.<sup>57</sup> Story, an admirer of the civil law, read widely (some said too widely) within its traditions.<sup>58</sup> When Story first came upon the subject of conflict of laws—a subject of greater immediacy in the American union than it had been in England and therefore greatly in need of study—he did not find an entirely blank page. Cases on the topic existed. But there were not many, and some of the cases were merely examples of the invocation of “sound judicial instinct.” There was no system. There was no legal order. It was Story’s study of the civil law that supplied the system and the order. His professed aim was to “use the works of the civilians, to illustrate, confirm, and expand the doctrines of the common law.”<sup>59</sup> He did that and more, expounding a variety of rules and principles drawn from the civil law which he both saw, and wished to see “incorporated into the very substance of the jurisprudence”<sup>60</sup> of the American states.

Story had fellow workers in the project of making use of civilian sources to fill perceived deficiencies in the English law of conflicts.<sup>61</sup> An unexceptional example is a New York decision of 1803, a suit brought to enforce a promissory note barred by the statute of limitation of New York but not by that of Connecticut, where the note had been executed.<sup>62</sup> The court invoked the authority of Ulrich Huber and Emerigon to hold that courts did “not derogate from their own dignity by enforcing

56. B. CURRIE, *Survival of Actions: Adjudication versus Automation in the Conflict of Laws*, in SELECTED ESSAYS ON THE CONFLICT OF LAWS 128, 133 (1963) [hereinafter SELECTED ESSAYS].

57. J. STORY, *COMMENTARIES ON THE CONFLICT OF LAWS* (3d ed. 1846). See B. CURRIE, *The Verdict of Quiescent Years*, in SELECTED ESSAYS, *supra* note 56, at 613.

58. See K. NEWMYER, *SUPREME COURT JUSTICE JOSEPH STORY* 297 (1985) (describing his civilian learning as “nothing short of prodigious” and citing his use of the works of 47 commentators). See also Nadelmann, *Joseph Story’s Contribution to American Conflicts Law: A Comment*, 5 AM. J. LEGAL. HIST. 230 (1961).

59. J. STORY, *supra* note 57, at 26. As a judge, Story also made frequent use of civilian authority in conflicts cases; see, e.g., *Van Reimsdyk v. Kane*, 28 F. Cas. 1062 (C.C.D.R.I. 1812) (No. 16,871).

60. J. STORY, *supra* note 57, at 26.

61. Nadelmann, *supra* note 58, at 249-50, stresses (and I agree) that it is wrong to regard Story’s work on conflicts as a complete break with prior law on the subject, as had been suggested by E. LORENZEN, *Story’s Commentaries on the Conflict of Laws—One Hundred Years After*, in SELECTED ARTICLES ON THE CONFLICT OF LAWS, 181, 193 (1947) (“The substance of the *Commentaries* was based upon the decisions of Anglo-American courts. This constituted a new method and a complete break with that of the statutory school, the fetters of which Story helped to destroy in Europe.”).

62. *Nash v. Tupper*, 1 Cai. R. 402 (N.Y. Sup. Ct. 1803).



the laws of the state where the contract originated."<sup>63</sup> An earlier North Carolina case that raised a choice of law problem involving succession to chattels, similarly invoked civil law sources—in this case Vattel's *Law of Nations*<sup>64</sup>—to hold that principles of international relations were equally applicable to the American federal system. The law's purpose, Judge Taylor wrote, was "to cherish a spirit of friendly intercourse amongst their respective citizens."<sup>65</sup>

Far from isolated examples,<sup>66</sup> these cases demonstrate that the history of our law of conflicts was shaped in part by the civil law. Common law on the subject was scanty.<sup>67</sup> What law there was either already rested upon general rules of international law or upon mere lawyerly instinct. Civil law sources filled the gaps. Although detailed work remains to be done, even a cursory look at some of the early civilian treatises demonstrates the reality of Brainerd Currie's hope<sup>68</sup> that the analysis of conflicts in terms of governmental interests indeed could be traced to the earliest days of conflict of laws.<sup>69</sup> "I have diligently sought for evidence of its antiquity," Currie wrote about his fundamental insight, "because I knew that it would be distasteful to the orthodox."<sup>70</sup> Indeed that evidence exists, ready to be uncovered in the works of Bartolus, Huber, and Vattel.

A second instance of American usage of Continental ideas—although worthy of only brief mention in this Article—happened where the common law cases were abundant and clear enough, but were (in the opinion of American judges) mistaken. A South Carolina decision of 1818, dealing with the question of whether the seller of goods impliedly

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63. *Id.* at 413-15.

64. E. DE VATTEL, *LAW OF NATIONS* (J. Chitty ed. 1883) (1758).

65. *Williamson's Adm'rs. v. Smart and Kilbee*, 1 N.C. (Cam. & Nor.) 146, 154 (1801).

66. *See, e.g., Robinson v. Campbell*, 16 U.S. (3 Wheat.) 212, 219 (1818) (Justice Todd noting that, "The foundation of this doctrine, and of all the other principles concerning the *lex loci*, are laid down by Huberus, in his *Praelectiones*, with that admirable force and precision which distinguish the works of the writers who have been formed in the school of the Roman jurisconsults."); *Union Bank of Georgetown v. Smith*, 24 F. Cas. 566, 573 (C.C.D.C. 1830) (No. 14,362) (Huber cited on the scope of principle of comity in contract case); *Desesbats v. Berquier*, 1 Binn. 336, 347 (Pa. 1808) (citing and defending the opinions of Vattel, Huber, Wolfe and other civilians on conflicts questions involving succession to movables). *But cf. Respublica v. Gaoler of Philadelphia*, 2 Yeates 263, 264 (Pa. 1798) (distinguishing counsel's citation of Vattel as applicable "merely to nations entirely independent on each other").

67. *See* Nelson, *The American Revolution and the Emergence of Modern Doctrines of Federalism and Conflict of Laws*, in *LAW IN COLONIAL MASSACHUSETTS, 1630-1800*, at 419 (D. Coquillette ed. 1984).

68. This hope is expressed in *SELECTED ESSAYS*, *supra* note 56, at 584.

69. *Id.* at 612.

70. *Id.*

warranted their soundness,<sup>71</sup> provides a good example. English law required an express warranty. The South Carolina courts did not. Rejoicing that the citizens of his young state were not so “hackneyed in arts of deception and fraud” that they would embrace the degenerate regime of *caveat emptor*, Judge Gantt opined that South Carolina would “ever continue to be governed by the Civil Law inaxim, ‘that a sound price requires a sound commodity.’”<sup>72</sup> For better or worse, the view expressed in his opinion did not ultimately prevail, at least until the advent of our own “consumer society.” In the first part of the 19th century, however, the civil law of sales was the law of South Carolina.

This and similar cases from other jurisdictions stand as a reminder that American judges of this period faced a real choice of whether or not to “receive” the English common law.<sup>73</sup> Most often American state courts did receive the common law and incorporated it into their domestic law. But “reception” of the English rules was by no means a foregone conclusion. Where common law rules were thought unsuitable to conditions in the new land, or considered contrary to principles of justice and utility, they might be set aside in favor of better rules. The civil law provided one likely source for better rules. Americans who put George Washington in a toga and who eulogized jurists like Pothier could logically consider a recourse to European legal authorities a sensible and fruitful idea.

Finally, the civil law was widely regarded as a source of fundamental principles of reason and justice in the early Republic. Continental lawyers had much to say about natural rights and rights recognized under the law of nations. Grotius, Pufendorf, and the “Natural Law School” are known, at least vaguely, to lawyers even today. American lawyers in the early 19th century knew such writers more intimately, and they sometimes put the treatises written by these men to work in litigation. I provide two examples: one involving an ordinary rule of civil practice, the other involving judicial review of legislation. Both examples are slightly unusual cases. American reports include many instances that

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71. *Barnard v. Yates*, 10 S.C.L. (1 Nott & McC.) 142 (1818). See also *Vanderhost Co. v. MacTaggart*, 3 S.C.L. (1 Brev.) 269, 270-71 (1803) (where buyer only inspects sample there is an express warranty).

72. *Barnard*, 10 S.C.L. (1 Nott & McC.) at 145.

73. See, e.g., *Heath v. White*, 5 Conn. 228, 234 (1824) (preferring a reading of the statute of descent and distribution based on civil law as more “agreeable to the law of nature and reason” (quoting *Canaan v. Salisbury*, 1 Root 155 (Conn. 1790))); *Gates & Colvin v. Green*, 4 Paige Ch. 355, 358 (N.Y. Ch. 1834) (referring to “civilians, and to the law of other countries” to show the inequity of a rule requiring a lessee to pay rent for building destroyed by fire); *Miller v. Beverleys*, 14 Va. (4 Hen. & M.) 415, 419 (1809) (rejecting common law decisions which “do not conform to the standard of that justice which commands us to live honestly, hurt nobody, and render every one his due”).

are more straight-forward,<sup>74</sup> but these two highlight the power that the civil law could have in the hands of American judges.

The first example, a case decided by the Supreme Court of North Carolina in 1824,<sup>75</sup> involved a defendant's motion for a new trial made after the time for appellate review in an action to collect a debt had passed—a case that was originally brought before a justice of the peace. Taken together, the circumstances were strong for allowing a new trial. The evidence clearly showed that a mistake had produced the judgment in the justice's court. The supreme court denied the motion nonetheless, citing a necessity for finality of judgments and finding in the Novels of Justinian and in the words of Robert Pothier good authority for a "rule so wise and well calculated to promote the tranquility of society."<sup>76</sup> In other words, Chief Justice Taylor called upon the civil law when he needed justification for the court's action in a hard case. Civil law on the same point provided a way to show that his ruling was not the act of harshness it must have seemed, but instead the application of a universally admitted legal principle.

The other example involves constitutional law. For consistency's sake, I again have selected a North Carolina case<sup>77</sup> from the many possible examples.<sup>78</sup> The facts were unusual, and the result was (by today's lights) probably mistaken: A married woman had joined her husband in a conveyance of their land. Difficulties arose because the law then required that a married woman be examined privately to ensure her free assent, and this had not been done. The deed therefore was formally invalid. After her death, and in order to clear up title to the land, her husband and the grantee secured passage of a private act by the North Carolina legislature declaring the deed valid and quieting title in its grantee.<sup>79</sup> The woman's heirs later challenged the Act as unconstitutional, and the North Carolina Supreme Court agreed. Instead of seeing the Act as a sensible way out of a difficult situation, Justice Daniel was

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74. *See, e.g.,* *Haven v. Foster*, 26 Mass. 111, 9 Pick. 112 (1829) (extensive citation by counsel of civilian writers in case dealing with money paid by mistake and principles of inheritance law); *McDonald v. Neilson*, 2 Cow. 139, 158-59 (N.Y. 1823) (Pothier cited for a "rule not only of the civil and moral, but also of the levitical law"); *State v. Executors of Worthington*, 7 Ohio 171, 172-73 (1835) (Roman law, Pothier, and the Napoleonic Code cited for the principle that the words of contracts are to be interpreted against the drafter).

75. *Bain v. Hunt*, 10 N.C. 308, 3 Hawks 572 (1825).

76. *Id.* at 310, 3 Hawks at 576.

77. *Robinson v. Barfield*, 6 N.C. 287, 2 Mur. 391 (1818).

78. *See also* *Merrill v. Sherburne*, 1 N.H. 199 (1818); *Gardner v. Village of Newburgh*, 2 Johns. Ch. 162 (N.Y. Ch. 1816); *Dickinson v. Dickinson*, 7 N.C. 243, 3 Mur. 327 (1819); *Payne v. Hubbard*, 4 N.C. 151, 2 Car. L. Rep. 97 (1815); *Lindsay et al. v. Commissioners*, 2 S.C.L. (2 Bay) 38, 61 (1796); *Commonwealth v. Walker's Executor*, 11 Va. (1 Hen. & M.) 144, 147 (1806).

79. Ch. 26, Nov. Sess., 1777 PRIVATE ACTS OF THE GENERAL ASSEMBLY OF N.C. (1794).

moved to indignation at this intrusion upon judicial rights and struck down the Act. "Miserable would be the condition of the people," he wrote, "if the judiciary was bound to carry into execution every act of the Legislature . . . ."80 In refusing to enforce the statute, Daniel purposely cited the authority of Emerich de Vattel for the statement of what he called "principles of reason, justice, and moral rectitude."<sup>81</sup> Common law cases were of little use to him. English law admitted parliamentary sovereignty to effect a statutory conveyance. Daniel had to look elsewhere for guidance in understanding the American Constitution, and thus he pressed Continental law into the service of establishing the regularity of judicial review of legislation.<sup>82</sup>

American lawyers, at least some of them, plainly regarded the civil law as a resource to call upon when the common law was deficient, wrong, or in need of buttressing with basic and internationally recognized principles of justice. In some measure they shared that habit of mind with contemporary English common lawyers, for many common citations of Continental sources exist in English reports of the same period.<sup>83</sup> Neither English nor American lawyers seemed to regard the division between common law and civil law as an absolute and unbridgeable gulf.

#### CONCLUSION

Four things need to be said in conclusion. First, early common lawyers, English and American—and more than a few of them—knew something about Continental law. They had a familiarity with the great traditions of the *ius commune* and, later on, with European writers on natural law and the law of nations. They were not the insular practitioners Maitland depicted, the lawyers who neither knew nor cared for any system but their own. This does not mean that they were experts on the civil law, still less that they *preferred* the civil law to their own as a general rule. The evidence all comes down against any such generalization. But there is evidence that contacts between English law and Continental law existed—and had existed for a long while. The common law that Maitland described (if it ever existed) was a 19th century innovation,

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80. *Robinson*, 6 N.C. at 291, 2 Mur. at 420.

81. *Id.* at 292, 2 Mur. at 422.

82. See generally Corwin, *The "Higher Law" Background of American Constitutional Law* (pts. 1 & 2), 42 HARV. L. REV. 149, 365 (1928-1929) (American concept of judicial review stems from a long western tradition); Sherry, *The Founders' Unwritten Constitution*, 54 U. CHI. L. REV. 1127 (1987) (the importance of the English concept of natural law in the creation and interpretation of the American Constitution).

83. See, e.g., *Pillans & Rose v. Van Mierop & Hopkins*, 3 Burr. 1663, 1670, 97 Eng. Rep. 1035, 1038 (K.B. 1765) (reference to Grotius, Pufendorf, Vinnius).

something of an exception rather than the rule. Consequently, legal changes in the wake of 1992 may well represent something like a restoration to the *status quo ante*.

Second, knowledge of Continental sources led to their use in practice. In the examples given, civil and canon laws were not regarded as frills or as pure ornamentation. Nor did the *ius commune* serve merely as general intellectual background or as a preliminary stage in the academic or legal training of common lawyers. In some situations, Continental law did serve educational or ornamental purposes.<sup>84</sup> But this was not always the case. At the time of Magna Carta, during the 17th century constitutional struggles, and in the new American Republic, Continental law was adopted and used within the common law itself.

Third, the fate of Continental ideas in common law practice varied. Some attempted borrowings failed quickly or faded over the course of time. Magna Carta's primitive enforcement provision provides a clear example. Some were changed almost beyond recognition or used for quite new purposes in the process of application in common law jurisdictions. This happened, for instance, to the *mitior sensus* doctrine. Some civil law borrowings survived and succeeded on their own terms. The law of conflicts provides the best example of outright success. In every situation, using foreign ideas required assimilation within a framework of distinct legal institutions. The use of foreign law required decision and manipulation on the part of men who had no firm and full grounding in the legal system from which they borrowed. Ideas from abroad which took root in the common law sometimes turned out to look quite different in the rockier soil of the common law.

Fourth, and finally, there was never any danger (or possibility, if you like) of wholesale displacement of the common law by the civil law. The borrowings I describe occurred where the common law was non-existent, deficient, or wrong. They were normally the product of individual lawyers who made individual choices when the interests of their clients so required, and they also were the choices of judges looking for help in dealing with specific problems. Law often has grown by small choices, made by lawyers with modest goals but large horizons.

There may have been people, of course, who at one point or another favored the wholesale abandonment of the common law in favor of the civil law system, although it is not easy to discover their identities. How-

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84. See, e.g., Coquillette, *Justinian in Braintree: John Adams, Civilian Learning and Legal Elitism, 1758-1775*, in 62 PUBLICATIONS OF THE COLONIAL SOCIETY OF MASSACHUSETTS 359 (1984); 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); Stein, *The Attraction of the Civil Law in Post-Revolutionary America*, 52 VA. L. REV. 403, 423 (1966).

ever, the influences described in this Article were never of an “all or nothing” kind. They were interstitial. In all this, I do not suggest that there were no differences between common law and Continental law. Rather, I suggest that the two were not so *separated* that borrowings could not occur. Common lawyers always wished to avoid some aspects of Continental law, but they also habitually regarded it as a companion and resource to be called upon in need, not as a stranger. If the changes of 1992 lead to increasing contacts between European law and the common law—as indeed the coming changes must—then in many ways this change may actually represent a restoration of an important part of the heritage of the common law.