

Book Review

STUDIES IN ROMAN LAW IN MEMORY OF A. ARTHUR SCHILLER, LEIDEN, E.J. BRILL, 1986. By Roger S. Bagnall and William V. Harris. Leiden, Netherlands: E.J. Brill Co., 1986.

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The long-awaited *festschift*¹ honoring the late Professor A. Arthur Schiller at first seems rather thin given the amount and range of Schiller's own scholarly production.² Limited to Roman Law, the book thus touches neither Coptic law nor African law, both areas of important interest in a scholarly life which started with a first publication in 1927 and continued through the posthumous publication of *Roman Law: Mechanisms of Development* in 1978. Yet the collection contains a number of interesting items, and as a whole demonstrates a breadth of interests and approaches that surely would have pleased Professor Schiller. Most of the authors are legal scholars, but classicists are also included; this is particularly appropriate in Schiller's case as his interests ranged far beyond the law school into classical studies generally, to an extent unusual for an American law professor during Schiller's lifetime.

The thirteen articles comprising the collection reflect a number of different approaches to Roman law. As a branch of historical studies, Roman law scholarship concerns itself with collecting and classifying the remaining textual and archaeological evidence, interpreting it both in the narrow but essential sense of understanding what the material collected says and in the broader sense of placing it within as complete a historical context as possible. Related to these basic studies are a number of other approaches including comparative studies of Roman and other legal material, and studies of the influence of Roman law and institutions on later civilizations. The collection includes articles representing all these fields.

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¹ R.S. BAGNALL & W.V. HARRIS, eds., *STUDIES IN ROMAN LAW IN MEMORY OF A. ARTHUR SCHILLER* (1986) (hereinafter *STUDIES*).

² See *A List of the Publications of A. Arthur Schiller*, in *STUDIES* at VIII.

Previously unpublished material is found in the first article by Roger S. Bagnall, "Two Byzantine Legal Papyri in a Private Collection", which contains partial texts of a will and deed of gift from the Byzantine period. Bagnall makes the process of dealing with such material fascinating to the non-specialist lawyer; indeed, his skill recalls Schiller's own competence and research in papyrology, now virtually the only significant source of additions to the material available for study. The will that Bagnall analyzes contains a series of specific legacies without naming a general heir, a practice apparently followed by other wills in Late Roman Egypt although not valid in classical law.³ Lionel Casson's article, "New Light on Maritime Loans"⁴ is an equally interesting commentary on a previously published text containing a notice of payment including the terms of a maritime loan. In the same vein is Sarah Pomeroy's "Copronyms and the Exposure of Infants in Egypt",⁵ which examines the relationship between certain kinds of names found in papyri and the status of persons who bore them. This article, while most interesting, nevertheless seems rather far removed from the announced subject of the collection.

Several articles deal with the Roman legal scholar's traditional task of interpreting the *Digest*. Tony Honoré of Oxford University continues his study of the authorship and structure of the interpolations in the *Digest*, started in his book on Tribonian⁶ and numerous articles,⁷ with an article entitled "The Authorship of Interpolations in the Digest: A Study of 'licet. . . attamen'".⁸ David Daube of the University of California skillfully sheds new light on a number of old arguments in "Turpitude in Digest 12.5.5".⁹ Professor Theo Mayer-Maly continues his interesting series of studies on treasure trove¹⁰ in an article "*Ducente Fortuna*"¹¹ (in German) based partially on the *Digest* and partially on other texts.

Professor Honoré has developed techniques which are mainly stylistic but also partly hermaneuteic for studying the text of the *Digest*. Their

³ W.W. BUCKLAND, *TEXTBOOK OF ROMAN LAW* 282 (2d ed. 1950).

⁴ *STUDIES* at 11.

⁵ *STUDIES* at 147.

⁶ T. HONORÉ, *TRIBONIAN* (1978).

⁷ See *STUDIES* at 97 n.3.

⁸ *STUDIES* at 97.

⁹ *STUDIES* at 33.

¹⁰ See T. Mayer-Maly, *Der Schatzfund in Justinian's Institutionen*, in *STUDIES IN JUSTINIAN'S INSTITUTES IN MEMORY OF J.A.C. THOMAS* 109 (P.G. Stein & A.D.E. Lewis eds. 1983).

¹¹ *STUDIES* at 141.

purpose is to identify the authors of each part and write a history of the composition of the whole.¹² The main element of Honoré's new approach is an exhaustive study of the Latin of the *Digest* as exemplified in his thorough study of Tribonian's style.¹³ Ideally, substantial success in this venture would enable one to know a good deal more about the history of the classical law and to write a fuller history of the contrasts between classical law and late Roman law. Honoré's article here¹⁴ attempts to use one stylistic device that can be confidently identified as a favorite of Tribonian's (*licet. . . attamen*) as a way of identifying interpolations and as some evidence they were by Tribonian, leading to, one hopes, a fuller picture of Tribonian's role in the process of redaction. Even if Professor Honoré sometimes seems to draw broader conclusions than the material put before the reader justifies (at least to one not expert in the technique), his knowledge of the texts and his learning is so great that one tends to have confidence in his conclusions.

Perhaps the most interesting part of the collection is the three articles on public law, both because they are of excellent quality and because this area is relatively less cultivated in Roman law scholarship generally. William V. Harris writes about "The Roman Father's Power of Life and Death"¹⁵ and Naphtali Lewis about "The Process of Promulgation in Rome's Eastern Provinces".¹⁶ Ramon Katzoff, Schiller's last doctoral candidate,¹⁷ contributes a piece on the use of the word "katholicos" in certain Egyptian judgments.¹⁸

Starting from the notorious rule of Roman law that fathers possessing the *vitae necisque potestas* had the authority to kill those subject to their power,¹⁹ Harris examines the rather thin evidence of the actual use of this power as applied to children. He explores eleven possible cases (involving eight sons and three daughters) and concludes that the penalty was hardly ever applied. Although the rule of law is stated to have been in effect up to the time of the late Empire,²⁰ it was

¹² T. HONORÉ, *TRIBONIAN* 70 (1978).

¹³ *Id.* at 70-123.

¹⁴ *STUDIES* at 97.

¹⁵ *STUDIES* at 81.

¹⁶ *STUDIES* at 127.

¹⁷ *STUDIES* at 128.

¹⁸ *STUDIES* at 119.

¹⁹ See generally P.F. GIRAUD, *MANUEL ELEMENTAIRE DE DROIT ROMAIN* 149-56 (8th ed. 1929, reprinted 1978).

²⁰ *STUDIES* at 92.

evidently widely disliked by the time of transition from Republic to Empire. Harris seeks an explanation for the persistence of the rule despite the obvious distaste for it and its presumable lack of practical pertinence. It may have had, as he suggests,²¹ a kind of symbolic significance, sustaining a high standard of conduct where applied to magistrates or as a way of protecting the always tense relationship between an aristocratic father and his son. Here, we are in the area of pure speculation and the well-known Roman legal conservatism may well be sufficient to explain the persistence in the texts of a rule that had long ceased to be applied. The suggestion, briefly put forth,²² that the Roman rule may have been more severe than that applied in other societies whose level of social development was similar is interesting but remains to be fully explored.

Professor Lewis's article has a much narrower focus than its title²³ suggests, dealing only with the long-debated question whether "communications to provinces and localities from Roman governors and generals functioning in eastern mediterranean lands"²⁴ were originally written in Latin or Greek although clearly promulgated in Greek to a Greek-speaking population. Although arguments have been made for each of the extreme positions, Lewis wisely concludes that there must have been documents in both categories, the good Greek of the final product having been assured by a competent staff.²⁵ In a detailed illustration, Lewis demonstrates that traces of a written or oral Latin original can clearly be seen in the Greek text, and that, notwithstanding previous scholarly doubts, the illustrative text was dictated. It is a case of an original language author and a secretary with a different native language working together to produce a text which does not perfectly reflect the language of either.

Professor Katzoff's skillful and thorough article about the use of the word "katholicos"²⁶ in certain Egyptian texts of the Imperial era demonstrates how difficult it often is to arrive at a firm understanding of the meaning of terms.

There are two interesting comparative pieces, "*Animalia Ferae Naturae*: Rome, Bologna, Leyden, Oxford and Queen's County, N.Y."²⁷

²¹ STUDIES at 90.

²² STUDIES at 91.

²³ N. Lewis, *The Process of Promulgation in Rome's Eastern Provinces*, STUDIES at 127.

²⁴ *Id.*

²⁵ STUDIES at 129.

²⁶ R. Katzoff, *Law as Katholicos*, STUDIES at 119.

²⁷ STUDIES at 39.

by Charles Donahue, Jr. of Harvard University and "Tenant Remedies for Unsuitable Conditions Arising After Entry: A Roman Law Perspective on Modern American Common Law".²⁸ Such comparative writing requires enviable learning to give an accurate account of several legal systems as well as substantial skill to make pertinent and useful comparisons. Donahue's article on ownership of wild animals starting from a discussion of the famous *Pierson v. Post* case²⁹ is so erudite as to make one wish to read him on subject matters which are of greater inherent interest. Professor Frier's article³⁰ by contrast deals with a subject of substantial importance, and he manages to use the Roman material to shed light on modern American developments.

The late Hans Julius Wolff, from whose elementary history of Roman law³¹ so many Americans received their first exposure to Roman law, contributed a brief piece entitled "Some Observations on Pre-Antoninian Roman Law in Egypt".³² This is intended to illustrate (by two examples) that the application of the *ius civile* to newly-enfranchised citizens unfamiliar with its "principles and solemn ways" inevitably led to empty formalism. This was, of course, even more true after the *Constitutio Antoniniana* when a vastly increased peregrine population was called upon to deal with the *ius civile*.³³

Having read this collection with profit and enjoyment, I am nevertheless left with a feeling I have often had after reading Roman law anthologies or publications. While it is undoubtedly true that the articles are skilled, the work interesting, and the results useful in completing our picture of the history and content of Roman law, there is nevertheless a dimension that seems lacking. The focus is almost always on detail, and attempts to use knowledge of Roman law to aid the solution of broader legal historical and philosophical questions are rarely found.

A partial change of focus would be useful not only to Roman law studies but to legal studies generally. Since the amount of new evidence is slight, a great deal of writing necessarily involves rearguing questions which have long ago proved intractable. A scholar who limits himself to traditional areas of research and manages to find a new subject to write about will inevitably find a very small one. In classics as a whole

²⁸ STUDIES at 35.

²⁹ 3 Caines 175 (N.Y. Sup. Ct. 1805).

³⁰ STUDIES at 39.

³¹ H.J. WOLFF, ROMAN LAW: AN HISTORICAL INTRODUCTION (1951).

³² STUDIES at 163.

³³ H.J. WOLFF, ROMAN LAW: AN HISTORICAL INTRODUCTION 88 (1951).

some important and relatively unexplored areas have recently been investigated, including neo-Latin and the history of classical scholarship.³⁴ I suggest that giving attention to new areas of research would do Roman law scholarship a great deal of good and perhaps partially rescue it from the extreme marginization in which it now finds itself in both American and European law schools.³⁵ Unhappily, openness to new subjects and questions does not abound. A name that readily comes to mind, however, is that of the French scholar Yan Thomas who has worked in a number of relatively untouched areas including the history of Roman law scholarship. His brilliant introduction to the new French edition of Mommsen's *Droit Public Romain*,³⁶ places that work in its context as a way better to understand the questions of method involved in describing a constitutional system. His work shows how inquiry into new subject matter can, in addition to being rich in itself, lead to even larger and more important questions.

Closer to home is the work of Professor Alan Watson who, having established a firm reputation in traditional Roman law scholarship,³⁷ has in a recent series of books used Roman and other material from his vast store of historical knowledge to develop a theory of the evolution of legal systems.³⁸

It is a good test of the health of a research field in the humanities to ask whether there is any interest in its conclusions outside the small circle of those expert in its technical subject matter. Roman law research needs to produce more scholarship that will attract the interest of other scholars and thinkers outside the subject's traditional domain.

³⁴ W.M. Calder III, *Research Opportunities in the Modern History of Classical Scholarship*, in W.M. CALDER III, *STUDIES IN THE MODERN HISTORY OF CLASSICAL SCHOLARSHIP* 3 (1984).

³⁵ P. Stein, *Obituary*, in *STUDIES*, at XVIII.

³⁶ Y. Thomas, *Mommsen et l' 'Isolierung' du Droit* (1984) in T. MOMMSEN, 1 *LE DROIT PUBLIC ROMAIN* 1 (1892, reprinted 1984). See also Y. Thomas, *La romanistique et la notion de jurisprudence* in 4 *DROITS: REVUE FRANÇAISE DE THÉORIE JURIDIQUE* 149 (1986).

³⁷ See, e.g., A. WATSON, *ROME OF THE XII TABLES: PERSONS AND PROPERTY* (1975).

³⁸ A. WATSON, *THE EVOLUTION OF LAW* (1985); A. WATSON, *SOURCES OF LAW, LEGAL CHANGE AND AMBIGUITY* (1984); A. WATSON, *THE MAKING OF THE CIVIL LAW* (1981). In a similar vein, see P. STEIN, *LEGAL EVOLUTION: THE STORY OF AN IDEA* (1980).