



‘Our laws are as mixed as our language’: Commentaries on the Laws of England and Ireland, 1704-1804

Seán Patrick Donlan*

Readers are reminded that this work is protected by copyright. While they are free to use the ideas expressed in it, they may not copy, distribute or publish the work or part of it, in any form, printed, electronic or otherwise, except for reasonable quoting, clearly indicating the source. Readers are permitted to make copies, electronically or printed, for personal and classroom use.

[C]onsider in the course of history, the variety of invasions this island has sustained, most of them in their turns productive of laws; consider a happier view, the mixed body of the English legislature; men various in their talents, their education, their pursuits and connections; many of them improved by an experience and knowledge of other countries; consider all this, and it will be no wonder that the law we live under is as compound as the atmosphere in which we breathe: that the political maxims of other states are adopted and made to conform to the genius of this: and by a kind of legislative commerce, the defects of our natural growth (if such occur) are improved by the importation of foreign productions.

Edward Wynne, *Eunomus: or dialogues concerning the laws and constitution of England* (1767), 111-12.

That all legal orders are mixed or hybrids is a truism. But like many truisms, it bears occasional repeating and elaboration. The modern classification into legal ‘families’ or ‘systems’ has proven professionally and pedagogically useful in contemporary comparative law, especially in the analysis of ‘mixed legal systems’.¹ It is also, however, extremely selective, often historically specific, and typically Eurocentric.² Discussions of ‘mixed jurisdictions’, obsessive about the respective and distinct legacies of their Anglo-American and continental parents, frequently fail

* BA (Houston), JD (Louisiana), PhD (Trinity College, Dublin). Lecturer, School of Law, University of Limerick, Ireland. An earlier version of this article was delivered at the Second Congress of the *World Society of Mixed Jurisdictions Jurists* in Edinburgh, Scotland (27-30 June 2007). This paper is appearing in the *Journal of Comparative Law* (JCL, ISSN 1477-0814) and is published in the EJCL with the permission of the JCL Editorial Board.

¹ See especially VV Palmer (ed), *Mixed jurisdictions worldwide: the third legal family* (2001).

² E Özücü, ‘Family trees for legal systems: towards a contemporary approach’ in M van Hoecke (ed), *Epistemology and methodology of comparative law* (2004).

to acknowledge the complexity of their ancestors. As a result, they distort both past history and present options.

Thirty years ago, Joseph McKnight wrote that '[h]owever mixed his system is in fact the English lawyer does not think of it as such'.³ For much of Western history, the legal traditions of Europe were characterised by considerable pluralism and diversity. In its open nature and use of transnational, pan-European bodies of law and legal doctrine, England was little different. A wide variety of legal sources or authorities, including many from beyond the law, were persuasive in legislation and adjudication. The creation of genuinely common or general national laws, a legal 'system' centred on the state, and the elimination of competing jurisdictions was a very long historical process. Over centuries, English lawyers were active participants in, and selectively incorporated significant elements of, continental law.

This (admittedly curious) paper reviews, all too briefly, the genealogy of English law, especially its complexity in the century before the *Code Civil* (1804). This comparative legal history is pursued largely through the rich literature of eighteenth-century jurists. If present discussions would profit from the study of this past, legal history might also benefit from the conceptual vocabulary developed in the study of mixed jurisdictions. Given limitations of space, this paper merely hints at, rather than highlights, these possibilities. Modern scholarship on mixed jurisdictions, Scottish materials, and secondary sources on legal history are cited sparingly.

De legibus et consuetudinibus Angliæ

For centuries, Roman military and political dominance extended throughout most of Europe. Much of Britain, too, was colonised by Rome from 78-409 AD. Indeed, Richard Burn (1709-85)—DCL, noted legal writer, justice of the peace, and subsequently chancellor of Carlisle—wrote that 'some of the most eminent Roman lawyers, as Papinian, Paulius, and Ulpian ... did sit in the seat of judgment in this nation.'⁴ Later conquests were of ever greater consequence. John Ayliffe (1676-1732), LLD, published on civil and canon law, wrote a history of Oxford, and served as a proctor in the University's chancellor's court. He noted that the '[c]hanges of Government' due to 'the *Romans, Saxons, Danes, and Normans* ... [meant] that now our Laws are a Mixture of all these Laws put together'.⁵ The arrival of the Anglo-Saxons in the fifth and sixth centuries was especially important, not least on the self-image—and legal fantasies—of later generations. Even they arguably 'incorporated various Roman concepts, practices and rules into their own regal customs.'⁶ Christianity was a still more critical conduit for Romanist learning. Both English law and society remained diverse, including the absorption of successive waves of Vikings in the ninth and tenth centuries. At its borders, too, England was surrounded by Celts with their own aboriginal laws. Conquest and the forceful 'migration of laws' subsequently played a role in the English conquest of Wales and Ireland and later in English colonies. As a

³ 'Some historical observations on mixed systems of law' (1977) 22 *Juridical Review* (ns) 177, 178.

⁴ R Burn, *Ecclesiastical law* ((2nd edn) 1767), v-vi.

⁵ J Ayliffe, *New pandect of Roman civil law*, xlvi.

⁶ JF Winkler, 'Roman Law in Anglo-Saxon England' (1992) 13 *Journal of Legal History* 101, 108. Cf CP Sherman in 'The Romanization of English law' (1913-14) *Yale Law Journal* 318.

result of these different influences, John Reeves (1752-1829), the greatest English legal historian of the eighteenth century, remarked that '[t]he common law is of a various and motley origin.'⁷

The Franco-Normans, Norsemen who had settled in France, added administrative *nous* to England's centralised kingship. While its folk-law was broadly similar to their own, the inter-regnal transfer to the Normans effected significant changes. For centuries, England was ruled by French-speaking monarchs with claims to the French throne. England's distinctive legal creations (central and Eyre courts, the writ, and the jury) are generally credited to the Normandy-born Henry II (1133-89). The laws, too, were expressed in a variety of languages. Latin, English, and 'Law French' remained important for centuries; where appropriate, Celtic languages were also used.⁸ And, an anonymous eighteenth-century writer noted,

the probability is, as *Lord Bacon* has expressed it, that our Laws are as mixed as our language, compounded of British, Roman, Saxon, Danish, and Norman customs; and as our language is so much the richer, so the Laws are the more compleat.⁹

Formally at least, this linguistic pluralism lasted into the eighteenth century when it was altered by legislation. Through a long series of wars, especially the 'Hundred Years War (1337-1453), the English slowly lost its continental possessions. But the Calais Pale fell only in the mid-sixteenth century; the Channel Islands remain England's. Claims to the French throne were not formally abandoned until the end of the eighteenth century.

The eleventh-century rediscovery of Justinian (482/3-565)'s *Digest* (c533) brought a revival of the *Corpus Iuris Civilis*. The importance of 'the Common Civil Law of the Romans' was not lost on eighteenth-century English jurists.¹⁰ Thomas Bever (c1725-91), DCL and professor of civil law at Oxford at mid-century, was judge of the cinque ports and chancellor of the dioceses of Lincoln and Bangor. He noted that, with the rediscovery, Roman law 'became, almost instantaneously, the supplement, not only of the European feudal constitutions; but was also dignified with the title of the universal law of the great community of mankind, over the whole face of the globe.'¹¹ A class of professional lawyers and elaborate written doctrine developed. Indeed, 'the Books of the *Civil Law* were receiv'd into all Parts of the Western Empire, and were adorn'd with excellent Glosses and Commentaries, which were made with great Harmony and Agreement unto each other.'¹²

The early development of centralised royal courts meant that England was not a weak borrowing system. The turn to neo-Roman models was thus less dramatic and reception more inhibited, than elsewhere in Europe. But, as on the continent, English folklaw blurred seamlessly into feudal institutions. The Oxford professor of common law Robert Chambers (1737-1803) argued that England was 'like all other European nations, ... for some centuries after the

⁷ *A history of the English law from the Saxons to the end of the reign of Edward the first* (1783), 2.

⁸ See 'FO', *The law French dictionary alphabetically digested* (1701) and R Kelham, *A dictionary of the Norman or Old French language* (1779).

⁹ *A law grammar; or, an introduction to the theory and practice of English jurisprudence* (1791), 17.

¹⁰ *A dissertation on the law of nature, the law of nations, and the civil law in general together with some observations on the Roman civil law in particular; to which is added, by way of appendix, a curious catalogue of books, very useful to the students of these several laws, together with the canon law* (1723), 51. The appendix or '*Libri juridici*' is forty-two pages long.

¹¹ Bever, *A discourse on the study of jurisprudence and the civil law* (1766), 20.

¹² Ayliffe, *New pandect*, xxxix.

Conquest regulated by the feudal subordination and consequently governed by the feudal law'.¹³ Francis Stoughton Sullivan (1719-66) was a barrister, advocate and a judge in the ecclesiastical courts and the court of admiralty of Ireland. Also professor of both civil and common law at the University of Dublin, he was repeating a cliché in writing that feudalism was 'a kind of *jus gentium*' or universal law throughout Europe.¹⁴ Indeed, the feudal law was absorbed into the learned laws. Richard Wooddeson (c1745-1822), Oxford lecturer in moral philosophy and subsequently professor of common law, wrote how, as a result of the Sicilian king Frederick II (1194-1250), the feudal law 'under the title of *Feudorum Confuetudines*, [was] subjoined to the *Corpus Juris Civilis*, by a discordant kind of alliance.'¹⁵

It is difficult to overstate the Church's philosophical and practical-political importance to European history. Its responsibilities extended far beyond theology. In law, its institutions bequeathed a *Roman-canonical* influence throughout Europe: professional, judge-centred courts emphasising writing and permitting appeals. Henry II's famous dispute with Thomas Becket (1118-70), the archbishop of Canterbury, was part of wider debates on the boundaries of church and state. Canon law and the ecclesiastical courts were important in England into the nineteenth century. '[A]ll Christian States and Princes have admitted the *Canon-Law* more or less, without Distinction of Religion, and do still retain some Part of it.'¹⁶ Arthur Browne (1756?-1805), LLD, was regius professor of both civil law and (occasionally) Greek in Dublin, an advocate in the ecclesiastical and admiralty courts of Ireland, a polemicist, and a member of the Irish Parliament before the Act of Union 1800. 'Churchmen', he wrote, were 'our first Jurists'.¹⁷ This was true beyond the ecclesiastical courts. The kings' advisors, and consequently judiciary, were frequently clergy trained in the 'learned laws'.

European jurists created a *ius commune*, a body of doctrine or 'law' common across the frontiers of the continent, in contrast to particular laws specific to a place. They acted as teachers and scholars, and served as advisors, diplomats, record-keepers, administrators, and judges across the continent, paving the way for receptions of the canon and civil laws. Lawyers throughout Europe 'applied a mixed legal system whose components were on the one hand local statutes and customs and on the other hand the law books of Justinian and the Canon Law.'¹⁸ Over centuries, this vulgarised Germanic-Romanist *mixité* displaced local laws. 'Every constitution of modern Europe [was] founded upon an union' of the civil, feudal, and canon laws.¹⁹ Common lawyers, too, drew on the *ius commune*. Indeed, it has been argued that

[i]n the realm of basic principles, organizing ideas, techniques of argumentation, and habits of thought, the parallels are sufficiently great that one might want to call the

¹³ R Chambers, *A course of lectures on the English law delivered at the University of Oxford 1767-1773* (1999, composed with Samuel Johnson), TM Curley (ed), 112.

¹⁴ *Lectures on the Constitution and Laws of England* ((2nd edn) 2004 [1776]), SP Donlan (ed), 19.

¹⁵ *Elements of jurisprudence*, 83. See also *A systematical view of the laws of England* (1792-3).

¹⁶ Ayliffe, *Parergon juris canonici Anglicano: or, a commentary by way of supplement to the canons and constitutions of the church of England* (1726), xix.

¹⁷ Browne, *A compendious view of the civil law and of the law of the admiralty*, i.39.

¹⁸ H Coing, 'The Roman Law as *Ius Commune* on the Continent' (1973) 89 *Law Quarterly Review* 505, 510.

¹⁹ Bever, *History of the legal polity of the Roman state and of the rise, progress and extent of Roman laws* (1781), xii.

common law simply a variant, admittedly an eccentric variant, of the multitude of legal systems that ultimately derive from the *ius commune*.²⁰

The nineteenth-century English legal historian FW Maitland (1850-1906) argued that term ‘common law’ was itself borrowed by analogy from the ‘*ius commune*’ of the canonists to distinguish general from particular laws.²¹

While Bever bemoaned that later writers did not produce more scholarship, he believed England ‘never ... failed to produce a succession of great and able Civilians, who have done the highest honor to their profession, both as advocates and statesmen.’²² As on the continent, English legal education in the civil and canon laws was conducted in the universities. Oxford and Cambridge taught the learned laws from an early date.²³ University education in the *lex proprium* was, across Europe, a much later development.²⁴ The ‘*Corpus Juris Canonici*’ was ‘introduced into *England* during the reign of king *Stephen*, AD 1149 by the industry of *Roger Vacarius*, who read public lectures upon their use and excellency in the university of Oxford.’²⁵ If the Lombard Vacarius (c1120-c1200) could not have taught at Oxford, his *Liber pauperum* (c1170s) was an important channel for continental thought into the following century.²⁶ English, Welsh, and Irish civilians were educated both at home and abroad. Their training in pan-European bodies of law made them especially useful as diplomats and advisors. Long after the Reformation, Oxford still conferred degrees, Browne noted, ‘*in utroque Jure tam Civili quam Canonico*.’²⁷

Within England, the common law had important advantages over its rivals. Its effectiveness as a forum and greater guarantee of enforcement meant it began to absorb competing courts. Like the *ius commune*, it served as subsidiary law and was received in England’s other jurisdictions. Common law courts eventually acted as superior courts. By the fifteenth century, however, the royal courts were increasingly criticised for their rigidity. As a result, additional courts rooted in the king’s prerogative powers arose. Most important was the fifteenth-century development of the ‘Equity’ courts. The king’s Chancellor, acting on his behalf, was permitted to decide petitioners’ claims ‘equitably’, i.e. according to justice and conscience. Eventually the Court of Chancery developed for this purpose. Sir Jeffray Gilbert (1674-1726), judge of the Irish king’s bench and chief baron of the Irish exchequer, noted that from a ‘very small and inconsiderable beginning, [the equity courts] hath not only curbed the jurisdictions of the common law, but hath introduced a new process, and a new manner of trial totally before unheard of.’²⁸ Chancery was especially open to the influence of the learned laws. ‘Almost all of the chancellors, from Becket to Wolsey ... were ecclesiasticks, well skilled in the Roman laws.’²⁹

²⁰ C Donahue, Jr, ‘*Ius commune, canon law, and common law in England*’ (1992) 66 *Tulane Law Review* 1745, 1748.

²¹ FW Maitland, *Roman canon law in the Church of England: six essays* (1898), 4.

²² Bever, *History*, x.

²³ F De Zulueta and P Stein, *The teaching of Roman law in England around 1200* (1990).

²⁴ Note, however, the importance of the oral doctrine or ‘common learning’ of the judge-jurists of the English Inns. Baker, *The law’s two bodies: some evidential problems in English legal history* (2001).

²⁵ A law grammar, 131.

²⁶ RW Southern, ‘From schools to university’ in JI Catto (ed), *The history of the University of Oxford: vVolume I – the early Oxford schools* (1984), 9.

²⁷ Browne, *A compendious view of the ecclesiastical law of Ireland* ((2nd edn) 1803), 123n.

²⁸ *Two treatises on the proceeding in equity: and the jurisdiction of that court* (1756), 24 (published posthumously). Volume one was called *Forum Romanum: or, the Roman tribunal*.

²⁹ Burn, v-vi.

According to Charles Barton (1767/8-1843), barrister and legal writer, they ‘naturally entertained a predilection for the civil, as connected with the canon or ecclesiastical law; they consequently adopted its rules and principles in their mode of dispensing justice’.³⁰ Procedures as well as substantive elements were borrowed.

An institute of the laws of England

An even more distinctively Anglo-civilian body of law and lawyers developed. Samuel Hallifax (1733-90), LL.D., professor of civil law at Cambridge, and bishop of St Asaph, wrote on law and religion. He noted this sectorial civilian influence:

the Imperial law, to this day, obtains, under different restrictions, in the Courts of Bishops and their officers, the Courts Military, the Courts of Admiralty, and the Courts of the two Universities; in all which it has been received either by the consent of Parliament, and so is become a part of the Statute or Written law; or by immemorial usage and custom, and thus constitutes an inferior branch of the Common or Unwritten law.³¹

This use of the *ius commune* occurred, in part, because it was believed that ‘courts of different regions should observe and adhere to an uniformity of decisions’ across Europe.³² These courts were in addition, of course, to the ecclesiastical courts. The civilians’ ‘Doctors’ Commons’ provided a place for practitioners to dine and socialise.

A voluntary society like the English Inns, it probably dates from the late fifteenth century.³³ Doctors’ Commons did not have a teaching function or control entry into the profession, but its members had a monopoly in the civilian and ecclesiastical courts.³⁴ An almanac from 1777 listed fourteen public offices.³⁵ Many of the civilian advocates were also members of the Inns. They were, like their continental contemporaries, ‘mixed jurists’.

The existence of these jurisdictions did not, of necessity, generate conflict. For some time, ‘Common lawyers seemed to have regarded canon law and civil law as comparable bodies of law maintained and passed down by their counterpart professions in much the same way.’³⁶ Many civilians, including the ‘legal humanists’, sought to use their learning to reform English law.³⁷ The civilians ‘were the first ... to attempt an exposition of English law on truly systematic

³⁰ *Historical treatise of a suit in equity ...* (1796), 19.

³¹ *An analysis of the Roman civil law compared with the laws of England* (1774), xx.

³² Wooddeson, *A systematical view*, 138 (discussing admiralty).

³³ Squibb, *Doctors’ Commons: a history of the College of Advocates and Doctors of Law* (1977); FD Logan, ‘Doctor’s Commons in the early sixteenth century: a society of many talents’ (1988) 61 *Historical Research* 151.

³⁴ Andrew Coltée Ducarel (1713-85), DCL, commissary of Canterbury, and fellow of the Society of Antiquaries, wrote a ‘Summary account of the Society of Doctors Commons’ in 1753. He presented the work to Sir George Lee (1700?-58), DCL, MP, dean of arches, and judge of the prerogative court of Canterbury. It was included as Appendix One in (1931) 15 *London Topographical Record* 21.

³⁵ *Browne’s general law-list ...* ((2nd edn) 1777), 153-6. Also included is a list of the doctors and proctors of Doctors Commons. *Ibid.*, 147-52.

³⁶ DJ Seipp, ‘The reception of canon law and civil law in the common law courts before 1600’ (1993) 13 *Oxford Journal of Legal Studies* 388, 412.

³⁷ RJ Terrill, ‘Humanism and rhetoric in legal education: the contribution of Sir John Dodderidge (1555-1628)’ (1981) 2 *Journal of Legal History* 30.

lines.’³⁸ They were similarly critical of the exceptionalism and insularity of the legal history of the common lawyers. And English law was, in fact, supplemented by continental and canonical legal methods, maxims, courts and procedures, as well as specific doctrines. They were ‘*adopted*, or used by way of *illustration*’ or ‘to regulate inconvenient usages or other defects.’³⁹ Such borrowing occurred through both formal and informal legislative, doctrinal, and judicial receptions. This was, Bever wrote, ‘a very innocent, nay, a very laudable plagiarism’.⁴⁰

Thomas Wood (1661-1722) was an Oxford DCL and briefly assessor of the vice-chancellor’s court there. He was also called to the bar at Gray’s Inn. He wrote that ‘the most ancient of [common law] writers, would look very naked, if every *Roman Lawyer* should pluck away his Feathers.’⁴¹ The most important legal literature of the early common law showed considerable Roman erudition. Indeed,

[f]rom the reign of *Stephen* to that of *Edward* the third, the Civil Law prevailed very much, and even the Judges and Professors of the Common Law had frequent recourse to it, when the Common Law was silent or defective; as plainly appears from the works, of *Bracton*, *Thornton*, and *Fleta*, who have transcribed one after another, in many places, the very words of Justinian’s Institutes.⁴²

If English borrowing was not as extensive as in other parts of Europe, Halifax wrote that ‘certain parts and principles of the Imperial law have been incorporated into our own, [is] a fact too incontestable to be denied.’⁴³ Indeed, he claimed that ‘great improvements’ were made by such ‘ingraftments’.⁴⁴ The sixteenth century even saw ‘a Reception of the continental *lex mercatoria* in England.’⁴⁵

Both legal records and law reports were common in Europe’s secular and spiritual courts.⁴⁶ But being handwritten and elliptical, they were often of little use in future adjudication. Reports were unofficial, rarely contained more than the judgment reached and the parties involved, and generally lacked an explanation of the court’s motives or reasoning. As with Roman edicts, English writs provided some legal continuity. But especially before printing, there were few authentic texts of either legislation or jurisprudence. Even English judicial ‘opinions were not sources of law, but simply evidence of what the law was. Legal learning and reasoning transcended single instances.’⁴⁷ The decisions of juries were less useful still for the development of a meaningful jurisprudence. But lacking the texts and elaborate written commentary of the learned law, common lawyers increasingly relied on the reports generated in adjudication. Already by the time of *Les comentaries ou les reportes de Edmund Plowden* (1571), the

³⁸ CP Rodgers, ‘Legal humanism and English law – the contribution of the civilians’ (1984) 19 *Irish Jurist* (ns) 115, 120.

³⁹ Browne, *Civil law*, i.12n19.

⁴⁰ Bever, *Discourse*, 25.

⁴¹ *A new institute of the imperial or civil law* (1704), ix.

⁴² *A law grammar*, 129-30.

⁴³ Halifax, xvi.

⁴⁴ *Ibid.*, xxi.

⁴⁵ Stein, ‘Continental influences on English legal thought, 1600-1900’ in *The character and influence of the Roman Civil Law* (1988), 218.

⁴⁶ A Wijffels (ed), *Case law in the making: the techniques and methods of judicial records and law reports – volume one: essays* (1997).

⁴⁷ Baker, *An Introduction to English legal history* (3rd edn, 1990), 227.

common law '[h]ad come to depend on judicial decisions, interpreted in the context of the facts which gave rise to them.'⁴⁸ Such case 'law' was effectively doctrine, though of a particularly important sort. It was binding in the instant case and persuasive for future decisions. As in Europe, precedents possessed authority on the basis of fairness and as 'best evidence' of the law.⁴⁹

Slowly, very slowly, European legal pluralism would give way to nation-states and common national laws.⁵⁰ A series of horrific confessional wars resulted in the formal recognition of states and the elaboration of a more complex 'law of nations'. European princes were now sovereign both internally and externally. Philosophically, the Reformers' emphasis on divine law-making served as a model for state absolutism and legal positivism. Catholic thought also remained important. The canon law continued almost without alteration in protestant kingdoms. In England, a 'kind of National Canon law, composed of legatine and provincial constitutions, and adapted only to the exigencies of this church and kingdom' was created.⁵¹ And, with the growth of internal state power, the expansion of the English common continued. By the sixteenth century, Wales was already firmly within the orbit of English law; in the following century, it finally displaced native Irish law and mixed 'March' laws at its borders. Scotland had, of course, long been independent and drew heavily on the *ius commune*. The union of the English and Scottish crowns (1605) and parliaments (1707) suggested a legal union, but the common lawyers successfully prevented it.⁵² Instead, Scots law would increasingly come under the influence of English law.

Within England, too, the common law began to absorb other jurisdictions. This exposed internal divisions within English law, as the relationship between common lawyers and prerogative lawyers and civilians deteriorated in the seventeenth century.⁵³ As Browne later noted of the equity courts, '[t]he charge of encroachment on ... legal jurisdictions, was prompted by ignorance, or instigated by party'.⁵⁴ Parliamentarians aligned themselves with the apologetics of the common law and the 'ancient constitution'; common lawyers associated themselves with rising parliamentary power. This internecine rivalry is exemplified in Sir Edward Coke (1552-1634)'s clashes with Sir Francis Bacon (1561-1626). Like many English lawyers who found their way to print, Bacon attended university. There, he was exposed to the civil law and later studied it privately. He also attended Gray's Inn. His *Maxims of the law* (1597) was '[a] rapprochement between the traditional common law notion of maxim and the civilian theory of *regulae*' enshrined, among other places, in Justinian's *Digest (De diversis regulis iuris antiquae)*.⁵⁵ Bacon's suggestions for legal reform also included an early modern codification or 'digest' of the law. It was, he wrote, 'rather a matter of order and explanation, than of alteration.'⁵⁶ His suggestions were frequently reprinted in the following centuries.

⁴⁸ Baker, 'Records, reports and the origins of case-law in England' in Baker (ed), *Judicial records, law reports, and the growth of case law* (1989), 42.

⁴⁹ See Stein, 'Civil law reports and the case of San Marino' in *The character and influence of the Roman civil law* (1980), 118-9.

⁵⁰ HP Glenn, *On common laws* (2005).

⁵¹ W Blackstone, *Commentaries on the laws of England: book the first* (1765), 82.

⁵² BP Levack, 'The proposed union of English law and Scots law in the seventeenth century' (1975) 20 *Juridical Review* (ns) 97.

⁵³ L Moccia, 'English law attitudes to the "civil law"' (1981) 2 *Journal of Legal History* 157.

⁵⁴ Browne, *Civil law*, i.40-1.

⁵⁵ Stein, *Regulae iuris: from juristic rules to legal maxims* (1966), 170.

⁵⁶ Eg, Bacon, 'A proposal for compiling and amendment of our laws' in Bacon, *Law tracts* (1737).

The hostility between Anglo-civilians and common lawyers was not without humour. George Ruggle (c1575-1621/2)'s *Ignoramus* (1615), performed by students of the civil law, was especially critical of its common law rivals.⁵⁷ King James I loved it; lord Coke did not. Indeed, Coke 'could not endure any thing connected with the civil law.'⁵⁸ Ironically, the period was one in which civilians were especially accomplished. The Italian expatriate Alberico Gentili (1552-1608) was a noted writer on the law of nations and was later admitted to Gray's Inn. Arthur Duck (1580-1648)'s *De usu auctoritate juris civilis Romananorum* was published posthumously in 1653, translated and reprinted into French and German. Richard Zouche (1590-1661), it has been written, 'was ... the last of his kind: an English civil lawyer whose writings acquired a durable European reputation.'⁵⁹ Like the works of his contemporaries, John Cowell (1554-1611)'s *Institutiones juris Anglicani* (1605) pressed the common law into a civilian framework. He had received an LLD from Cambridge and served as professor of civil law and justice of the peace there. His *Interpreter* (1607) ignited considerable controversy. A law dictionary, definitions in the work claimed extensive powers for the crown. While the king himself suppressed the work, the dictionary was useful enough to be republished in the eighteenth century.⁶⁰

Debates about the power of monarchy came to a head in the seventeenth century, overlapping with jurisdictional disputes. The association of the Anglo-civilians with royal absolutism was long-lasting.⁶¹ In the late eighteenth century, Browne wrote that '[t]he contest of prevalence ... has long since ceased, but this contest, conducted on political rather than philosophical grounds, engendered a cloud of heat and prejudice, which long obscured a fair comparison of their merits.'⁶² The effective victory of parliament and common lawyers over, respectively, the king and civilian and prerogative lawyers had profound effects. Bever noted that, as a result, 'the Roman or civil law ... [was] too often carelessly thrown aside as obsolete and useless; and even represented as dangerous to the civil polity of the nation.'⁶³ Indeed,

some ignorant people have been induced to think the civilians a tribe of dangerous intruders, who, if not resisted, would spread slavery, popery, and foreign power, over the whole kingdom. Under the influence of these vain and ridiculous terrors, they have supposed the whole body of the civil law to be the work of the absolute princes of Rome; and have therefore too hastily concluded, that any encouragement given to the study of it must involve our English liberties in ruin.⁶⁴

⁵⁷ EFJ Tucker, 'Ruggle's *Ignoramus* and humanist criticism of the language of the common law' (1977) 30 *Renaissance Quarterly* 341. The title character was named after a grand jury endorsement.

⁵⁸ Browne, *Civil law*, ii.84n16.

⁵⁹ BP Levack, 'Law' in N Tyacke (ed), *The history of the University of Oxford: volume IV – seventeenth-century Oxford* (1997), 563.

⁶⁰ Eg, *A law dictionary: or the interpreter of words and terms used in either the common or statute laws of Great Britain, and in tenures and in jocular customs* (1727).

⁶¹ Levack, *The civil lawyers in England 1603-1641* (1973).

⁶² Browne, *Civil law*, i.21.

⁶³ Bever, *History*, ii-iii.

⁶⁴ Bever, *Discourse*, 29. See HF Jolowicz, 'Some English civilians' (1949) 2 *Current Legal Problems* 139.

Sullivan, educated as a civilian, made the same links in the eighteenth century.⁶⁵ This internal legal rivalry was deeply entangled with competing professional interests and political ideologies. Common law purists reacted with hostility to, as they saw it, civilian pollutionists.

The study of the law of nature and nations

Pan-European movements in moral and legal philosophy meant that the law of nature and nations were areas of particular civilian influence. John Taylor (c1704-66) was a Cambridge LLD, a classical scholar and civilian advocate, ecclesiastic, and subsequently chancellor of Lincoln. He suggested that '[t]he *Jus Gentium*, or Law of Nations, in the Conception of the Roman Lawyers, differed little from the Law of Nature' and 'it may not be altogether improper to consider the Law of Nature as a Text, and the Civil Law as a Comment.'⁶⁶ In response to the political and philosophical crises of the early seventeenth century, some natural lawyers suggested the possibility of constructing a rational system of law on the basis of deduction. Even in England,

[i]n purely formal terms, arguments from the writing of Natural Lawyers—of foreign Natural Lawyers at that—provided a legally acceptable foundation for the overturning of long-standing Common Law rules.... Nowhere is there a hint that Pufendorf's principles are any less valid as sources of legal argument than are the earlier decisions of the English courts.⁶⁷

Natural law could, it seemed, be redacted into written, positive law. In the following century, Sir James Mackintosh (1765-1832), polemicist, barrister, lecturer at Lincoln's Inn, and MP, noted that 'the law of nations, [had], in many of its parts, acquired among our European nations much of the precision and certainty of positive law' through the works of the continental natural lawyers.⁶⁸

Contemporaneously, 'institutional' writings became important.⁶⁹ These were based on the simple, comprehensive structure of Justinian's *Institutes*, 'an epitome of the Digest' and 'shew[ed] an easy way to the obtaining a knowledge of the *Civil law*'.⁷⁰ They were generally written in the vernacular rather than in Latin and sought to rationalise existing laws or harmonise them into a common national law. Wood wrote *Institutes* of both civil and common law. While not the first, he noted in his English institute that he

*Entertained Hopes that Now It might not be Impossible to Sort, or to put in some Order, this heap of Good Learning; and that a General and Methodical Distribution, Preparatory to a more Large and Accurate Study of our Laws, might now be made*⁷¹

⁶⁵ '[T]he common lawyers and parliament perceived the design, and foresaw the consequences that might follow. Their opposition was steady and successful'. Sullivan, 181-82.

⁶⁶ J Taylor, *Elements of the civil law* (1755), 128, 133. A second edition (1769) and an abridged *Summary of the Roman law* (1773) were later published.

⁶⁷ DJ Ibbetson, 'Natural law and common law' (2001) 5 *Edinburgh Law Review* 4, 9.

⁶⁸ *Discourse on the study of the law of nature and nations* (1799), 5.

⁶⁹ K Luig, 'The institutes of national law in the seventeenth and eighteenth centuries' (1972) 17 *Juridical Review* (ns) 193. Coke borrowed the title, but little else, for his *Institutes* (1628-44).

⁷⁰ Thomas Cunningham, *A new and complete law dictionary ...* ((2nd edn) 1771) under 'CIV'.

⁷¹ *An institute of the laws of England; or, the laws of England in their natural order ...* (1720), ii.

Sir Matthew Hale (1609-76) and Gilbert each adopted variations on the institutional approach.⁷² Other Englishmen drew on more contemporary continental developments. Sir Henry Finch (1558-1625), for example, utilised Ramist logic to organise English law in his *Nomotexnia* (c1585).⁷³ Throughout Europe and America, modern natural law and institutional writings provided a standard by which laws could be reformed or unified. Each weakened the *ius commune*, simplified education in the national laws, and, on the continent, prepared the way for later codifications.

Legal pluralism continued after the Interregnum and the ‘Glorious Revolution’ of 1688. But, by the end of the seventeenth century, the common law had clear priority over other internal laws and institutions. The prerogative courts were either restrained or, in the case of the courts of star chamber and requests, eliminated.⁷⁴ Common law and equity courts began to converge. The civilian jurisdictions, Hale wrote, were ‘but *Leges sub graviore Lege*, and the Common Laws of this Kingdom have ever obtain’d and retain’d the Superintendency over them’.⁷⁵ Edward Bullingbrooke (?), LLD, was vicar-general of Armagh, and advocate in the Irish ecclesiastical and civilian courts. Of the former, he wrote that they were ‘inferior branches of the customary law of the law, and may properly be called the king’s ecclesiastical laws’.⁷⁶ The common law had established a clear priority over other jurisdictions. Common law judges even began to sit alongside the civilians in the admiralty courts and on the court of Delegates. These changes also made Roman and continental law less threatening and

Civil law was openly and explicitly considered a source of jurisprudence for the common law—a philosophizing jurisprudence distinct from doctrine and thus different from jurisprudence as it existed on the continent. In this guise, the civil law and related national law gradually found a nonspecialized place in English legal thought that did not threaten English law or liberty and therefore could be broadly acknowledged and appreciated.⁷⁷

Bever, for example, cited John Locke (1632-1704)’s recommendation to read Hugo Grotius (1583-64) and Samuel Pufendorf (1632-94), ‘the ornaments of the last century, ... the fathers of modern jurisprudence.’⁷⁸

Taylor’s *Elements of the civil law* (1755) was a popular work on ‘the *Common Law* of the *Romans*’.⁷⁹ It was ‘meant to serve for an Introduction to the Study of the Civil Law; or rather, to contain the Principles of Law in general.’⁸⁰ In this equation of Roman law with perennial principles, its use appeared unavoidable. Similarly, the translator of Claude Joseph De Ferrière

⁷² In Hale’s *History and analysis of the common law of England* (posthumously published 1713) and Gilbert’s unpublished treatise on English law (c1700) respectively.

⁷³ W Prest, ‘The dialectical origins of Finch’s Law’ (1977) 36 *Cambridge Law Journal* 326.

⁷⁴ The court of star chamber has long been a victim of whiggish history, but English criminal law owes much to it in areas like conspiracy, contempt of court, perjury, fraud, and defamation. TG Barnes, ‘Star chamber mythology’ (1961) 5 *American Journal of Legal History* 1.

⁷⁵ Hale, 44.

⁷⁶ *Ecclesiastical law; or, the statutes, constitutions, canons, rubricks, and articles, of the Church of Ireland* (1770), x. Bullingbrooke published an abridgement of Irish statutes and a work on the justices of the peace.

⁷⁷ PA Hamburger, ‘The development of the nineteenth-century consensus theory of contract’ (1989) 7 *Law and History Review* 241, 258.

⁷⁸ Bever, *Discourse*, 35 (footnote b). See *Ibid.*, 35-6.

⁷⁹ Taylor, *Elements*, 145.

⁸⁰ *Ibid.*, v.

(1680?-1748?)'s *History of the Roman or Civil law* (1724) claimed that it was a 'Treasure, ... the most perfect Collection of Natural Reason and Equity, applied to all the various Transactions and Intercourses between Man and Man'.⁸¹ This was not a view reserved to the Anglo-civilians. The popular author Giles Jacob (c1686-1744) wrote that 'no other Laws are esteem'd comparable to it for its Equity.'⁸² Noted common lawyers like Sir John Holt (1642-1710), chief justice of king's bench, made similar remarks. 'Insomuch as the law of all nations are doubtless raised out of the ruins of the civil law ...,' he wrote, 'it must be assumed that the principles of our law are borrowed from the civil law'.⁸³ In discussing the law of nations, Chambers called on Grotius and Pufendorf, as well as the German Christian Wolff (1679-1754) and the Swiss Jean-Jacques Burlamaqui (1694-1748) and Emmerich de Vattel (1714-67).⁸⁴

Although Wood, among others, had argued for university study of the common law, William Blackstone (1723-80) was the first such lecturer.⁸⁵ The jurist, legislator, and judge had, in fact, previously sought the Oxford professorship in civil law and had some familiarity with civilian doctrine. It has even been suggested that he 'was essentially a civilian and an academic'.⁸⁶ His *Commentaries on the laws of England* (1765-9), based on his lectures, certainly borrowed institutional elements.⁸⁷ As a consequence, the clarity and comprehensiveness of the work served a code-like function and ironically helped insulate English law from further borrowing. It would be especially important in America given the scarcity of law reports. Referring to the civil law as 'a collection of written reason', Blackstone echoed his generation's belief in 'it's use as well as [being an] ornament to the scholar, the divine, the statesman, and even the common lawyer'.⁸⁸ In encouraging the study of English law, he wrote that

These originals should be traced to their fountains, as well as our distance will permit; to the customs of the Britons and Germans, as recorded by Caesar and Tacitus; to the codes of the northern nations on the continent, and more especially to those of our own Saxon princes; to the rules of the Roman law, either left here in the days of Papinian, or imported by Vacarius and his followers; but, above all, to that inexhaustible reservoir of legal antiquities and learning, the feudal law, or, as Spelman has entitled it, the law of nations in our western orb. These primary rules and fundamental principles should be weighed and compared with the precepts of the law of nature, and the practice of other countries; should be explained by reasons, illustrated by examples, and confirmed by undoubted authorities; their history should be deduced, their changes and revolutions

⁸¹ De Ferriere, *The history of the Roman or Civil law* (1724), John Beaver (tr), A3. This included, without footnotes, a section on England from Duck's *De usu autoritate juris civilis Romananorum*.

⁸² *A treatise of laws: or, a general introduction to the common, civil, and canon law* (1721), 244. Jacob wrote books on manorial law, statute law, public law, and a law dictionary. He also published *A student's companion: or, the reason of the laws of England* (1725) and *Lex mercatoria: or, the merchant's companion* (1718).

⁸³ *Lane v Sir Robert Cotton* (1701) 12 Mod Rep 482.

⁸⁴ Chambers, 83-94.

⁸⁵ *Some thoughts concerning the study of the laws of England in the two universities* (1708).

⁸⁶ AWB Simpson, 'The rise and fall of the legal treatise' in *Legal theory and legal history* (1986), 296.

⁸⁷ JW Cairns, 'Blackstone: an English institutist: legal literature and the rise of the nation state' (1984) 4 *Oxford Journal of Legal Studies* 318; A Watson, 'The structure of Blackstone's Commentaries' (1988) 97 *Yale Law Journal* 795.

⁸⁸ Blackstone, 5.

observed, and it should be shewn how far they are connected with, or have at any time been affected by the civil transactions of the kingdom.⁸⁹

This from a whiggish and insular common lawyer.

Continental natural jurisprudence played an influential, if limited, role in every enlightened English lawyer's thought. Wooddeson adopted the 'same threefold division which the Institutes of Justinian have taught us, and which appear ... the most clear, and analytically just'.⁹⁰ In insisting that legal studies be rooted in moral philosophy, he wrote that

it was not till within the two last centuries, that the fundamental principles of moral jurisprudence were duly investigated and embraced. Within that period the writings of Hooker, Cumberland, and Butler among our own countrymen; and among foreigners those of Grotius, Winkler, Pufendorf, Burlamaqui, Bynkershoëk, Barbeyrac, and Vattel have been received with very general and merited applause.⁹¹

The first Cambridge professor of common law, Edward Christian (c1758-1823), similarly reflected civilian influence. His elliptical *Syllabus; or, the heads of lectures ...* (1797), included a chapter on 'Civil and canon law' as well as a number of ecclesiastical affairs.⁹² At Oxford, Robert Eden (1701-1759)'s *Jurisprudentia philologica sive elementa juris civilis, secundum methodum et seriem Institutionum Justiniani ...* (1744) was popular with students for decades.

English translations of continental texts were common in the eighteenth century. Numerous others were accessible through Latin. George Harris (c1721-96), DCL, published a critical translation of the first book of Justinian's *Institutes*.⁹³ Early in the century, Wood translated part of the work of Jean Domat (1625-96).⁹⁴ Grotius and Pufendorf, too, were frequently translated.⁹⁵ The Scot George Turnbull (1698-1748), translated Johann Gottlieb Heineccius (1683-1741).⁹⁶ Charles de Secondat, baron de Montesquieu (1689-1755)'s *L'Esprit des lois* (1748) was extremely popular, both in French and through the English translation of Thomas Nugent (1700?-72). Among many other continental authors, the Irishman translated the works of Burlamaqui.⁹⁷ The writings of Vattel, Frederick II of Prussia (1712-86)'s code, and Cesare Beccaria (1738-94)'s *Dei delitti e delle pene* (1764) were all translated at mid-century.⁹⁸

⁸⁹ *Ibid.*, 35-36.

⁹⁰ Wooddeson, *Elements*, 111.

⁹¹ *Ibid.*, 4.

⁹² *A syllabus; or, the heads of lectures ...* (1797), 5.

⁹³ *D Justiniani institutionum liber primus* (1749).

⁹⁴ Domat's *Les Loix civiles dans leur ordre naturel, suivies du droit public* (1680-94) was translated as *A treatise of the first principles of laws in general* (1705)? Another translation, that of William Strahan (?-1748), was entitled *The civil law in its natural order* (1722).

⁹⁵ See Stein, *Legal evolution: the story of an idea* (1980), 3. A life of the Dutchman was translated from the French. JL de Burigny, *The life of the truly eminent and learned Hugo Grotius* (1765).

⁹⁶ *A methodical system of universal law* (1763).

⁹⁷ *Principles of natural law* (1748) and *Principles of politic law* (1752).

⁹⁸ Vattel, *Law of nations; or principles of the law of nature applied to the conduct and affairs of nations and sovereigns* (1759); *The Frederician code; or, a body of laws for the dominions of the King of Prussia* ((2 vols) 1761, translated from the French); *An essay on crimes and punishments* (1767, with a commentary attributed to Voltaire).

Gaetano Filangieri (1752-88)'s treatise on the 'science of legislation' was translated in part in 1791. The complete extant text was available in English in 1806.⁹⁹

The decline and fall of the Roman empire

Numerous eighteenth-century Anglophone authors were writing in this tradition, blending pan-European legal and moral philosophy. Many Scots were influential, including Gershom Carmichael (1672-1729) and Francis Hutcheson (1694-1746), the Irish 'father of the Scottish enlightenment'.¹⁰⁰ One of century England's best-known moral philosophers, Thomas Rutherford (1712-71)'s most important publication was an institutional work based on Grotius.¹⁰¹ Edward Gibbon (1737-94) relied, in part, on Heineccius for the famous forty-fourth chapter (on Roman jurisprudence) of his *The decline and fall of the Roman empire* in six volumes (1776-88). William Paley (1743-1805)'s *Principles of moral and political philosophy* (1788) was also extremely popular. Paley, DD, served as chancellor of the diocese of Carlisle and a justice of the peace; the work discusses moral obligations, property, contracts, crimes, and 'civil government'. Alexander Crowcher Schomberg (1756-92), poet and jurist, wrote on Roman and maritime law.¹⁰² Robert (Plumer) Ward (1765-1846) studied at Oxford and in France. He practiced briefly as a barrister, wrote a work on the law of nations, was subsequently an MP, served as a sheriff, and wrote novels.¹⁰³

It is difficult to plot the 'penetration and resistance' of civilian influence. Eighteenth-century lawyers were themselves of different minds. It was generally conceded that common lawyers were 'indebted to [civilians] chiefly for systematical schemes'.¹⁰⁴ Ayliffe wrote that the common law 'originally gave no methodical Account of Things purely rational, as of Obligations, Contracts, Crimes, Trespasses, Last Wills and Testaments, and the like.'¹⁰⁵ Wooddeson 'quoted rules for the interpreting of laws, which seem' he said 'evidently taken from the Civilians.'¹⁰⁶ Indeed, the *ius commune* and the canon law were both important, as '[v]irtually all of the thirty-six Latin-language maxims on law and on statutory interpretation extracted by Thomas Wood from Sir Edward Coke's Reports and Institutes are readily traced to these sources, or directly to Justinian's codification.'¹⁰⁷ Wood's argument about continental influence was strong:

[I]f there is that wide difference between the Common and Civil Laws in their forms of Pleading and manner of Tryal, this is only the stile, practice, and course of the Courts. I

⁹⁹ *Analysis of the science of legislation ...* (1791), William Kendall (tr) and *The science of legislation*, (1806) Sir Richard Clayton (tr, 1745-1828).

¹⁰⁰ Carmichael published translations of Pufendorf with extensive commentary in 1718 and 1724. Hutcheson's *Short introduction to moral philosophy* (1747) was published posthumously.

¹⁰¹ *Institutes of natural law being the substance of a course of lectures on Grotius de jure belli et pacis ...* (1754-6).

¹⁰² *An historical and chronological view of Roman law* (1785), subsequently translated into French, and *A treatise on the maritime laws of Rhodes* (1786).

¹⁰³ *An enquiry into the foundation and history of the law of nations ... to the age of Grotius* (1795).

¹⁰⁴ Chambers, 119. Bever noted the 'peculiarly scientific cast of the civil law'. *Discourse*, 24.

¹⁰⁵ Ayliffe, *New pandect*, xlvi.

¹⁰⁶ Wooddeson, 85.

¹⁰⁷ H Baade, 'The Casus Omissus: a pre-history of statutory analogy' (1994) 20 *Syracuse Journal of International Law and Commerce* 45, 92.

contend that there is a mixture in the *Principles, Maxims and Reasons* of these two Laws; and indeed the Laws of all Countries are mixed with the Civil Law, which have arrived to any degree of perfection.... True it is that the Common and Civil Laws had not the same Root or Stock; yet by Inoculating and Grafting, the Body and Branches do seem at this day to be almost of a Piece.¹⁰⁸

Wood explicitly borrowed John Selden (1584-1654)'s famous image of English law as the ship of the Argonauts, in which it remains essentially the same while constantly changing. He continued by adding, '[u]pon a Review, I think it may be maintain'd, that a great part of the Civil Law, is part of the Law of *England*, and interwoven with it throughout.'¹⁰⁹

In the eighteenth century, the distance between judicial methodologies on either side of the English Channel was not so great as it was to become.¹¹⁰ In England, '[t]he theory was that the court should look to the reason of the precedent, the principle behind the rule.'¹¹¹ They were not, strictly speaking, binding. In fact:

Judicial decisions, or determinations of the courts of justice [...] altho' by virtue of the laws of this realm they bind as a law between the parties thereto, as to the particular case in question, until reversed by writ of error; yet do not make a law properly so called (for that only the king and parliament can do): yet they have a great weight and authority in expounding, declaring, and publishing what the law of this kingdom is; especially when such decisions hold a consonancy and congruity with resolutions and decisions of former times.¹¹²

Wood noted, however, that English law reports 'are as highly valued as the *Responsa Prudentum* amongst the Romans to be found in the *Digest*, which are *Authoritative*.'¹¹³ Indeed, Ayliffe criticizes the growing importance of past decisions as effectively making 'every Judge ... a Law-giver, by drawing the Law *de Similibus ad Similia*, as he fancies'.¹¹⁴

In eighteenth-century England, reception was, at least in one area, a common theme. As Browne put it, 'the debt of our code to the civil, is most conspicuously shewn in the branch of title arising from contract.'¹¹⁵ William Murray, lord Mansfield (1705-93), perhaps the most famous British lawyer of the century, was both criticised and celebrated for borrowing from the civil law and *lex mercatoria*.¹¹⁶ The Scots' jurisprudence contributed to the incorporation of the

¹⁰⁸ Wood, *A new institute*, xi-xii.

¹⁰⁹ *Ibid.*, xii.

¹¹⁰ G Gorla and L Moccia, 'A "revisiting" of the comparison between "Continental law" and "English law" (16th-19th Century)' (1981) 2 *Journal of Legal History* 143.

¹¹¹ M Lobban, *The common law and English jurisprudence 1760-1850* (1991), 86.

¹¹² Burn, xxv.

¹¹³ Wood, *An institute*, 16.

¹¹⁴ Ayliffe, *New pandect*, 8.

¹¹⁵ Browne, *Civil law*, i. 35. See gen. Ibbetson, *A historical introduction to the law of obligations* (1999).

¹¹⁶ For the previous century, see DR Coquillette, 'Legal ideology and incorporation II: Sir Thomas Ridley, Charles Molloy, and the literary battle for the law merchant, 1607-1676' (1981) 61 *Boston University Law Review* 315. Molloy (1645/6-90)'s *De jure maritime et navali: or a treatise of affairs maritime, and of commerce* (1676) was repeatedly reprinted in the eighteenth century.

principles of the law merchant and the law of nations into English commercial law.¹¹⁷ In this, he was not entirely novel. Mansfield followed Holt, among others, in arguing in *Pillan v Van Mierop* that '[t]he law of merchants and the law of the land is the same'.¹¹⁸ Sir John Eardley Wilmot (1709-92)'s opinion in the same case even more explicitly relied on civilian authorities. The Welsh legal comparativist William Jones (1746-94) argued, in fact, for the basic similarity of much of English and Roman law. A graduate of Oxford and the Middle Temple, he wrote that 'a perfect harmony subsists on this interesting branch of jurisprudence in the codes of nations most eminent for legal writers, particularly of the ROMANS and the ENGLISH.'¹¹⁹ The work of the French jurist Robert Joseph Pothier (1699-1772) on obligations was utilized extensively in England, both in the original and the early nineteenth century translation. His English translator cites Jones' suggestion that 'the greatest portion of which is law at *Westminster* as well as at *Orleans*'.¹²⁰

The Anglo-civilians still practiced, published, and played an important role in public life. If only out of necessity, they wished only 'to live in perfect amity with her sister profession'.¹²¹ Sir George Hay (1715-78), DCL, became an MP, the king's advocate-general, vicar-general to the archbishop of Canterbury. There were also numerous practical works on admiralty and the ecclesiastical courts.¹²² Both still played important roles. The admiralty court was, Browne wrote, governed by 'those parts of the civil law which treat of maritime affairs, blended with other maritime laws; the whole corrected, altered, and amended, by acts of parliament and common usage.'¹²³ He acknowledged debts to Mansfield and to the 'eminent judge who now presides in the English high court of admiralty', Sir William Scott, lord Stowell (1745-1836), DCL.¹²⁴ A graduate of the Middle Temple, Stowell was advocate-general, MP, judge of the high court of admiralty, and privy councillor. Into the following century, his reputation would rival Mansfield's. An Irish almanac of 1794 noted that the ecclesiastical courts took

cognizance, and give sentence on Ordinations, institution of Clerks to Benefices, celebration of Divine Service, and all that relate to Churches, Matrimonial Rights, Divorces, Bastardy, Probate and Administration of Wills, Simony, Blasphemy, Adultries, Incests, Fornications, and Defamation.¹²⁵

With Burn and Browne, Edmund Gibson (c1669-1748), bishop of Lincoln and later London, and Thomas Oughton (1660-?), proctor and registrar of the court of delegates, each published important works on ecclesiastical law.¹²⁶

¹¹⁷ Rodgers, 'Continental literature and the development of the common law by the King's Bench: c1750-1800' in V Piergiovanni (ed), *The courts and the development of commercial law* (1987).

¹¹⁸ 3 Burr 1669.

¹¹⁹ Jones, *On the law of bailments* (1781), 11.

¹²⁰ *A treatise on obligations considered in a moral and legal view* (1802), preface (citing Jones, *Ibid.*).

¹²¹ *Discourse*, 29.

¹²² Eg, William Cockburn, *The clerk's assistant in the practice of the ecclesiastical courts ...* (1753) and Richard Watts, *The practice of the court of admiralty in England and Ireland* (1757).

¹²³ Browne, *Civil law*, ii.34.

¹²⁴ *Ibid.*, ii.43.

¹²⁵ *The city and county calendar or Irish court registry for the year of our lord 1794 ...* (1794). A list of courts, judges, and advocates is included at *Ibid.*, 135-8. Cf *The treble almanac ...* (1794), 61-2.

¹²⁶ The *Codex juris ecclesiastici anglicani* (1713) and *Ordo judiciorum* (1728) respectively.

With many contemporaries, Mansfield recommended that English law students study continental texts.¹²⁷ Many of the Anglo-civilians retained links to the universities, though legal education there was not thriving and ‘study had declined.’¹²⁸ But this was truer still of the Inns of the period. Professorships of civil law, as with others, were often nominal appointments and commitment to teaching varied extensively. Some were noteworthy. Oxford’s French Laurence (1757-1809), a protégé of Edmund Burke (1730-97), participated in the impeachment of Warren Hastings (1732-1818), and was one of the Irishman’s literary executors.¹²⁹ He was also an MP and a judge of the court of admiralty of the cinque ports. Joseph Jowett (1751-1813), LL.D., of Cambridge gained attention for his comparison of the Roman and English law. Dublin’s Patrick Duigenan (1734/5-1816), LL.D., was a particularly boorish protestant bigot, but served at various times in the metropolitan court of Armagh, the consistorial court of Dublin, the diocesan courts of Meath and Elphin, and as judge of the Irish prerogative court.¹³⁰

The eventual victory of the common lawyers and the either/or nature of much comparative law has seriously distorted the complexity of England’s legal past. ‘Legal history is winner’s history’.¹³¹ Many ideas and institutions seen to exemplify the ‘common law’ are quite recent developments, not least the modern Anglo-American advocate-led adversarial criminal trial. For centuries, criminal cases were dominated by the judges and juries heard numerous cases very rapidly. The introduction of counsel in the eighteenth century, however, altered trial dynamics considerably.¹³² The lawyer-centred oral and adversarial trial before a jury brought about the complex law of evidence, the ‘beyond-reasonable-doubt’ standard, and the rhetorical excesses that still mark Anglo-American law. In fact,

[t]he broad similarity between the historic common law criminal procedure and the modern Continental procedure should serve to remind us that adversary procedure cannot be defended as part of our historic common law bequest. The criminal lawyer and the complex procedures that have grown up to serve him and to contain him are historical upstarts.¹³³

Similarly, principles like the presumption of innocence and the privilege of self-incrimination also have European origins.¹³⁴

There were also numerous other English courts beyond or below the ‘superior’ courts. If we only use Chambers’ account, the courts of justice at mid-century (c1767-73) included: parliament, the privy council, the lords and the court of the lord high steward, chancery, king’s

¹²⁷ *A treatise on the study of the law: containing, directions to students, written by those celebrated lawyers, orators, and statesmen; the Lords Mansfield, Ashburton, and Thurlow ...* (1797), 49.

¹²⁸ Bever, *Discourse*, 28.

¹²⁹ See Burke, ‘Fragment.—An essay towards an history of the law of England’ in *The writings and speeches of Edmund Burke* (1997 (10 vols.)), P Langford, (gen ed), i.325.

¹³⁰ See generally the anonymously published *Sketches of the lives and characters of eminent English civilians* (1804) of Charles Coote (c1760-1835), DCL and judge of the court of delegates.

¹³¹ RH Helmholz, ‘Canon law and the English common law’ in *Canon law and the law of England* (1987).

¹³² JM Beattie, ‘Scales of justice: defense counsel and the English criminal trial in the eighteenth and nineteenth centuries’ (1991) 9 *Law and History Review* 221.

¹³³ JH Langbein, ‘The criminal trial before the lawyers’ (1977-78) 45 *University of Chicago Law Review* 263.

¹³⁴ K Pennington, ‘Innocent until proven guilty: the origins of a legal maxim’ in D Maffei (ed), *A Ennio Cotese: tomo III* (2001) and MRT Macnair, ‘The early development of the privilege against self-incrimination’ (1990) *Oxford Journal of Legal Studies* 66.

bench, common pleas, exchequer, exchequer chamber (of various sorts), circuit or assize courts, the session of justices of the peace (quarter sessions), county courts, the sheriff's torn court, the manorial courts of leet and baron, coroner's court, the courts of weights and measures, and the fair courts of piepowder.¹³⁵ This list is not comprehensive. Numerous 'courts of requests' created by statute served as small claims courts, as did a wide variety of borough courts. Many of these were administered in a summary manner by men untrained in the law, common or otherwise. There was considerable discretion and little precedent. Frequently lacking a record of their activities, the equitable 'law' they applied was ephemeral. There existed, too, counties palatine, providing varying levels of legal autonomy, as well as the Isle of Man and the Channel islands. Finally, one would do well to remember the blurry border between law and the numerous other normative systems of the period.

A very mixed and heterogeneous mass

In analyzing mixed jurisdictions, Professor Özücü has made fine distinctions about the balance of the individual mix: 'mixing bowls', 'salad bowls', 'salad plates', purées, etc.¹³⁶ For English law and the blending process of the nineteenth century, 'sausage-making' may be more apt. The nineteenth century brought considerable change to the legal thought and structures of Europe's *ancien régimes*. The pluralism and diversity that had characterised Europe was significantly altered by the legal unity of the modern state and nationalism. 'The new, unified national laws were not suppletive; they were binding, and purported to obliterate local particularity.'¹³⁷ In this internal convergence and national divergence, the various ingredients of English law were chopped and pressed into a single casing.

Alternatively, we might say that the English mix was puréed into positivism. The focus on law-making and legal clarity was linked to the new powers of the state and demands for popular accountability. In the civil law, this was expressed in legislation, often codes, and exegetical interpretation. English positivism corresponded with British parliamentary supremacy and the rise of statute law. Law reporting also improved. A clearer appellate hierarchy of courts was established with professional Law Lords at their head. Precedent hardened into *stare decisis*. The writ system was, on the other hand, relaxed in favour of general pleading. This brought a new focus on substantive, rather than procedural, law. Finally, along with the Act of Union of Britain and Ireland 1800, the final absorption or 'suffusion' of England's civilian, ecclesiastical, and equity jurisdictions occurred.

The Prussian-German statesman, Otto Eduard Leopold, prince of Bismark (1815-98) is said to have quipped that 'the less the people know about how sausages and laws are made, the better they sleep'. For the student of mixed jurisdictions, however, it is vital to understand the making of modern law. Almost three centuries ago, Wood anticipated the general use of 'common law' for the totality of English law:

All this together make up our *Common Law*; and though it runs thro' different Channels, yet every part of it (even that in the Spiritual courts) may claim the name of the *Common*

¹³⁵ Chambers, 217-26.

¹³⁶ For the conceptual complexity and sophistication of these discussions, see Özücü, 'Mixed and mixing systems: a conceptual search' in Özücü, E Attwooll, and S Coyle, *Studies in legal systems: mixed and mixing* (1996).

¹³⁷ Glenn, 'Persuasive authority' (1987) 32 *McGill Law Journal/Revue de Droit de McGill* 261, 279.

Law of *England*. For the whole is a composition of the *Feudal*, *Civil* and *Canon* Laws; and its *Definitions*, *Divisions* and *Maxims* are drawn out of one of those three Laws.¹³⁸

But the royal courts' absorption of its rivals has all too frequently obscured the historically diverse origins of English law. One hundred years after Wood wrote, Browne noted that 'much of the civil law ... was incorporated with our own, though by long use the debt is forgotten, and we are apt to consider it as part of our original stock.'¹³⁹ The debt English lawyers owe to the feudal, civil, and canon laws, and to England's many other jurisdictions is often forgotten. Eighteenth-century English law was a 'system in transition', not from one family to another, but from one type of *mixité* to another. That process, of course, continues.

Cite as: Seán Patrick Donlan, 'Our laws are as mixed as our language': Commentaries on the laws of England and Ireland, 1704-1804, vol. 12.1 ELECTRONIC JOURNAL OF COMPARATIVE LAW (May 2008), <<http://www.ejcl.org/121/art121-6.pdf>>.

¹³⁸ Wood, *A new institute*, viii.

¹³⁹ Browne, *Civil law*, i.12-13.