LAW MODERATIONS – HILARY TERM 2022

MODERATORS' REPORT

Part I

A. STATISTICS

Number of candidates in each class

	2022	2021	2020	2019	2018
Distinction	42	42	42	30	34
Pass	185	198	162	189	166
Pass in 1 or 2 subjects only		2	1	2	2
Fails	1	2	-	-	-
Total	228	244	205	221	202

Percentage of candidates in each class

	2022	2021	2020	2019	2018
Distinction	18.42	17.21	20.49	13.57	16.83
Pass (without Distinction)	81.14	81.15	79.02	85.52	82.18
Pass in 1 or 2 subjects only		0.82	0.49	0.90	0.99
Fails	0.44	0.82	-	-	-

Number of vivas held

Vivas were not held in these examinations.

Number of scripts second marked

Scripts in this examination are not automatically double marked. Instead, scripts are double marked during the first marking process to decide prize winners, and when a fail mark has been awarded. Further double marking takes place during the first marking process if the marking profiles of those marking a particular paper appear misaligned, or if a profile contains an unusually large number of very high or very low grades.

Once first marks are returned, the following classes of script are second marked:

B. EXAMINATION METHODS AND PROCEDURES

Online examinations

Law Moderations took place in 9th week of Hilary Term. As in 2020 and 2021, the examinations were open book and took place online. Candidates were given 3 hours to complete their answers.

Word limits and rubrics

A word limit of 2000 words was applied for each question. Given that most scripts were submitted in a PDF document, checking the word count for any answer was not straightforward. Markers were asked to notify Paul Burns of any script that seemed unduly long. A sample of scripts for each paper was also checked against the word limit.

Mitigating circumstances

33 candidates submitted mitigating circumstances applications. At the Board's final meeting, the Moderators assessed the seriousness of each application and then used those assessments to determine whether to adjust the results of each candidate. The results of 3 candidates were adjusted on the basis of their application.

Late penalties

The possibility of late submission was eliminated in 2021/22.

Examination conventions

The Notice to Candidates was emailed to candidates on 07/02/2022 and the Examination Conventions were emailed to candidates and uploaded to Canvas on 07/02/2022.

Part II

A. GENERAL COMMENTS ON THE EXAMINATION

This was the third year in which Law Moderations took place online. It was the first in which most candidates studied remotely for the duration of their course, having been prevented from coming to Oxford by the COVID-19 pandemic.

Plagiarism

All of the exam scripts were run through plagiarism software, and a number of instances of plagiarism were identified. A range of penalties was imposed, with many at the most minor end but, in some instances, a significant reduction in marks was imposed and a couple of cases were referred to the Proctors. Candidates should be aware that plagiarism is now routinely identified and punished.

The Turnitin Similarity Index for each question of each script was reviewed and a sample of scripts was then further investigated to look at the extent to which the candidate's script matched with text already held in the Turnitin and other online databases. Six penalties were

applied for poor academic practice and a further three scripts were referred to the Proctors for suspected plagiarism. One paper was given a mark of 0 by the Proctors, and the other two were pass marks. 5 papers (four being Constitutional Law, one was The Roman Introduction to Private Law) received penalties of 5 marks from the Exam Board and one paper received a penalty of 10 marks (Constitutional Law).

Almost all of the plagiarism identified looked, to the Moderators, to be negligent rather than deliberate, the consequence of sections of textbooks, lecture handouts, or judgments, being cut and pasted into notes, and then uploaded in the exam. The examiners suspected that this was inadvertent: the result of poor notetaking rather than a deliberate attempt to cheat. But it was plagiarism, nevertheless, and penalties were imposed. The Moderators urge candidates to be aware of the risk of cut and pasting in exams. If candidates wish to do this - and the best scripts that that the Moderators saw plainly avoided this practice entirely - extreme care should be taken to ensure that what is uploaded is the candidate's own work, not material drawn from another source.

B. EQUALITY AND DIVERSITY

Breakdown of results by gender for Course 1 and Course 2 combined.

	2022		2021		2020		2019		2018	
Result	**Gender**	**No**	**Gender**	**No**	**Gender**	**No**	**Gender**	**No**	**Gender**	**No**
Distinction	F	23	F	19	F	21	F	18	F	17
	M	19	M	23	M	21	M	12	M	17
Pass	F	114	F	126	F	96	F	118	F	104
	M	72	M	72	M	66	M	71	M	62
2 paper pass	F	0	F	2	F	0	F	1	F	2
	M	0	M	0	M	0	M	1	M	0
1 paper pass	F	0	F	0	F	1	F	0	F	0
	M	0	M	0	M	0	M	0	M	0
Fail	F	0	F	2	F	0	F	0	F	0
	M	1	M	0	M	0	M	0	M	0

The percentage of male students obtaining Distinctions was marginally lower than 2021. The percentage of female students obtaining Distinctions increased. 20.65% of male students, and 16.79% of female students, obtained Distinctions in 2022.

Appendix A of this report contains a gender breakdown by paper.

C. COMMENTS ON PAPERS AND INDIVIDUAL QUESTIONS

A Roman Introduction to Private Law

The standard of scripts this year was high. On the whole, candidates exhibited an impressive grasp of the content, structure and context of Roman private law. Many candidates answered more than the required number of problem questions (i.e. two or three rather than one) and many provided perceptive, well-structured solutions. On the other hand, the examiners were concerned to notice that some candidates appeared to be uncritically reproducing pre-prepared notes in the context of problem questions as well as essays and gobbets – see further remarks below in the context of individual questions. No marks were awarded for the inclusion of irrelevant material, even if accurate, and candidates are strongly discouraged from doing this in future years.

Question 1

As ever, candidates are advised to keep their focus on the specific issue raised by the texts chosen. It is unlikely that a text will invite general discussion of a topic. This advice was largely observed in this paper, with a pleasing number of strong answers to gobbets. Nevertheless, candidates ought to be careful not to offer too great a volume of irrelevant detail – a curated answer that keeps its focus on the question is likely to fare better than a longer answer that mixes acute observations with irrelevant additional matter.

Comments on each text:

(a) G.1.4: This text required discussion of the changing nature of *senatusconsulta*. Candidates could anchor their discussion to Gaius's claim that such enactments have 'the force of a statute [*lex*]', and/or to his observation that 'this has been doubted'. Comparisons could usefully be drawn with Justinian's treatment of the same topic, where a different rationale for the shift in nature is provided, or to textbook accounts of the role of *senatusconsulta* in the Republic. Weaker answers tended to offer a general account of written sources of law, or to provide less detail on the topics listed above.

(b) J.2.1.38: This text invited discussion of the duties of the usufructuary, particularly as regards replenishment where an usufruct is held over a flock. Difficult aspects of the text that merited discussion include: ownership of the young (which would vest in the usufructuary via *perceptio*), the standard of care, and the choice of examples provided by Justinian. Answers that kept their focus squarely on how usufructs applied to flocks and similar *res* fared well. Weaker answers provided generic accounts of usufruct.

(c) G.2.45: This text concerned the bar on acquisition of *res furtivae* (stolen things) by *usucapio*. Better answers kept their focus on the specific prohibition and speculated as to why *usucapio* might not be desirable in the context of *res furtivae*, considered the implications of this rule for Roman ownership, and explored analogous doctrines (e.g. other things that could not be acquired by *usucapio*), Weaker answers offered broad accounts of *usucapio*, or were let down by inaccuracies.

(d) J.3.23.3: This text required discussion of perfection in a contract of sale, and the consequent passage of risk. Answers could focus on Justinian's observations on written contracts (as a vehicle for discussing the different regimes in sale under Justinian) or on the fact that the risk rule applies 'although the thing has not yet been delivered to him' (noting the separation of contract and conveyance, and the divorcing of risk and ownership). Weaker answers tended to offer generic accounts of sale, or to

delve into tangents from elsewhere within sale (e.g. lengthy discussions of the rules on price).

(e) J.4.1.3: This text, which was extremely popular, concerned the boundary between manifest and non-manifest *furtum*. Many candidates sensibly compared Justinian's approach to that of Gaius, and were largely differentiated in their precision and rigour in doing so. Better answers also commented on the significance of Justinian saying 'having been seen or caught'.

(f) G.3.216: This text concerns the scope of chapter three of the *lex Aquilia* and its residuality compared to chapter one. Answers focused on the narrower scope of chapter one (killed slaves and *pecudes*), noting that chapter three dealt not only with killed animals other than *pecudes*, and wounds to slaves and *pecudes*, but also with property damage in general. Candidates sometimes made perceptive comments on the development of the *lex Aquilia*, though weaker candidates suggested that even in classical law chapter three applied only to killed animals other than *pecudes*.

Question 2

This problem was the most popular of the three on the paper. It raised a wide range of issues across property, contract and delict, with a particular emphasis on *furtum*, *usucapio* and fruits. Stronger answers tended to show breadth of knowledge, whereas weaker answers tended to neglect an entire dimension (e.g. contractual, proprietary) of the problem. The points raised were:

- Ownership of Bella – necessary to establish standing in the delictual claims to follow, but straightforward:
    - The snatching of the dog had no bearing on Livia's ownership of it (no argument that it had been abandoned so acquirable by *occupatio*).
    - Gaius could not acquire it by *traditio*, as he received from a non-owner, nor could he begin *usucapio* due to the stolen nature of B.
- *Furtum* of Bella by Tiberius – straightforward.
- Sale of Bella by Tiberius to Gaius – query how G's realisation 'that the dog must be stolen' affects the sale in light of its good faith nature, and interlink to the above *usucapio* analysis as necessary.
- Gaius putting Bella down – a straightforward chapter three analysis. The killing was clearly intentional, but there was scope to discuss whether this intention was *dolus* in light of its compassionate aims, as well as whether it was right to describe G's act as killing in light of B's weakened state.
- Ownership/*furtum* of the puppies – the initial position is straightforward (L as owner owns the puppies, as there is no usufructuary or *bona fide* possessor with a rival claim). There was also scope to discuss whether 1) the puppies were also *res furtiva* by virtue of being fruits of a stolen *res*; and 2) whether G steals the puppies when he handles them upon birth.
    - P1 is gifted by G to N. Ownership does not pass via *traditio* as G is a non-owner, and N does not begin *usucapio* (even though gift is a *iusta causa*) as the puppy is stolen. L can recover by *vindicatio*.
    - P2 is sold by G to S. By virtue of its being stolen, the analysis unfolds as with P1.
        - Upon L recovering P2 via *vindicatio*, candidates could discuss S's claim against G for eviction under the contract of sale.
        - If candidates argued that P2 was not *res furtiva*, then having possessed in good faith pursuant to a *iusta causa* (the sale) for 37 months, S would have become the new owner via *usucapio*.
    - P3 did not raise any issues.

- Livia calling Nerilla ‘a crook who handles stolen goods’ – this was an *iniuria* point, and invited discussion as to whether the claim was true and therefore lawful.

Question 3

The principal issue raised by this problem was one of overlapping doctrines. It required candidates to consider what alternatives might exist where the obvious option fails. At the heart of the problem was a *mancipatio* ceremony that fails due to the transferee lacking Roman citizenship (the problem having been deliberately set shortly before the general grant of citizenship in 212CE). Having recognised that the *mancipatio* could not succeed, candidates were left to explore whether the actions undertaken by the parties had any legal significance. Pleasingly, many candidates rose to the challenge and argued that there was nevertheless a valid consensual sale between the parties, accompanied by an orthodox *traditio*. This then invited discussion of bonitary ownership and *usucapio*.

The other issues raised by the problem were more straightforward:

- The *stipulatio* for the price. While the validity did not raise issues, candidates could have discussed how this interacted with the enforceability of the price in sale (i.e. did the *stipulatio* stand alone, such that the price could be enforced twice through an action on the sale and a *condictio* on the *stipulatio*?)
- The mixing of the ox and herd, and the identifiability of the ox as the crucial matter.
- The ox’s muscle disease, and whether this was a defect (likely patent, given it had been apparent for month) under the sale.

Question 4

This problem attracted fewer takers, and raised some very difficult issues in contract law. At the core of the problem was a pair of real contracts. The first was an attempted mutuum for 100,000 sesterces. As this money is never delivered, the contract never forms, and so no duties (principally to repay the sum) arise. There was, however, room to discuss whether the *attempted* delivery sufficed (it didn’t). The second was a *pignus* to secure the loan, which forms upon the security (the team of horses) being delivered. This then placed Crassus under a duty to care for the security, answerable to the standards of the bonus paterfamilias. As the destruction of the horses was caused by *vis maior*, no liability arose.

The problem also raised a small number of delictual issues:

- An action in *rapina* against Latro. In identifying the claimant, candidates needed to ensure consistency with their contractual analysis (almost certainly Crassus as owner, but if candidates had argued that the loan was valid then there was scope for exploring whether Atticus could bring a claim, either by virtue of being owners upon an effective delivery of the coins, or else through the negative interest he had in them upon their theft if bound by the contract to restore the equivalent sum).
- Some candidates explored whether Crassus might be liable to Atticus in delict for the death of the horses, most obviously under chapter one, but Crassus was clearly not at fault for their deaths.

Question 5

This essay attracted very few answers. It raised questions about the nature and desirability of taxonomies of law, and whether such schemes can be universal or necessarily reflect the demands of the society behind a given legal system. Candidates could make good use of the

schemes adopted by Gaius and Justinian, and the contrasts between them, alongside judicious selection of topics that seemed to reinforce or undermine Birks's claims.

Question 6

This essay was extremely popular, though not terribly well done. It was very difficult to do this essay justice without reflection on what might be meant by "efficient" use of property. Many answers took this to mean "greater" (i.e. servitudes further efficiency insofar as they allow A to use B's land), and then launched into broad and general accounts of the different types of servitude. Better answers not only showed greater care in handling the pivotal notion of efficiency, but also used their idea of efficiency to shape their discussion of doctrine. Many answers offered uncritical and general accounts of servitudes which rapidly lost sight of the question actually posed.

Question 7

This question concerned the enforceability of the *stipulatio*. In the quotation, Cicero seems to raise the problem of evidence, which in turn raises the oral nature of the *stipulatio*, and the increasing usage of written evidence to address such problems. While these topics are common in essays on the *stipulatio*, this essay was unusual in its relatively early focus. Answers could range throughout the lifespan of the *stipulatio* in exploring the dynamic between oral nature and written certainty, and the problems of evidence the former raised, but those that kept their focus on the earlier stages of the contract's lifespan tended to fare better.

Question 8

In this quotation Schulz makes two claims: that *iniuria* was 'strong and efficient protection' as regards injuries to immaterial interests, but that it was 'not a happy idea' to bundle together such wrongs with personal injuries. In exploring these two claims, candidates made strong use of the chronological development of *iniuria*, noting that violent wrongs seemed to rest at its foundations in the XII Tables, but that from an early point in the wrong's lifespan it came to be associated with immaterial interests (e.g. the ambiguous nature of slapping). Good essays grappled with the two claims head on, exploring how the manner in which damages were calculated, or the controlling role of the *contra bonos mores* idea, led to the effective remediation of personality interests, and explored the extent to which personal injuries were absorbed by, or remained separate from, the general notion of *contumelia*.

Question 9

This essay attracted very few takers. It required discussion of the 'authority' of juristic writings, and the relationship between the earlier authoritative status conferred by the *ius respondendi* and the later significance of inclusion in the Digest. These two endpoints required discussion, though candidates could also have explored the shifting nature of juristic writings in the intervening centuries (e.g. Gaius's account of juristic authority through unanimity, the dynamic of classical juristic literature as persuasive rather than authoritative, and/or the Law of Citations).

Question 10

Virtually no candidates attempted this essay. It concerned the role of the Digest in securing the dissemination of Roman legal learning. Candidates were encouraged to think about why the Digest in particular might have been preferrable over the Institutes (which were too superficial) and the Codex (which was not systematic in the same way as the Digest).

Criminal Law

The general level of answers was pleasing. Nearly all candidates showed a good knowledge of the definitions of the relevant offences and core criminal law terms, and an ability to apply them. It was also pleasing generally to see in answers to the essay questions a good use of the academic literature to explore theoretical issues.

Those candidates who scored below 60 nearly all did so due to time management problems. This is, perhaps, a particular danger with "open book" exams where a candidate may have such a large amount of material available to use that they get carried away in writing a lengthy first essay and are then unable to answer the remaining questions effectively. Candidates should be familiar with how much they can expect to write in 40-45 minutes and be highly attuned to the dangers of spending too much time on one question. The benefit of doing collections and timed essays cannot be overstated.

Question 1

This question concerned the definition of recklessness in the criminal law. It was a fairly popular question and generally well answered. Some candidates discussed subjective and objective forms of mens rea generally instead of focussing on recklessness.

Question 2

This was not a particularly popular question. Weaker candidates answered it without giving much if any consideration to the difference in mens rea between unlawful act manslaughter and reckless manslaughter.

Question 3

This was not a particularly popular question. Weaker candidates summarised the law on duress but did not really get to grips with the theoretical issues at the heart of the question asked. Stronger candidates were able to give examples of where duress appeared to have been used on the basis of either of the approaches referred to in the question.

Question 4

This was a fairly popular question. There were some outstanding answers, showing a detailed and insightful understanding of the issue. Weaker candidates did not understand the distinction between negative and positive sexual autonomy, often mistaking it for some other distinction with which they were familiar with, e.g., between narrow and broad understandings of vitiated consent.

Question 5

This question was attempted by a few candidates, but was generally well answered when attempted. Strong answers were able to set out the current law (no mean feat!) and then explore the complexities and broader theoretical issues behind it.

Question 6

This was not a popular question and was generally not answered well. This question proved problematic for quite a number of candidates who wrote about the role of foresight as regards mens rea rather than in connection with causation.

Question 7

This was a fairly popular question. Most candidates were able to summarise the new law on dishonesty. Stronger candidates were able to unpick some of the ambiguities in the current law and predict difficulties the courts may face in the future around its interpretation.

Question 8

A surprising number of candidates attempted this question. It was a very difficult one, especially given the limited material available on the reading list. Most answers explored the law around loss of control, self-defence and domestic abuse to answer the question. There was impressive evidence of wider reading and careful analysis in answering this question.

Question 9

This was a very popular question. Only the strongest candidates discussed the difficulty in finding an assault or battery which is required for a s. 47 offence, in the case of passing on of COVID. Some candidates preferred to discuss just s. 20, even though it was said to be a mild case and so was unlikely to be grievous bodily harm. In relation to the mask weaker candidates omitted a discussion of whether this could amount to self-defence (and even among those who did few discussed s.76 Criminal Justice and Immigration Act on the degree of force permitted).

Question 10

This was a popular question and was generally well done. It was disappointing to see quite a lot of loose talk of intoxication as a discrete defence to offences of specific intent. Most candidates were able to apply Clinton well. Some answers dwelled on what were effectively non-issues (such as self-defence) or overlooked obvious issues, such as the possibility that partial defences might be raised in response to a charge of murder arising from the death of Humphrey.

Question 11

This was a popular question. The fraud issues were generally discussed well. Most candidates did not discuss the issues around intention to permanently deprive and particularly s. 6 Theft Act 1968 in sufficient detail. Stronger candidates identified harder-to-spot issues, such as the possibility that burglary may have been committed.

Question 12

This was not a particularly popular question and it was tricky. A number of candidates thought that S could not be guilty of attempted criminal damage to her own car because if S had damaged the car there would have been no offence under s.1 Criminal Damage Act. They needed to explore the possibility of an impossible attempt in more detail.

Question 13

This was a popular question, although challenging as very numerous often complex issues had to be covered in a small space of time. It was surprising that few candidates discussed Slingsby (for part (iv)) and that there was little discussion of Domestic Abuse Act 2021, s. 71. Stronger answers in part ii discussed the potential liability of both N and L.

Constitutional Law

Though there were some extremely good scripts, the general standard of papers submitted was slightly disappointing. A great many appeared to be pieced together from tutorial essays and notes. Though adequate, they often lacked a sustained focus on the question set – beyond a careful introductory paragraph – and did not possess an internal coherence, with only a loose, if any, connection between the paragraphs. Those candidates who, in contrast, wrote their answers in direct response to the question generally received very high grades. Indeed, the examiners suspect that the line between 2.1 scripts and first-class scripts may have had a close correlation with the group of candidates who relied on cut and paste and the group who wrote their answers from scratch.

Question 1

Very few candidates answered this question, but the ones that did produced some of the best answers seen by the examiners.

Question 2

This was widely answered, but surprisingly few candidates considered the role conventions play in structuring the relationship between the executive and Parliament. A great many focused on the legal enforceability of conventions. Whilst this could have been relevant to the question, candidates would have had to have done quite a bit of work to demonstrate the relevance. Most did not, and it looked as if tutorial essays were being recycled.

Question 3

This was generally well-answered, though few candidates directly considered the role of the common law in limiting the prerogative. There was some good analysis of the Cherry decision.

Question 4

A hard question to answer well, a few very strong answers were given, but the bulk of answers provided a general survey of the role of the courts in the application of the Human Rights Act.

Question 5

This was generally well-answered, though the answers given were often rather formulaic. Very few candidates considered the possibility that rather than an executive-dominated legislature, the UK has a parliamentary-dominated executive.

Question 6

Almost all the candidates sought to dodge the question set and, instead, provided general essays on the rule of law. The best answers engaged the timing question, and asked whether the rule of law always had been a feature of the UK constitution, or became part of that system by virtue of changes in the common law or legislation.

Question 7

This was widely answered and generally well-done.

Question 8

There was some good analysis of the implications of the Human Rights for Parliament, but only a small number of answers took the opportunity to discuss the nature of parliamentary sovereignty, and the rather unorthodox understanding of that rule found in Lord Reed's speech.

Question 9

This was reasonably well-answered, but there was a surprising reluctance to challenge the position in the quotation.

Question 10

Again, reasonably well-answered, but few candidates considered whether it was, given the ambiguities of the Convention, possible for the court to avoid developing the rights found in that document.

Board of Examiners

Nick Barber (Chair)

Helen Scott

Kate Greasley

Appendix A

Breakdown of results by individual paper and by gender

Criminal Law	Student Count	75 – 79	71 – 74	70	68 - 69	65 – 67	61 – 64	60	58 – 59	50 - 57	48 - 49	40 - 47	39 or less
	Number												
Criminal Law - All	231		15	36	42	75	43	9	4	3		2	1
Female	138		7	16	26	49	26	7	2	3		1	
Male	93		8	20	16	26	17	2	2			1	1
	Percentages												
Criminal Law - All			6.49	15.58	18.18	32.47	18.61	3.90	1.73	1.3		0.87	0.43
Female	59.74		46.67	44.44	61.90	65.33	60.47	77.78	50	100		50	
Male	40.26		53.33	55.56	38.10	34.67	39.53	22.22	50			50	100

A Roman Introduction to Private Law	Student Count	75 – 79	71 – 74	70	68 - 69	65 – 67	61 – 64	60	58 – 59	50 - 57	48 - 49	40 - 47	39 or less
	Number												
Roman Law - All	229	1	14	34	12	68	70	16	8	4	1		
Female	136		6	20	7	34	49	14	4	1			
Male	93	1	8	14	5	34	21	2	4	3	1		
	Percentages												
Roman Law - All		0.44	6.11	14.85	5.24	29.69	30.57	6.99	3.49	1.75	0.44		
Female	59.39		42.86	58.82	58.33	50	70	87.50	50	25			
Male	40.61	100	57.14	41.18	41.67	50	30	12.5	50	75	100		

Constitutional Law	Student Count	75 – 79	71 – 74	70	68 - 69	65 – 67	61 – 64	60	58 – 59	50 - 57	48 - 49	40 - 47	39 or less
	Number												
Constitutional Law - All	235		18	24	18	62	75	12	14	6			1
Female	138		11	15	6	37	50	7	8	3			
Male	93		7	9	12	25	25	5	5	3			1
	Percentages												
Constitutional Law - All			7.66	10.21	7.66	26.38	31.91	5.11	5.96	2.55			0.43
Female			61.11	62.5	33.33	59.68	66.67	58.33	57.14	50			
Male			38.89	37.5	66.67	40.32	33.33	41.67	28.57	50			100