Law Moderations 2024/25

A ROMAN INTRODUCTION TO PRIVATE LAW

CORE READING LIST

1. TEXTS

The translations of the prescribed texts for the course, provided in hard copy to all students and available electronically via Canvas, are referred to in the core reading list as:

G. *The Institutes of Gaius* (based on the translation by TL Mears, Edition 2024-2025)

J. *The Institutes of Justinian* (based on the translation by TL Mears, Edition 2024-2025)

These text will also be provided (fresh copies) in the Examination Schools.

2. TEXTBOOKS

The core reading list refers to the following introductory textbooks, which may generally be treated as alternatives:

Nicholas B Nicholas, *An Introduction to Roman Law* (Clarendon Press 1962)

[The pagination in all subsequent reprints is identical; the 2008 reprint includes a foreword, revised bibliography and glossary of Latin terms by Ernest Metzger.]

Du Plessis P du Plessis, *Borkowski's Textbook on Roman Law* (6th edn, OUP 2020)

Other textbooks at a similar level are, of course, available, including G Mousourakis, *Fundamentals of Roman Private Law* (Springer 2012) or R Domingo, *Roman Law. An Introduction* (Routledge 2018).

The core reading list refers to the following more detailed textbook, in two versions:

Thomas (old) JAC Thomas, *Textbook of Roman Law* (North-Holland 1976)

Thomas (new) JAC Thomas, Textbook of Roman Law (reprint edn, Philip McDonald 2013)

[The text of this reprint is the same as Thomas (old) but the pagination is different. All Philip McDonald reprints from 2013 are identical.]

For further reading and reference, students should consult **WW Buckland, *A Text-Book of Roman Law from Augustus to Justinian*** (PG Stein ed, 3rd edn, CUP 1963).

The core reading list employs the following abbreviations for other frequently prescribed literature:

Birks P Birks, *The Roman Law of Obligations: The Collected Papers of Peter Birks* (E Descheemaeker ed, OUP 2014)

Buckland and McNair WW Buckland and AD McNair, *Roman Law and Common Law* (FH Lawson ed, 2nd edn, CUP 1952)

Johnston D Johnston (ed), *The Cambridge Companion to Roman Law* (CUP 2015)

Jolowicz and Nicholas HF Jolowicz and B Nicholas, *Historical Introduction to the Study of Roman Law* (3rd edn, CUP 1972)

Zimmermann R Zimmermann, *The Law of Obligations: Roman Foundations of the Civilian Tradition* (OUP 1996)

3. NATURE OF THE CORE READING LIST

The core reading list is an agreed minimum, to which tutors may add or from which they may subtract material. The thirteen topics are of unequal weight and are not intended to correspond to weeks or tutorials; each tutor will select which topics to cover and in what order.

4. LATIN TERMINOLOGY

The set translations of the *Institutes* include a list of English–Latin and Latin–English translations.

A useful glossary of Latin terms, prepared by Jeffrey Hackney, is provided in the ‘Some sources’ folder of the Roman Law Resources page on Canvas.

October 2024

1 THE *CORPUS IURIS* AND THE STRUCTURE OF THE *INSTITUTES*

1. TEXTS AND LITERATURE

G. 1.8
G. 2.1–2; 12–14
G. 3.88; 91
J. 1.1
J. 2.1 pr; 2.2
J. 3.13

Nicholas, 38–59; 60–61; 98–99; 158–159
Du Plessis, 54–62
Thomas (old), 54–60
Thomas (new), 60–66

PBH Birks and G McLeod, 'Introduction' in *Justinian's Institutes* (PBH Birks and G McLeod trs, Duckworth 1987), 7-26

PBH Birks, 'Definition and Division: A Meditation on *Institutes* 3.13' in PBH Birks (ed), *The Classification of Obligations* (Clarendon Press 1997) 1–35

2. QUESTIONS TO CONSIDER

1. Does Roman law deserve its reputation for intellectual orderliness?
2. What place in the *Corpus Iuris* did the *Institutes* occupy and with what original purpose?
3. What is the difference between the law of property and the law of obligations?
4. What is the relationship between 'right in personam' and 'obligation'?
5. Contract and tort (= delict = wrong) divide the law of obligations by reference to the events from which obligations arise. Is that two-fold classification exhaustive? Did Gaius think it was?
6. When English lawyers distinguish between obligations at common law and obligations in equity (or between legal obligations and equitable obligations), what kind of classification are they making? Is there a Roman equivalent?

2 SOURCES OF LAW

1. TEXTS AND LITERATURE

G. 1.1–7
J. 1.2

Nicholas, 14–38
Du Plessis, 27–54
Thomas (old), 27–54
Thomas (new), 31–60

Jolowicz and Nicholas, 86–107; 353–380
Buckland and McNair, 1–22
D Johnston, *Roman Law in Context* (CUP 1999), 2–24
DJ Ibbetson, 'Sources of Law from the Republic to the Dominate' in Johnston, 25–44
GD MacCormack, 'Sources' in E Metzger (ed), A Companion to Justinian's Institutes (Cornell University Press 1998) 1–17

2. QUESTIONS TO CONSIDER

1. How should one distinguish a legislative from an interpretative source of law?
2. Should the urban praetor be counted as an interpretative or a legislative source – or a *tertium quid*?
3. How was the function of authoritative interpretation discharged during the first life of Roman law? How is it discharged in English law?
4. What was a rescript? Were rescripts functionally identical with the responses of the jurists?
5. Trace the sequence of legislative sources under the Republic, Principate and Dominate. Can any parallels be drawn with English parliamentary legislation?

3 PROPERTY I: ALIENATION AND VINDICATION OF CORPOREAL THINGS

1. TEXTS AND LITERATURE

(1) Mancipation (*mancipatio*)

G. 2.14a–17; 22–23

(2) Cession in law (*in iure cessio*)

G. 2.24–27

(3) Delivery (*traditio*)

G. 2.18–21
J. 2.1.40–46

(4) Transfer Defective for Informality

G. 2.40–41

(5) Transfer defective because '*nemo dat quod non habet*' (no-one gives what he does not have)

G. 2.43

(6) Security of transactions: imperfect transfers cured by usucapion (*usucapio*)

G. 2.41–51
J. 2.6

(7) Vindication (*vindicatio*) and the Publician Action (*actio Publiciana*)

G. 4.36

Nicholas, 116–130
Du Plessis, 182–187
Thomas (old), 157–165
Thomas (new), 167–176

P du Plessis, 'Property' in Johnston (ed), 175–198
PBH Birks, 'The Roman Law Concept of Dominium and the Idea of Absolute Ownership' [1985] Acta Juridica 1, 3–7; 29–31

2. QUESTIONS TO CONSIDER

1. What was the position in AD 200 of a person who received informally a thing that could only be transferred formally? In particular, what was his position:
   (a) two years after the transfer;
   (b) two months after the transfer?
   (c) where a *vindicatio* was brought against him; and
   (d) where he himself needed to vindicate the thing?

   Would it make any difference to your answer if his opponent were, in each of these cases, the person who could prove that he was the owner at civil law?

2 In the previous question, for 'who received informally a thing which could only be transferred formally' read 'who took a conveyance of a thing from a non-owner'.

3 A wants to make a gift to B of a huge statue of Mars which is currently on long loan to a municipality. He also wants B to keep for himself a painting which he had previously lent to him. B lives several days' journey away. A is of the view that it must be possible to complete these transactions in writing. Advise him.

4 PROPERTY II: TYPES OF THING (*RES*); ORIGINAL ACQUISITION OF CORPOREAL THINGS

1. TEXTS AND LITERATURE

(1) What can be privately owned

G. 2.1–17; 22; 27
J. 2.1.pr–10; 2.2

(2) Finding, taking, making and picking

Occupation (*occupatio*)
G. 2.66–69
J. 2.1.12–18
J. 2.1.22

Treasure trove (*thesauri inventio*)
J. 2.1.39

New things – artificial: specification (*specificatio*)
G.2.79
J. 2.1.25

New things – natural: separation (*separatio*) and harvesting (*perceptio*)
J. 2.1.35–37
J. 2.1.19

(3) Merging and mixing

Mergers: accession (*accessio*)
G. 2.70–78
J. 2.1.20–26; 29–34

Mixtures
J. 2.1.27

Nicholas, 130–140
Du Plessis, 153–157; 193–205
Thomas (old), 170–179
Thomas (new), 180–191

2. QUESTIONS TO CONSIDER

1. How would classical Roman law apply to these situations?
   (a) While cleaning a chimney of A's house, B finds a diamond ring that A opines must have been dropped into the chimney by a jackdaw.
   (b) Using a metal detector, C discovers a gold bracelet eight inches below the surface of a public park.
2. What are the practical consequences of the difference between the rule for granular mixtures (*commixtio*) and the rule for fluid mixtures (*confusio*)?
3. D, a sculptor commissioned to produce a marble bas-relief for the country villa of a politician, mistakenly used E's marble and fixed the finished work to the wrong villa. The fixing was done by removing the plaster, by inserting metal pins ten inches long into the wall and by remaking the plaster around the edges of the work. F, the owner of the building, will not allow it to be removed. Advise D.

5 PROPERTY III: OWNERSHIP AND POSSESSION; PROTECTION OF POSSESSION

1. POSSESSORY INTERDICTS

Precedents for numerous interdicts were included in the praetor's edict. As you read about the protection of possession, you will need to know the wording of the two most important ones. Gaius deals with interdicts in remarkable detail but you need not read his account unless the subject particularly catches your interest (G. 4.139–160 – NB not included in the translations of the set texts).

In relation to land, the principal interdict was 'As you now possess' (*uti possidetis*), which ran thus:

> **As you now possess that land which is the subject of this claim, discounting any possession which as between you is held secretly, by force, or at will, with that possession I forbid any forceful interference.**

In relation to movables, the equivalent was the interdict 'With whichever party' (*utrubi*):

> **With whichever party this slave the subject of this claim has been for the greater part of this year, discounting such time when as between the two parties he was there secretly, by force, or at will, to prevent that party from taking him away I forbid the use of any force.**

2. TEXTS AND LITERATURE

Nicholas, 108–115; 153–157
Du Plessis, 174–180
Thomas (old), 138–146
Thomas (new), 146–155

Buckland and McNair, 62–88

3. QUESTIONS TO CONSIDER

1. Colloquially, 'my possessions' are the things I own but it is as true today as it was for Ulpian that 'property has nothing in common with possession' (D. 41.2.12.1). What proof can be offered of the truth of Ulpian's dictum?
2. What fact situations serve to illustrate that possession is not merely a matter of observable fact?
3. Why was possession, even wrongful possession, protected by the praetor?

6 PROPERTY IV: INCORPOREAL THINGS: LIMITED INTERESTS AND SERVITUDES

1. TEXTS AND LITERATURE

(1) Incorporeal things

G. 2.14
J. 2.2

(2) Praedial servitudes

G. 2.29; 31
J. 2.3

(3) Usufructs

G. 2.14
G. 2.30–33
J. 2.4; 2.5; 2.6

Nicholas, 140–149
Du Plessis, 161–172
Thomas (old), 195–208
Thomas (new), 209–223

Buckland and McNair, 98–110

2. QUESTIONS TO CONSIDER

1. Obligations and servitudes are both incorporeal things. Why do we regard the latter as property in the strict sense but the former not?
2. A wants a right of way over B's land. He is willing to pay a substantial sum. Should he make clear from the outset whether he wants to cross the land with animals and vehicles? How will B ensure that what he gets is a servitude and not merely a contractual licence?
3. C has just received a usufruct of a farm under the will of an uncle. C's nephew D is owner of the farm, subject to the usufruct. C dislikes D and has been heard to say that he intends to strip the farm of every use and fruit that he can find. Will the law permit him to do that?
4. How much can we learn about a society from the types of property rights that it recognises? Discuss with reference to all of the property topics you have covered.

7 CONTRACT I: CLASSIFICATION OF CONTRACTS (METHODS OF CONTRACTING)

1. TEXTS AND LITERATURE

(1) Four Categories of Nominate Contract

G. 3.89 (cf G. 3.182)
J. 3.13.2 (cf J. 4.1.pr)

(2) Obligations contracted by conveyance (esp. loan for consumption and gratuitous borrowing), touching also on unjust enrichment

G. 3.90–91
J. 3.14

(3) Obligations contracted by stipulation (*stipulatio*)

G. 3.92–93
J. 3.15.pr–1
Zimmermann *Law of Obligations* 68–75, 78–82

(4) Obligations contracted by writing

G. 3.128–134
J. 3.21

(5) Obligations contracted by consensus (overview)

G. 3.135–137
J. 3. 22

Letting and hiring (*locatio conductio*)
G. 3.142–143
J.3.24.pr–5

Partnership (*societas*)
G. 3.148
J. 3.25.pr

Mandate (*mandatum*)
G. 3.155–157
J. 3.26.pr–7

(6) Buying and selling (*emptio venditio*)

G. 3.139–141
J. 3.23.pr.–3

(7) The system of contracts in practice: determining the right type of contract

G. 3.145–147, 3.162
J. 3.26.13

Nicholas, 158–167
Du Plessis, 253–257
Thomas (old), 225–227
Thomas (new), 241–243
Birks, 26–36

(8) Innominate Contracts and Pacts

G. 3.143–144, cf J 3.24.1,2
Nicholas 189–92
Thomas (old), 311–15
Thomas (new), 317–20

2. QUESTIONS TO CONSIDER

1. How many nominate contracts were there? Examine the lines between: (a) sale and hire; and (b) hire, mandate and deposit.
2. 'The more precisely the law library defined the nominate contracts, the more clearly appeared the need to cover the gaps between them.' What illustrations of this process can be found in the *Institutes*?
3. Like the English deed, the Roman stipulation was more a mode of contracting than a kind of contract. To what extent could it serve to fill the gaps between the other nominate contracts?
4. All modern jurisdictions, while recognising that each nominate contract is to a certain extent a law unto itself, operate a general law of contract. The nominate contracts are features in the contractual landscape rather than contractual islands in a non-contractual sea. To what extent, and by what means, did Roman law approach this modern position?
5. What is a 'formal requirement'? What goals are served by formality? Can you think of any formalities in English law to compare to those in Roman law?
6. What was the formal requirement in classical law for a valid stipulation?

8 CONTRACT II: GROUNDS FOR NULLITY (*STIPULATIO* AND SALE)

1. TEXTS AND LITERATURE

G. 3.97–106 (omitting 100, 101, 104)
J. 3.19.pr.–5 (extracts of 4 only)
J. 3.19.7–8
J. 3.19.12
J. 3.19.14
J. 3.19.16–21 (extracts of 20 only)
J. 3.19.23–24
J. 3.19.26–27
J. 3.23.5

Nicholas, 172–174
Du Plessis, 257–264
Thomas (old), 227–233
Thomas (new), 243–249

Birks, 71–74
Zimmermann, 587–596 (mistake); 651–658 (duress and fraud); 686–691 (impossibility); 706–712 (immorality)

2. QUESTIONS TO CONSIDER

1. 'Mistake negatives consent.' Is this a proper way to summarise the Roman law of mistake?
2. Is it possible to group together mistake, duress (threat), and deceit (fraud) as factors vitiating consent?
3. Can one say that the doctrine of *error in materia* (= *error in substantia*) protected the buyer against latent defects?

9 CONTRACT III: DUTIES OF PARTIES AND BREACH OF CONTRACT

1. TEXTS AND LITERATURE: *BONA FIDES* AND *STRICTUM IUS*

The formula that took issues for trial sometimes made good faith the standard upon which the judge was to proceed. This was true of all four consensual contracts and three of the real contracts. For example, the formula for the action brought by a buyer – the action on a purchase – ran thus:

> **Let Titius be judge. Whereas Aulus Agerius bought the slave the subject of this suit from Numerius Negidius, which purchase is the matter of this claim, whatever on that account Numerius Negidius ought to give to or do for Aulus Agerius in good faith, for the value of that in money let the judge condemn Numerius Negidius; if it does not appear let him absolve.**

The effect of this was to allow the judge, and more importantly the jurists, to determine what the implications of good faith were for each kind of contract. What English lawyers think of as terms implied by law could thus be built on this foundation.

Nicholas, 163–165
Du Plessis, 254
Thomas (old), 248–9
Thomas (new), 265
Jolowicz and Nicholas, 211–215
Zimmermann, 783–793
F de Zulueta, *The Roman Law of Sale* (Clarendon Press 1945), 8–9

2. TEXTS AND LITERATURE: DUTIES OF PARTIES, STANDARDS OF CARE (DEGREES OF LIABILITY), IMPOSSIBILITY AND RISK

Duties of the parties in *mutuum* and *commodatum*

J. 3.14.2–4
Thomas (old) 271-273, 274-276
Thomas (new) 288-289, 290-292
Du Plessis 301-302, 302-304
Nicholas 168-171

Duties of seller and buyer (see also chap. 10)
J. 3.23.3–3a
Thomas (old), 283–288
Thomas (new), 300–305
Nicholas, 180–182

Standards of care (degrees of liability)
Thomas (old), 249–254
Thomas (new), 265–271
Nicholas 170-171 (placed in a sub-chapter on *mutuum*, but not limited thereto)

Birks, 79-80 (*custodia*)
Zimmermann, 192–199 (placed in a sub-chapter on *commodatum*, but not limited thereto)

Risk in sale
Nicholas, 179–180
Du Plessis, 271–272
Thomas (old), 289
Thomas (new), 305–306

3. QUESTIONS TO CONSIDER

1. People engaged in commerce rely on a mix of express terms and terms implied by law. In the light of the actions to which stipulation gave rise, could it have facilitated that pattern of reliance?
2. What justifies the lender's liability for accidental loss suffered while over-using the object?
3. Illustrate from the contract of sale the principal benefits derived from founding trials on good faith rather than strict law.
4. Can you set out the different effects of impossibility at the moment the contract is made (initial impossibility) and of impossibility intervening before the contractual duties are discharged?
5. Why were there different standards of care for different types of contract?
6. The Roman doctrine of risk in sale contracts has often been criticised as 'unjust'. Can you think of reasons why?

10 CONTRACT IV: LATENT DEFECTS AND WARRANTY OF TITLE (SALE)

1. TEXTS AND LITERATURE

The consensual sale initially did not give the buyer remedies with regard to latent defects, except against a bad faith seller. The maxim was *caveat emptor*, 'buyer beware'. For the sale of slaves on the Roman slave market, the Aediles issued the following edict:

> **Those who sell slaves must make sure that buyers are informed of any disease (*morbus*) or defect (*vitium*) and whether the slave is a runaway, a loiterer on errands […] all these matters they must disclose when selling. If a slave is sold contrary to this provision or contrary to what has been proclaimed or promised, this is what is owed: We shall grant the buyer an action […] for rescission.**

The edict was supplemented by an action for reduction of the price. Another edict awarded the same protection to the buyer of cattle (*iumenta*). In cases not covered by these edicts (purchase of timber, for example), the Praetor helped the buyer using the *ex fide bona* clause.

Nicholas, 180–182

Du Plessis, 273–276

Thomas (old), 284–288

Thomas (new), 300–305

Birks, 81–90

F de Zulueta, *The Roman Law of Sale* (Clarendon Press 1945), 42–51

R Powell, 'Eviction in Roman and English Law' in D Daube (ed), *Studies in the Roman Law of Sale* (Clarendon Press 1959) 78–90

Zimmermann, 293–304 (liability for eviction), 305–322 (liability for latent defects)

2. QUESTIONS TO CONSIDER

1. What instruments were used/developed to protect buyers in a legal environment where the maxim '*caveat emptor*' was the starting point?
2. How did the Aedilician Edict fit in with and then alter the law of the consensual sale (*emptio venditio*)?
3. Is the acquisition of title important for buyers?
4. Can actions granted against the seller in bad faith be understood as warranties?

11 DELICT I: WRONGS PROTECTING WEALTH

1. INTRODUCTION

Nicholas, 207–211
Du Plessis, 321–322
Thomas (old), 349–354
Thomas (new), 365–367

Buckland and McNair, 338–350

2. TEXTS AND LITERATURE: THEFT (*FURTUM*)

G. 182–208
J. 4.1

Nicholas, 211–215
Du Plessis, 333–341
Thomas (old), 353–360
Thomas (new), 369–376

Birks, 158–187
Zimmermann, 922–943

3. TEXTS AND LITERATURE: ROBBERY (*RAPINA*)

G. 3.209
J. 4.2

Nicholas, 215
Du Plessis, 341–342
Thomas (old), 360–361
Thomas (new), 376–377

Birks, 188–191

4. TEXTS AND LITERATURE: WRONGFUL LOSS (*DAMNUM INIURIA*)

G. 3.210–219

Nicholas, 218–222
Du Plessis, 323–333
Thomas (old), 363–368
Thomas (new), 379–385

Birks, 192–220
Zimmermann, 961-968

5. QUESTIONS TO CONSIDER

1. What is the difference between crime and tort? Is the Roman law of delict more like the former or the latter?
2. Draft a definition of *furtum*, adding explanatory notes on each of its elements.
3. Gaius says that a person can be liable to the action for theft who has not himself committed theft. Explain.
4. A's peacock lands on a road adjacent to his land. B, who is riding his horse furiously along the road, cannot avoid it. The peacock is killed under the hooves of the horse. Advise A. Would your advice differ if, frightened by the horse, the peacock had taken flight into the wheels of an on-coming carriage?
5. At what points did the praetor widen the scope of the delict of wrongful loss? Why was there such an incremental growth in liability?
6. How much would a claimant recover in an action under the *lex Aquilia*?

12 DELICT II: PROTECTING 'PERSONHOOD'; PRAETORIAN WRONGS

1. TEXTS AND LITERATURE: CONTEMPT, INSULT OR OUTRAGE (*INIURIA*)

G. 3.220–225
J. 4.4

Nicholas, 215–217
Du Plessis, 342–347
Thomas (old), 369–372
Thomas (new), 387–390

Birks, 221–246
Zimmermann 1050-1063

2. TEXTS AND LITERATURE: PRAETORIAN WRONGS

Nicholas, 222–223
Du Plessis, 347–351
Thomas (old), 373-376
Thomas (new), 391-394

3. QUESTIONS TO CONSIDER

1. The word '*iniuria'* is made from the negative prefix 'in-' (cf in English 'inattentive', 'inescapable') and the word for 'law' or 'right' which is '*ius*, *iuris'* (cf 'jurisprudence'= *iuris prudentia* = learning in the law). Compare the different specialised meanings of the word in the two delicts '*damnum iniuria*' and '*iniuria*'. What specialised meanings has the English word 'trespass' developed?
2. No text attempts a definition of the delict *iniuria*. Buckland says that it is conduct insulting in intention and effect but that is certainly inexact. Others have written of attacks on dignity or 'personhood'. 'An *iniuria* is committed when ...' Can you finish that sentence satisfactorily?
3. A and B conduct a prolonged conversation in the Bodleian Law Library. C's work is seriously disrupted. In the end, he yells at them to shut up. A and B shrug off his complaint and go on talking. C abandons the attempt to study. Applying the Roman rules, have A and B committed a delict? If so, exactly when was the delict complete?
4. Were the damages which were awarded for *iniuria* compensatory or were they governed by some other goal?

13 INFLUENCE OF ROMAN LAW

1. LITERATURE

H Bracton, *de Legibus et Consuetudinibus Angliae* [Bracton *On the Laws and Customs of England*], vol II (SE Thorne tr, Harvard University Press 1968-1977), 22–29

W Blackstone, *Commentaries on the Laws of England*, vol 1 (1st edn, Clarendon Press 1765), 63– 83 (skim only)

DJ Ibbetson, ‘‘The Law of Business Rome’: Foundations of the Anglo-American Tort of Negligence’ (1999) 52 CLP 74–109

PG Stein, *Roman Law in European History* (CUP 1999), 104–132 (ch 5), especially 114–115 and 119–123

RM Helmholz, ‘Continental Law and Common Law: Historical Strangers or Companions?’ [1990] Duke LJ 1207–1228

ADE Lewis, ‘”What Marcellus says is against you”: Roman law and Common law’ in ADE Lewis and DJ Ibbetson (eds), *The Roman Law Tradition* (CUP 1994) 199–208

AJB Sirks, ‘Roman law’ in P Newman (ed), *The New Palgrave Dictionary of Economics and the Law* (Macmillan 1998) 356–363

T Rüfner, ‘Substance of Medieval Roman Law: The Development of Private Law’, *The Oxford Handbook of European Legal History* (OUP 2018) 309–331 (skipping III 2 on testaments)

R Zimmermann, ‘Roman Law in the Modern World’ in Johnston, 452–480

2. QUESTIONS TO CONSIDER

1. Can a case be made for numbering the *Institutes* amongst the most important law books ever written?
2. Was the influence of Roman law in continental Europe and in England affected by different attitudes to liberty and the authority of the state?
3. Savigny wrote of a ‘Chinese wall’ separating the English common law from the civilian systems. Is this a misleading metaphor?