

Black Gaius

A Quest for the Multicultural Origins of the “Western Legal Tradition”

by
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Introduction: A Reversal of Grounds

The title¹ of this article is an intentional misquotation of Bernal's *Black Athena*,² intended to signal an independent appraisal of the roots of the so-called Western Legal Tradition. This article is both a critique of this tradition's "originalism," and of its being a "tradition" at all, thereby challenging the premises behind new projects of international cultural governance.

I do not want to plunge into the scholarship originated by Bernal's work³ nor is my intention to discuss his controversial theories. My aim is to investigate law and the theories of its origins in the West. I am interested in the challenge to the Western legal tradition as a whole, and not merely to particular elements or aspects of it; and this is manifested above all in a comparison with non-Western civilizations and non-Western philosophies.⁴ This effort is now necessary because recently we have witnessed various efforts to reconcretize the pillars of this tradition on the basis of the Roman Law supremacy over all other ancient laws. I see these efforts as strategies of legitimization of a "Western" supremacy in the field of law, through the pursuit of genealogies. Genealogies help to define who we think we are, or would like to think we are. They define an "us" and a "them," and are an essential mechanism of how identities are constructed.⁵ This "tracing back of the roots" is a work of representation, which occupies a central place in current studies on culture, especially in the practice of portraying cultures as "others."⁶

Thus the "Western root" of modern law becomes an issue. If the genealogical "tree of Western civilization were shown to have roots in the

1. Gaius was a Roman jurist who lived in the middle of the high classical period, from about 110 to 180 C.E. He was the originator of the institutional scheme by which Roman Law has been presented for centuries as a well connected and ordered system of law. Because of his academic approach and importance, all students of Roman Law become well acquainted with him; so that he can symbolize by his name "the" Roman jurist *par excellence*. Gaius is in a true sense the architect of Justinian's codification. Justinian calls him "our own Gaius," showing an affection for the teacher who had become every lawyer's introduction to his subject. See A.M. HONORÉ, *GAIUS* (1962); see also Peter Birks & Grant McLeod, *Introduction to JUSTINIAN'S INSTITUTES* 16 (Peter Birks & Grant McLeod trans., Duckworth 1987).

2. 1 MARTIN BERNAL, *BLACK ATHENA: THE AFROASIATIC ROOTS OF CLASSICAL CIVILIZATION* (1987).

3. See, e.g., *BLACK ATHENA REVISITED* (Mary R. Lefkowitz & Guy MacLean Rogers eds., 1996).

4. See also HAROLD J. BERMAN, *LAW AND REVOLUTION: THE FORMATION OF THE WESTERN LEGAL TRADITION* 33 (1983).

5. For a discussion of the role of historical legacies in defining social identities, see BEVERLEY SKEGGS, *FORMATIONS OF CLASS AND GENDER: BECOMING RESPECTABLE* (1997). See also David Kennedy, *New Approaches to Comparative Law: Comparativism and International Governance*, 1997 UTAH L. REV. 515, 536.

6. *CULTURAL REPRESENTATIONS AND SIGNIFYING PRACTICES* (Stuart Hall ed., 1997).

soils of many different lands, a vision of it as a pluralistic, diverse, multiethnic, and multicultural society might be legitimated.”⁷ But the strategy of exclusion of non-Europeans from the foundation of the “Western” tradition has been, in a sense, quite successful, because it manufactured a picture of legal history that is received as common sense, shaping an almost universal cultural status quo. What I maintain is that this status quo is ungrounded, and that there are possible countermoves, in particular the use of a delegitimizing critique as an attempt to operate a background/foreground shift.⁸ I believe that this kind of critique is necessary to perform a specific, politically motivated operation of reversing figure and ground, showing that there are more ways to change the status quo than previously appeared. The political motive here is to question the Western cultural dominance in the field of law in favor of a multicultural view. I do not think that this is a problem of making new findings, but instead a question of gaining new insights by approaching the sources from new angles.⁹ The result will be a global re-writing of the standard narrative.

I divide my work into two parts. The first is devoted to reconstructing the historical consciousness of the Western legal tradition, showing the emergence of a model based on the more or less explicit assumptions of Roman legal originalism and supremacy, and of its capacity of survival and renewal.¹⁰ In the second part, I provide some significant examples—like contract law, the conception of State, the settlement of disputes, and the formation of a legal culture – which cast doubt on the traditional view of the Western legal tradition.

In this first part, I report the bases in favor of viewing Roman Law as a still-useful tool, and in favor of its being at the root of American and Western legal culture, as distinct from other legal cultures around the world. Then I briefly investigate the emergence of the prevailing pattern in German legal studies. I then go on to depict the overturning of the “Aryan Model” of Roman Law by showing how the model was related to Comparative linguistics and to the birth of Comparative Law as a political project.¹¹ In the fourth chapter I show the opposition between this model and an alternative “African-Semitic Theory” which has been formulated by French Orientalists. Thus, I examine the responses that professional Romanists have made to these challenging theories through their

7. Guy MacLean Rogers, *Multiculturalism and the Foundations of Western Civilization*, in *BLACK ATHENA REVISITED*, *supra* note 3, at 429.

8. See DUNCAN KENNEDY, *A CRITIQUE OF ADJUDICATION (FIN DE SIÈCLE)* 248 (1997) [hereinafter *D. KENNEDY, CRITIQUE*].

9. See Reuven Yaron, *Semitic Elements in Early Rome*, in *DAUBE NOSTER: ESSAYS IN LEGAL HISTORY FOR DAVID DAUBE* 343 (Alan Watson ed., 1974).

10. In this section, the work of O.F. ROBINSON, *THE SOURCES OF ROMAN LAW* (1997), has been quite helpful in summarizing the basics of Roman Law.

11. See Kennedy, *supra* note 5, at 546-51.

maintenance of the myth of the “uniqueness” of Roman Law. Throughout this part, I maintain that there is no reason to deny the original Roman contribution, but rather that adoring scholars have grossly exaggerated it.¹² I end the first part by discussing the issue of discontinuity in legal history to see the strategies lying behind the efforts of seeing the past in terms of a growing tradition. I conclude that traditions are often invented to manage actual problems, to pursue actual strategies, and that they are used to hide the real issues at stake.

At the beginning of the second part, I give the reader a brief account of basic tenets and institutions of Roman, Egyptian, and Middle Eastern legal history. These accounts are necessarily schematic, and not properly part of the argument, but are there to help readers work through historical materials with which they may not be entirely familiar.¹³ Then I examine contract law in its Roman, Egyptian, and Semitic forms, emphasizing the defects of Roman primitivism in this field. Then I examine the incapacity of Roman legal culture to derive a consistent public law conception of the State to show that the State was ultimately built upon non-Roman patterns. From here, I attempt to sketch an outline of the Roman legal process essentially critical of the traditional view of the Roman capacity to govern society by means of law. This point allows us to undermine, or at least to raise a suspicion about, the standard approach used to explain Roman institutions that we normally receive in law school.¹⁴

These three examples lead us to a discussion of the central point of the Roman legal culture as a distinctive trait of Roman Law, and as the ancestor of the modern Western professional approach. I try to show that this legal science was fostered by two major waves of influence from the East, and that its greatest achievements were reached by *abandoning* the original structures in a context of de-Romanization of the later Empire.

My conclusion favors a rejection of the prevalent view taken in scholarly literature concerning the place of Roman legal history in the Western legal tradition. I replace that view with a much more plausible one: that what we call “Roman Law” is in fact a multicultural product effort of different, largely African and Semitic, Mediterranean civilizations. To strengthen my position I often adopt conventional theories or evolutionary paradigms to show that standard accounts contain contradictions. For instance, I use Berman’s definition of tradition¹⁵ as well as Watson’s theory of legal transplants and legal change,¹⁶ in order to

12. See Yaron, *supra* note 9, at 344.

13. See ALAN WATSON, *LEGAL TRANSPLANTS: AN APPROACH TO COMPARATIVE LAW* 12-14 (2d ed. 1993), which suggested many of the examples used here.

14. See *id.*

15. See BERMAN, *LAW & REVOLUTION*, *supra* note 4, at 5.

16. See *generally* WATSON, *supra* note 13; ALAN WATSON, *SOCIETY AND LEGAL CHANGE* (1977) [hereinafter WATSON, *SOCIETY*]; ALAN WATSON, *SOURCES OF LAW, LEGAL CHANGE AND AMBIGUITY* (1984) [hereinafter WATSON, *SOURCES*]; ALAN WATSON, *LEGAL ORIGINS AND*

show that from the acceptance of non-critical theories we can derive a global critique of Western legal culture.

I. Manufacturing the Western Roots

A. Genealogies and Governance

Visions of law-in-history have been crucial to liberal and conservative legal scholarship,¹⁷ and consequently a critical insight must focus upon them.

In this section I want to show that the currently shared theory that the Western legal consciousness is historically grounded upon foundations derived from Roman Law – conceived as an original offspring of human spirit – is actually due to projects of governance with strong practical implications

The subject of this first part of the work is then, so to speak, a history of historical consciousness in the field of law; an inquiry into “[t]he cultural function of historical thinking which casts serious doubt upon history’s status as either a rigorous science or a genuine art.”¹⁸ The very idea of “legal evolution” has a history of its own, and its strategic character is sometimes openly acknowledged even in traditional literature¹⁹

My aim is to prove that the historical consciousness on which Western man has prided himself, since the beginning of the nineteenth century, may be little more than a theoretical basis for the ideological position from which Western civilization views its relationship, not only to cultures and civilizations preceding it, but also to those contemporary with it. In short I think that it is possible, particularly in the field of law, to view historical consciousness as a specifically Western prejudice by which the presumed superiority of modern, industrial society can be retroactively substantiated.²⁰

From this standpoint we can start citing various accounts by eminent scholars which unambiguously state the point. Roman Law is deemed to be not only the foundation of Western Jurisprudence but has been, and continues to be, regarded as “one of the finest creations of the human spirit.”²¹ It is maintained that it was the work of even the earliest of Roman

LEGAL CHANGE (1991) [hereinafter WATSON, LEGAL ORIGINS].

17. See Robert W. Gordon, *Critical Legal Histories*, 36 STAN. L. REV. 57 (1984).

18. HAYDEN WHITE, *METAHISTORY: THE HISTORICAL IMAGINATION IN NINETEENTH-CENTURY EUROPE* 2 (1973) (citing Louis O. Mink, *Philosophical Analysis and Historical Understanding*, 21 REV. METAPHYSICS 667, 669 (1968)).

19. PETER STEIN, *LEGAL EVOLUTION: THE STORY OF AN IDEA* ix (1980). See also the various approaches to legal evolution discussed in E. Donald Elliot, *The Evolutionary Tradition in Jurisprudence*, 85 COLUM. L. REV. 38 (1985).

20. See WHITE, *supra* note 15, at 2.

21. WATSON, *SOCIETY*, *supra* note 16, at 12.

jurists who “[l]aid the foundations not merely of Roman, but of European, jurisprudence,”²² including common law countries²³ and commercial matters.²⁴ Roman Law’s importance lies fundamentally in the fact that as a highly advanced law, it serves as a guide for *all* of modern law,²⁵ even playing a pivotal role in the development of the American legal mind.²⁶ As Professor Mayali noted in his forward to a recent Symposium on Ancient Law:²⁷

In America the Law is king. Thus spoke Thomas Paine . . . [his] claim was not surprising. It was the product of a legal tradition which can be traced back beyond the Middle Ages to *its* Roman roots, a tradition that long ago associated the authority of the law with the exercise of political power.²⁸

Although Professor Mayali obviously concedes that major breaks occurred in the legal evolution of Western laws, he reaffirms that:

[W]e can sense the significance of the ancient [Roman] legal tradition which was so influential in the shaping of the modern Western legal culture and supplied the foundations of political reason.²⁹

Here, in Mayali’s narrative, we may find not only an assertion about Roman influences on our conceptions of the Law, but also a trend toward the foundation of a universally valid “Political Reason” grounded upon Western and Roman views. The shift from a theory of historical derivation toward a theory of sounded superiority is to me striking and apparent. Thus Roman Law should be at the root of the distinction between Adjudication and Legislation,³⁰ as one of the major achievements of the

22. FRITZ SCHULZ, *HISTORY OF ROMAN LEGAL SCIENCE* 94 (1946) (referencing Q. Mucius Scaevola who died in 82 B.C. Scaevola is credited with the first systematic application of dialectical reasoning to law). See PETER STEIN, *REGULAE JURIS: FROM JURISTIC RULES TO LEGAL MAXIMS* 36 (1966); see also BERMAN, *LAW & REVOLUTION*, *supra* note 4, at 136.

23. See Peter G. Stein, *Roman Law, Common Law, and Civil Law*, 66 *TUL. L. REV.* 1591 (1992); see also M. H. Hoeflich, *Mark John Austin and Joseph Story: Two Nineteenth Century Perspectives on the Utility of the Civil Law for the Common Lawyer*, 29 *AM. J. LEGAL HIST.* 36 (1985). This point will be quite important in our further discussion.

24. See Peter Stein., *Roman Law in the Commercial Court*, 46 *CAMBRIDGE L.J.* 369, 369-71 n.3 (1987).

25. STEIN, *supra* note 19, at 86.

26. See PETER STEIN, *THE CHARACTER AND INFLUENCE OF THE ROMAN CIVIL LAW* 411 (1988); M. H. Hoeflich., *Roman Law in American Legal Culture*, 66 *TUL. L. REV.* 1723 (1992); see also NORMAN F. CANTOR, *IMAGINING THE LAW: COMMON LAW AND THE FOUNDATIONS OF THE AMERICAN LEGAL SYSTEM* (1997) (tracing the “beginnings” of many American basic conceptions in Roman Law).

27. Symposium, *Ancient Law, Economics and Society*, 70 *CHI.-KENT L. REV.* 1465 (1995).

28. Laurent Mayali, *Social Practices, Legal Narrative, and the Development of the Legal Tradition*, 70 *CHI.-KENT L. REV.* 1469 (1995) (emphasis added).

29. *Id.* at 1477.

30. Even the interest in the theory of “rights” is supposed to come from a tradition of Roman Law scholarship. Geoffrey Samuel, *Epistemology, Propaganda and Roman Law: Some Reflections on the History of the Subjective Right*, 10 *J. LEGAL HIST.* 161 (1989).

West, or as a target of a critical strategy to collapse it.³¹

What is more remarkable is that such biases are shared even by historians. For instance, in Freeman's wide-ranging book entitled *Egypt, Greece and Rome: Civilizations of the Ancient Mediterranean*,³² whereas there are two entries in the index relating to law, one devoted to Greece and the other to Rome, there is no entry pertaining to Egypt.³³ This immediately creates an impression of Egypt as a lawless society. In fact, Freeman openly asserts that "[t]he Western World, its culture, its religious beliefs, its consciousness, has been shaped for good or bad by Greece and Rome."³⁴ This, of course, is odd for a book which purports to deal with at least three civilizations. Egypt is, after all, mentioned in the title. But then Egypt's contribution is immediately 'denied' in the introduction. Then, in examining the various legacies of the different cultures, the author states that "[t]here is the legacy of *Roman Law*, Greek political theory (and to a lesser extent, practice), an architectural heritage, and a literature which, whatever its own merits, has bequeathed theatre and even the concepts of psychoanalysis to Western culture."³⁵ In this way *Roman Law alone*, among the various ancient Mediterranean laws is recognized as the legal pillar of Western civilization.³⁶

The ideological character of such accounts is peculiar when, for instance, emphasis is directed toward Greek Democracy with a systematic 'denial' of the strong anti-democratic tradition also emerging from Ancient Greek culture.³⁷ It is apparent that such broad cultural accounts, especially when based on the much-vaunted Roman and Greek individualism, are intended to mark a sharp distinction between the West and traditional societies, and to reaffirm a clear superiority of Western patterns.³⁸

In combination with this biased approach, the legal systems of the West are presented as part of a common tradition, or more comfortably a family,³⁹ sharing peculiar values, a similar approach to legal techniques,

31. See D. KENNEDY, CRITIQUE, *supra* note 8, at 37.

32. See CHARLES FREEMAN, EGYPT, GREECE AND ROME: CIVILIZATIONS OF THE ANCIENT MEDITERRANEAN (1996).

33. See *id.* at 628. Moreover, in a book of 638 pages, only about 60 pages are dedicated to Egyptian history covering a period from 3200 to 500 B.C.

34. *Id.* at 4.

35. *Id.* at 4 (emphasis added).

36. Please note that no mention is made to the "Semitic" origin of the inventor of psychoanalysis, and the role of wordplay in Hebrew ancient and modern culture. See, e.g., JOHN B. GABEL ET AL., THE BIBLE AS LITERATURE 36 (3d ed. 1996). In this narrative, psychoanalysis springs out directly from Greek theater.

37. See generally JENNIFER TOLBART ROBERTS, ATHENS ON TRIAL: THE ANTIDEMOCRATIC TRADITION IN WESTERN THOUGHT (1994).

38. See AARON GUREVICH, THE ORIGINS OF EUROPEAN INDIVIDUALISM 3 (Kathanne Judelson trans., Blackwell Publ'g Ltd. 1995).

39. See Ugo Mattei, *Three Patterns of Law: Taxonomy and Change in the World's Legal Systems*, 45 AM. J. COMP. L. 5, 23 (1997).

and a net of common structures. Not to mention the theory that these systems are the cornerstone of the “rule of law” in the modern world, as they have been in history. In this way the modern discipline of Comparative Law and the old study of Roman Law converge in the tracing of the roots. As we have seen, even the split between a Common Law and a Civil Law tradition in the Middle Ages does not break the unity of this tradition and its link with the outstanding Roman achievements in the field of Law.⁴⁰

Of course the praise of Roman Law⁴¹ entails a highly positive (and positivistic) evaluation of the “uniqueness” of the Western Law as the final outcome of a tradition, as an ongoing uninterrupted process,⁴² a inexorable teleology that lead us to where we are today. Although sometimes we see attempts to reappraise ancient laws,⁴³ Roman Law is clearly put in the front and all the others on the back of stage; one cannot help but have the sense that in the last years we face an even more conscious project to restate its usefulness to cope with today’s problems.⁴⁴ According to this theory of the “renewal of the old,”⁴⁵ Roman Law displays a peculiar capacity to survive and renew itself through the ages as the cement of Western legal history. Such a theory is to be intertwined with the restatement of the project to use Roman Law as the common glue with which to build up a newer law for European countries⁴⁶—a project with quite practical implications⁴⁷ in the

40. See W.W. BUCKLAND & ARNOLD D. MCNAIR, *ROMAN LAW AND COMMON LAW: A COMPARISON IN OUTLINE*, 21 (F.H. Lawson ed., 2d ed. 1965); see also Alan Watson, *Roman Law and English Law: Two Patterns of Legal Development*, 36 *LOY. L. REV.* 247 (1990).

41. On the massive bibliography, see Michael H. Hoeflich, *Bibliographical Perspectives on Roman and Civil Law*, 89 *L. LIBR. J.* 41 (1997).

42. D. Johnston, *Limiting Liability: Roman Law and the Civil Law Tradition*, 70 *CHI.-KENT L. REV.* 1515 (1995).

43. See Richard A. Epstein, *The Modern Uses of Ancient Law*, 48 *S. CAL. L. REV.* 243 (1997); see also David V. Snyder, *Ancient law and Modern Eyes*, 69 *TUL. L. REV.* 1631 (1995).

44. See Knut Wolfgang Norr, *Technique and Substance: Remarks on the Role of Roman Law at the End of the 20th Century*, 20 *SYRACUSE J. INT’L L. & COM.* 34 (1994).

45. David Johnston, *The Renewal of the Old*, 56 *CAMBRIDGE L.J.* 80 (1997).

46. See generally REINHARD ZIMMERMANN, *THE LAW OF OBLIGATIONS: ROMAN FOUNDATIONS OF THE CIVILIAN TRADITION* (1990). This work received a mass of comments showing its importance in today’s legal culture. See, e.g., Peter B.H. Birks, *The Law of Obligations: Roman Foundations of the Civilian Tradition*, 13 *J. LEGAL HIST.* 311 (1992); James Gordley, *The Law of Obligations: Roman Foundations of the Civilian Tradition*, 40 *AM.J.COMP.L.* 1002 (1992) (book review); Tony Honore, *The Law of Obligations: Roman Foundations of the Civilian Tradition*, 107 *LAW Q. REV.* 504 (1991) (book reviews); David Johnston, *The Law of Obligations: Roman Foundations of the Civilian Tradition*, 69 *TULANE L. REV.* 1113 (1995) (book review); Peter G. Stein, *The Law of Obligations: Roman Foundations of the Civilian Tradition*, 38 *AM. J. LEGAL HIST.* 94 (1994) (book review); Tony Weir, *The Laws of Obligations: Roman Foundations of the Civilian Tradition*, 50 *CAMPBELL L. REV.* 165 (1991) (book reviews); Simon Whittaker, *The Law of Obligations: Roman Foundations of the Civilian Tradition*, *LLOYDS MAR. & COM. L.* 298 (1994) (book review).

47. See Reinhard Zimmermann, *Roman Law and European Legal Unity*, in *TOWARDS A EUROPEAN CIVIL CODE* 65 (A.S. Hartkamp et al. eds., 1994) (a rising project toward which few

unfolding of Europe as a cultural alternative to the United States.

So we face a theory elaborated by the rising academic discipline of Comparative Law,⁴⁸ which, consciously or unconsciously, supports a particular agenda of governance,⁴⁹ and toward which it is valuable to assume a critical attitude. In fact, in this project, Comparative Law assumes the typical function of depicting the frame of diversities between an “us” and a “them,” a center and a periphery, a West and an East.⁵⁰ What is peculiar is that this theory entails a devaluation of the classical common law/civil law distinction, in favor of a convergence among “modern” Western systems which ultimately depicts a more unitary Western legal family resting on the Roman pillars of Roman jurisprudence, superior to all the other world legal cultures.⁵¹

Although there are some isolated voices of dissent referring to the “disease” of Roman Law,⁵² or on the “malaise” of Comparative Law,⁵³ and although one voice preaches against a European code based on Romanistic patterns and the convergence theory,⁵⁴ the capacity of renewal of Roman Law is received so much as unscrutinized commonsense that it is even proposed seriously as assisting us in coping with artificial intelligence.⁵⁵

I try to summarize the main tenets of this kind of narrative as follows:

1. Roman Law was the best developed and most sophisticated legal system in the ancient world;
2. Roman Law is at the root of the Western Legal Tradition, making it peculiarly “Western”;
3. Roman Law has a vigorous capacity to renew itself and still today

expressed dissenting opinions). See also Pierre Legrand, *Against a European Civil Code*, 60 MOD. L. REV. 44 (1997).

48. See William Ewald, *Comparative Jurisprudence (I): What Was it Like to Try a Rat?*, 143 U. PA. L. REV. 1889 (1995) [hereinafter Ewald, *Comparative Jurisprudence (I)*]; William Ewald, *Comparative Jurisprudence (II): The Logic of Legal Transplants*, 43 AM. J. COMP. L. 489 (1995) [hereinafter Ewald, *Comparative Jurisprudence (II)*].

49. See Reinhard Zimmermann, *Roman and Comparative Law: The European Perspective*, 16 J. LEGAL HIST. 21 (1995) (some remarks apropos a recent controversy).

50. Kennedy, *supra* note 5, at 546.

51. See, e.g., CANTOR, *supra* note 26 (tracing even the beginnings of the Anglo-American legal tradition into Roman Law). See also WALTER ULLMANN, *LAW AND POLITICS IN THE MIDDLE AGES: AN INTRODUCTION TO THE SOURCES OF MEDIEVAL POLITICAL IDEAS* 53 (1975) (asserting that the impact of Roman Law upon governmental practice was without parallel “[p]artly because Roman Law was a mature expression of the most Roman of all Roman ideas - - the idea of law and order” and so “[i]t indelibly imprinted its seal on the physiognomy of what came to be Western Europe, and in fact played a major role in its making”).

52. James Q. Whitman, *The Disease of Roman Law: A Century Later*, 20 SYRACUSE J. INT’L L. & COM. 227 (1994).

53. Ewald, *Comparative Jurisprudence (I)*, *supra* note 48, at 1961.

54. See Pierre Legrand, *European Legal Systems Are Not Converging*, 45 INT’L & COMP. L.Q. 52 (1996).

55. See Geoffrey Samuel, *The Challenge of Artificial Intelligence: Can Roman Law Help Us Discover Whether Law is a System of Rules?*, 11 LEGAL STUD. 24 (1991).

can serve as a basis for actual governance;

4. Roman Law was the well-spring of a peculiar ethnic “genius” for legal affairs and legal scholarship.

I do not maintain that all Romanists share each of these opinions fully and equally. Many share only some of its tenets; others may adhere to each, but to some with less conviction. The degree of support of one or more of these tenets measures the degree of commitment to the Theory of Roman Law as the Original Foundation of Western Law, as well as the degree of emphasis placed upon its originality, superiority, uniqueness, continuity and usefulness.

My aim in this article is exactly to challenge this “Originalist” view of Roman Law and the “Continuity” model associated with it. In so doing I shall adopt a “Discontinuity” model, a kind of “Archeological” approach.⁵⁶

I would emphasize that the elaboration of the Western legal family is a peculiar enterprise within the discipline of Comparative Law, and the main method used to divide the world into legal families or cultural circles⁵⁷ is still that of genealogies.⁵⁸ The reconstructed genealogy for Western law is one with its Roman roots. The elements of the field are organized into a story through an arrangement of narrative motifs according to a standard theory of the historical work.⁵⁹ The Roman roots provide, in Hayden White’s terms, the “inaugural motifs” of the narrative, the various events of the Middle Ages and the rise of the modern State characterize the “transitional motifs,” and the Western systems as presently constructed constitute the “terminating motifs.”⁶⁰ As with any effort in construction, this representation necessarily entails exclusion. It is a time-worn technique of comparative inquiry to contrast the different systems of law, presenting the inner development of each family,⁶¹ something which indeed seems to me quite un-comparative in nature. Thus, I think it is important to see how this narrative came into being, since it is connected both with the renewal of Roman studies and with the birth of legal comparativism in the German culture.⁶²

My first task, then, is not to discuss whether these ideas are right or wrong, but try to show how they came about, how they have been grouped together in a more or less explicit theory, how they have been challenged,

56. MICHEL FOUCAULT, *THE ARCHEOLOGY OF KNOWLEDGE* (Alan Sheridan trans., Random House 1972).

57. See KONRAD ZWEIGERT & HEIN K. T̄Z, *INTRODUCTION TO COMPARATIVE LAW I* (Tony Weir transl., 2d ed., Oxford Univ. Press 1987).

58. For an effort in criticism of conventional approach in Mattei, *supra* note 39, at 40.

59. See WHITE, *supra* note 18, at 5.

60. For a complete discussion of this theory of the historical work, *see id.*

61. See generally RENÉ DAVID & JOHN E.C. BRIERLY, *MAJOR LEGAL SYSTEMS IN THE WORLD TODAY: AN INTRODUCTION TO THE COMPARATIVE STUDY OF LAW* (3d ed. 1985).

62. For a discussion on the intellectual origins of German legal thought, see Ewald, *Comparative Jurisprudence (I)*, *supra* note 48, at 1990-2045.

and the response of the professional lawyers who attempted to call into question these views. And, how and why these ideas are back on the stage today.

(1) *The “Aryan Model”*

Ideas do not coalesce by themselves. They are assembled by real, time-bound people, with actual needs and strategies. If we look for the package of ideas which lays at the base of the Western self-consciousness in law, we must come to grips with the sudden emergence of German legal historicism at the beginning of the last century.⁶³ This examination will illustrate that it was based on a peculiarly insulated conception of Roman Law, and how this conception came to be mingled with comparativism to produce an “Aryan model” of the Western legal tradition.⁶⁴ By “Aryan model” I mean a theory of the strong cross-cultural links among different peoples traceable back to a past, common, Indo-European period, producing a framework of similarities between their various institutions.

Legal historicism was the theory adopted by the most influential German scholar of the time: Karl Friedrich von Savigny,⁶⁵ “[t]he greatest jurist that Europe has produced.”⁶⁶ Savigny’s historicism was intended to replace a universalistic theory of Natural law as a basis for a rational purposive discourse on the law, a paradigm which dominated the legal debate during the “Enlightenment” period in the 18th century.⁶⁷ Law, Savigny maintained, was deeply rooted in local traditions; it is an expression of the deepest beliefs of a people, inseparable from their manners and morals, their customs and history. For Savigny, there was an organic link between law and the essence of a nation.⁶⁸ For him and his followers, the “cult” of Roman Law – a product of history, not “nature”—

63. For a look at the context of what Ewald has called comparative jurisprudence for its impact on America, see *THE RECEPTION OF CONTINENTAL IDEAS IN THE COMMON LAW WORLD 1820-1920* (Mathias Reimann ed., 1993).

64. GABOR HAMZA, *COMPARATIVE LAW AND ANTIQUITY* (József Szabó transl., Akadémiai Kiadó és Nyomda Vállalat, Budapest 1991), strongly influenced my work reconstructing the “Aryan Model.”

65. On Savigny see Ewald, *Comparative Jurisprudence(I)*, *supra* note 46, at 2012; see also Symposium, *Savigny in Modern Comparative Perspective*, 37 *AM. J. COMP. L.* 1 (1989). For the whole of the history of the German legal thought in the early nineteenth century, see JAMES Q. WHITMAN, *THE LEGACY OF ROMAN LAW IN THE GERMAN ROMANTIC ERA* (1990).

66. Hermann Kantorowicz, *Savigny and the Historical School of Law*, 53 *L.Q. REV.* 326, 326-27 (1973) (quoting Sir John Macdonnell).

67. See O. F. ROBINSON ET AL., *EUROPEAN LEGAL HISTORY* 242 (2d ed. 1994).

68. See Ewald, *Comparative Jurisprudence(I)*, *supra* note 48, at 2016 (citing FRIEDRICH KARL VON SAVIGNY, *VOM BERUF SUNSRER ZEIT FÜR GESTEZGEBUNCT UND RECHSWISSENSCHAFT* (1814)). In the course of history, the German Empire in the Middle Ages adopted Roman Law as the general law of the land, and so it became the root of the German unfolding of a proper national law, in this sense the Germans succeeded the Romans. See ROBINSON et al., *LEGAL HISTORY*, *supra* note 67, at 188.

had to supersede a universalistic rational conception of the law.⁶⁹ Roman Law became the alternative to the Law of Reason and it was an alternative embodied within German legal history. Of course to be a valid alternative, Roman Law had to be extraordinary. Without plunging into details which lie outside of the scope of the present essay, I would stress that Savigny's conception of the *function* of Roman Law was as a common law for Europe, and for Germany in particular.⁷⁰

Of course Savigny had a strategy, and it was to start a process of elaboration of a national German law, which indeed started and ended in 1900 with the codification of a common private law for the whole Germany. He needed a ground to build upon, and the mass of Roman legal texts gave him the building blocks for his "scientific" construction of a newer law. The stress on the overall importance of Roman Law led him to a conception of Roman Law as something more than just positive law. Roman Law came with an implied intellectual history,⁷¹ but it was a peculiar history. In order to build a new German law on its basis, Roman Law had to be studied as a complete and autonomous system⁷² which in turn could be elaborated and developed according to scientific principles into a modern legal system. It is not hard to see at work here the theory of the renewal of the old, and an eye towards the projects of governance that are reaffirmed today.⁷³ This approach produced an "ideology" of Roman uniqueness which entails an almost total exclusion of all other laws' importance.⁷⁴

It was Eduard Gans in particular⁷⁵ who conceived his work on the law of inheritance⁷⁶ in the spirit of "*Universalrechtgeschichte*," Universal Legal History. He surveyed Indian, Chinese, Hebrew, Islamic, Scandinavian, Icelandic, Scottish, Portuguese, Attic and Roman Law, *among*

69. HAMZA, *supra* note 64, at 34-35.

70. See Franz Wieacker, *Friederich Carl Von Savigny*, ZSS [Zeitschrift der Savigny-Stiftung für Rechtsgeschichte (Rom. Abt.)] 85 (1955).

71. See HAMZA, *supra* note 64, at 35 (from whom my argument in this portion of the article is extensively drawn).

72. See *id.* at 40.

73. See generally Johnston, *supra* note 42; ZIMMERMAN, *supra* note 46.

74. As a typical exclusion we can recall, for instance, the complete denial of any possible relevance of Hebrew law, notwithstanding that a large amount of German population was of Jewish origin. While Roman Law could hardly be described as the product of the German spirit (Volksggeist), it has been a "miracle" of German legal historicism to have denied any non-Roman influence on the development of a German national law. See ROBINSON et al., *supra* note 67, at 262.

75. Eduard Gans is reputed the founder of German Comparative Law. See Mitchell Franklin, *The Influence of Savigny and Gans on the Development of the Legal and Constitutional Theory of Christian Roselius*, in 1 FESTSCHRIFT RABEL 141 (J.C.B. Mohr, Tübingen 1954); see also HAMZA, *supra* note 64.

76. See 1 EDUARD GANS, ERBRECHT IN WELTGESCHICHTLICHER ENTWICKLUNG [THE LAW OF INHERITANCE IN A WORLD HISTORY PERSPECTIVE] (1824).

others.⁷⁷ The introduction to his massive work is a piece of great interest since it is based on a striving incoherence. He remarks that no exclusive importance should be given to any law in respect to other legal systems,⁷⁸ but *then* he asserts the special importance of Roman Law attributable to the *outstanding* role played by Rome in the entire *universal* history.⁷⁹ Tellingly, Gans work, though it touches practically each corner of the globe, is entitled “Roman History and Roman Law.”

How did this logic of exclusion come to be mingled with comparativism? Indeed, many of Savigny’s followers, such as Anselm Feuerbach, Karl Theodor Puetter, Gans himself and Unger, came to be of the opinion that comparative studies were important in Law⁸⁰ *as well as* in Linguistic inquiries.⁸¹ It was, then, a comparativism associated with the strategy of reconstructing the original common Aryan background of Western civilizations.

This trend towards comparative work gave birth in 1829 to the *Kritische Zeitschrift für Rechtswissenschaft und Gesetzgebung des Auslandes* (Critical Review of Comparative Legal Studies) as the first world journal on Comparative Law, which published twenty-six volumes through 1853. From a philosophical standpoint, the ideological foundation of Comparative Law in connection with race can easily be traced back to Hegel’s theory of a close link between institutions and race,⁸² and so between Roman institutions and their Indo- European background. This “Aryan” approach to comparison relied to a high degree on the findings of Comparative linguistics, where the works of Bopp and Jacob Grimm played a pivotal role in the making of the “Aryan theory.”⁸³

This brief account is not intended to cast doubt on the scholarship embodied in these works. Certainly the authors engaged in the building up of the “Aryan Theory” were prominent scholars with a solid reputation.⁸⁴

77. See HAMZA, *COMPARATIVE LAW*, *supra* note 64, at 40 (emphasis added).

78. *Id.* at xxiii.

79. *See id.* at xxv.

80. *See* HAMZA, *supra* note 64, at 43.

81. On the relevance of Linguistics and of Herder on the German legal thought, see Ewald, *Comparative Jurisprudence (I)*, *supra* note 48, at 2012-20; and from a more general cultural point of view see also Robert E. Norton, *The Tyranny of Germany over Greece?*, in *BLACK ATHENA REVISITED*, *supra* note 3, at 403.

82. On Hegel’s love for Europe and India and his total despise of Africa, see G.W.F. HEGEL, *LECTURES ON THE PHILOSOPHY OF WORLD HISTORY* 154-209 (H.B. Nisbet trans. and ed., 1975). The original work has been published by his disciples after his death in 1831. On the relations between Hegel and Gans, see HAMZA, *supra* note 64, at 39-43.

83. HAMZA, *supra* note 64, at 45; 1 ADOLF F. SCHNITZER, *VERGLEICHENDE RECHTSLEHRE* [*COMPARATIVE LEGAL STUDIES*] 13-14 (2d ed. 1961).

84. We can perhaps sometimes question such reputations on the basis of modern standards. For example, in 1847 a German expert in cuneiform texts, Oppert, published a book on Indian Criminal Law. Even if India has nothing to do with cuneiform writings, showing a lot of common tracks with Roman Law which were still seriously valued at the end of the century; see

They were not political hacks; nor were they outsiders, nor were they cranks. What needs to be stressed, though, is the importance of the link between the issue of race⁸⁵ and high-level legal studies in nineteenth century Germany, where the “Aryan Model” increasingly involved studies of the ancient German Law. For instance, in Rossbach’s work on Marriage⁸⁶ we find a comparative appraisal of Roman, Indian, Greek and German Law which completes, as it were, the Aryan approach. Rossbach’s theory was that the foundations of this part of the law were basically the same within the whole Indo-Germanic family, and in fact Rossbach’s findings were inspired by the Aryan theory itself, rather than being the result of independent tests of the theory. His main argument is that, notwithstanding the total lack of empirical evidence, the analogies among the different Aryan laws were attributable to the close bonds of these peoples who shared a common kinship.⁸⁷

All these studies produced at the end of the nineteenth century were different efforts to reconstruct the “Original Aryan Law” (Urrecht)⁸⁸ with a strong accent on Aryan ethnic community. These efforts adopted the methods of comparative linguistics but reconstructed the pattern of the Original Law on the basis of the Roman categories. Roman Law was “The Template” toward which the Original Law evolved.

Even an outstanding scholar like Jhering followed this trend in a work of Comparative history of Indo-Europeans.⁸⁹ He clearly identified the Law (in general) with Roman Law,⁹⁰ and traced it and its perfection back to its Aryan roots. For Jhering, Roman Law assumed a crucial importance even in the field of Comparative Law grounded on ethnic terms.⁹¹ The Aryan Theory became the key to understanding the Roman Law’s supremacy and uniqueness in comparison to the other non-Aryan laws.

the comment on his work in J. GILSON, L’ETUDE DU DROIT ROMAIN COMPARE AUX AUTRES DROITS DE L’ ANTIQUITE [ROMAN LAW COMPARED WITH OTHER ANCIENT LAWS] 28 (1899).

85. That the Indo-Europeans were intended as one racial group is out of question, and this is the point I am interested here, whereas it is immaterial the skin-color of ancient peoples. See Frank M. Snowden, Jr., *Bernal’s “Blacks” and the Afrocentricists*, in BLACK ATHENA REVISITED, *supra* note 3, at 112. Ironically the logic of exclusion can be as strong as “color-blind.”

86. See AUGUST ROSSBACH, UNTERSUCHUNGEN UBER DIE ROEMISCHE EHE (Stuttgart, C. Maecken, 1853); HAMZA, *supra* note 64, at 45.

87. See *id.* at 37; see also *id.* at 44.

88. B.W. LEIST, ALT-ARISCHES JUS GENTIUM (1889); see also B.W. LEIST, ALT-ARISCHES IUS CIVILE (1892).

89. RUDOLF VON JHERING, VORGESCHICHTE DER INDOEROPAER [THE EARLY HISTORY OF INDO-EUROPEANS] (Victor Ehrenberg ed., 1884). This was his last book, and was edited by Ehrenberg after the author’s death. See HAMZA, COMPARATIVE LAW, *supra* note 64, at 44.

90. See Walter M. Wilhelm, *Das Recht im roemischen Recht, in Jherings Erbe, Goettinger Symposium zur 150. Wiederkehr des Geburtstages von Rudolf von Jhering* (1970).

91. See 3 WOLFGANG FIKENTCHER, METHODEN DES RETEST IN VERGLEICHENDER DARSTELLUNG [COMPARATIVE LEGAL APPROACHES] 250 (1976).

It is important to note that the Aryan Theory has survived well into our century. Amaduni, a specialist on Armenian Law, elaborated a parallel between Roman and Armenian Law which he attributed to a common Indo-European ethnic origin.⁹² Of course, this theory reached a climax in the political biases of the 1930s. The perfection of Roman Law now taken for granted, the distinction between Roman and German Law was narrowed, so that the latter could be said to contain the qualities of the former, and a new model of an anti-individualistic Roman Law was built in search of a closer adherence to the political inspiration of the Nazi movement.⁹³ In Schoenbauer's opinion, it was even impossible to compare the laws of peoples not ethnically related, such as the Germans and the Egyptians.⁹⁴

It is true that the Aryan Theory was powerfully challenged by Koshaker⁹⁵ before the war, and by Condanari-Michler⁹⁶ after it, but this is not to minimize its success even among cultural comparativists like Dumézil.⁹⁷

Since the historical work represents an attempt to mediate among the "historical field" and an audience,⁹⁸ it is not at all surprising that such a mediation was reached in nineteenth century Germany on the following model:

1. Romans, Germans and other peoples are all linked by their common Indo-European roots;
2. Roman Law was part of an Indo-European legal culture;
3. Roman Law has been the most perfected product of this culture;
4. Roman Law can be the basis upon which to ground a modern German system as the most perfected Western legal system.

Rome is the projection of a myth. Historical consciousness and genealogies associated with it have a political dimension which cannot be

92. See Garabel Amaduni, *Influsso del Diritto Romano Giustiniano sul Diritto Armeno e Quantità di Tale Influsso* [The Impact of Roman Law on Armenia], in 2 ACTA CONGRESSUS IURIDICI INTERNATIONALIS (PROCEEDINGS OF THE CONFERENCE FOR THE 14TH CENT. FROM THE ENACTMENT OF JUSTINIAN'S LAWS, Rome Nov. 12-17, 1934) 244, 245 (1935).

93. Ernst Schoenbauer formulated these ideas in a Lecture delivered at the Deutscher Rechtshistorikertag in 1936, cited by MICHAEL STOLLEIS, GEMEINWOHLFORMELN IM NATIONALSOZIALISTISCHEN RECHT [COMMON TRENDS IN NAZI LAW] 35 (1974). See HAMZA, *supra* note 64, at 44.

94. See Ernst Schoenbauer, *Zur Frage des Eigentumsueberganges beim Kauf*, [Transfer of Property by Sale] in *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte (Rom. Abt.)* 52 (1932).

95. See Paul Koschaker, *Was vermag die vergleichende Rechtswissenschaft zur Indogermanenfrage beizusteuern?* [What We Got from Indo-Germanic Comparativism?] 1 Festschrift HIRT 147 (1936). According to Koschaker, no particular attention should be paid to race in legal history. See also HAMZA, *supra* note 64, at 46.

96. See Slavomir Condanari-Michler, *Über Schuld und Schaden in der Antike* [Negligence and Damage in Ancient Law] 3 SCRITTI FERRINI 28 (A. Giuffrè ed., 1948).

97. See GEORGES DUMEZIL, *ARCHAIC ROMAN RELIGION* 585 (1966) (referencing marriage rites in Rome and in ancient India).

98. WHITE, *METAHISTORY*, *supra* note 18, at 5.

underestimated: there is something worth fighting for. It is indeed quite interesting, in contrast with German professors engaged to the “Aryan Theory,” to see, for instance, Jewish scholars advocating the presence of Semitic elements in early Rome.⁹⁹ It seems to me that this “recall to Rome,” even amongst the Jewish scholars, remains a way to state who we are, and to refine a picture of ourselves.

But a picture depends on a framework. The Aryan framework revealed itself to be quite successful, but we must consider its rivals, and how they became losers in the competition of historical theories.

(2) *The “African-Semitic Theory”*

Having noted the growth of an Aryan theory of Western law, based on its Roman origin, in this section I show the emergence of a rival model pointing to Eastern and African origins of Roman Law. Whereas the Aryan theory is still widespread, and even received as a commonsense, this rival theory remained in the background, because it was constantly subjected to criticism, a casualty of the production of legal history. I do not enter the debate, I just “rediscover” an alternative model to show the rivalries that occurred among scholars in the making of the Western legal tradition as a tradition typically “Western.” I call this revisited rival theory the “African-Semitic Model” because it points to the Middle East and Egypt as places of a high-level legal culture from whence the Romans borrowed more advanced legal theories than they themselves possessed when Roman Law was still quite primitive.

I am not interested in discussing whether Egyptians are to be labeled as “African” from a racial point of view.¹⁰⁰ I use the term “Africa” or “African” with a mere geographical implication, since the land of Egypt lies in Africa. I want to use this term because it is always “denied” in discussions among legal historians, where Egypt is constantly referred to as an “oriental” or Middle Eastern country, or at best a Mediterranean region. Since the discussion is centered on Aryan origins and it is full of biased terms and labels, I prefer to assume a purely old-fashioned neutral liberal attitude by referring to countries on a geographical basis, to show that even from this superseded standpoint the “denial” of the term “African” is striking, and as such it is quite interesting even if (or especially because) it can be rationally justified by traditional legal historians. My use can be so-justified on “neutral” principles, but it is not intended to be neutral at all. I use it because I want to sharpen the opposition between the two theories.

For similar but distinct reasons, I prefer sometimes to adopt the term “Semitic” with reference to the race of peoples involved, rather than the more neutral geographical terms such as “Middle East” or “Near-East” and

99. See generally Yaron, *supra* note 9.

100. See Kathryn A. Bard, *Ancient Egyptians and the Issue of Race*, in BLACK ATHENA REVISITED, *supra* note 3, at 103.

so on. If “they” use Aryan, it is a bit shy to reply with “Oriental,” or the like. If there are political issues at stake I prefer to emphasize them, rather than hide them under a glaze of smooth labels. Thus, my use is certainly strategic, but the move here is just to make “objects” more clear-cut. Whenever non-Semitic and non-Roman peoples are involved I shall use of course the geographical terms such as Mediterranean, or Eastern, and so on.

With these provisos in place, we can see that the “African-Semitic” theory took off after the discovery of the so-called “Syrisch-romisches Rechtsbuch,” an astonishing ancient Comparative Law book on Syrian and Roman institutions.¹⁰¹ From this discovery sprang a long debate among scholars with some of them emphasizing Greek (Indo-European) influences, others underlying transplants from Hebrew (Semitic) Law, and still others stressing an analogy with cuneiform legal texts.¹⁰² The Syrian book was a riddle and a chameleon,¹⁰³ changing color according to the theoretical aims of the examining scholar, but it gave an impulse to the studies of cross-connections between Roman and other non-Indo-European ancient laws.

It is within such a framework that in the late nineteenth century a number of French scholars advanced the theory of Roman Law as a bundle, an amalgam of ancient Eastern and African legal traits.¹⁰⁴ This Theory, sound or unsound as it may be, is obviously important for our argument, as well as an alternative both to the Aryan Model (and the correlative notion of the “Uniqueness” Model of Roman Law), since it strongly challenges both. According to this theory, Roman Law evolved as a bundle of borrowings from Egypt and the Middle East.¹⁰⁵

It is quite interesting to note that the contrast between the Aryan and the African-Semitic Theory, pointing toward a Mediterranean dimension of legal evolution, in contrast with a Northern Aryan one, exactly matches with a contrast among German and French scholars, in the well-known

101. This “Rechtbuch” was discovered by Land who edited it for publication in 1862. J.P.N. LAND, ANECDOTA SYRIACA (1862), cited by PAUL KOSCHAKER, DIE KRISE DES ROEMISCHEN RECHTS UND DIE ROMANISTISCHE RECHWISSENSCHAFT [THE CRISIS OF ROMAN LAW] 276 (1938).

102. See HAMZA, *supra* note 64, at 53.

103. See WALTER SELB, ZUR BEDEUTUNG DES SYRISCH-ROMISCHEN RECHTSBUCHES [ON THE MEANING OF THE SYRIAN-ROMAN LAW BOOK] 331 (1964).

104. In comparison with the strong reputation still held even by politically biased German scholars, these French scholars are even today immediately introduced as “exponents of theories based on fictitious assumptions” and it is said that the discovery of connections between Roman and Syrian Law “carried in itself the seeds of unscientific theories, based only on bold hypotheses.” HAMZA, *supra* note 64, at 54.

105. See EUGENE REVILLOUT, LES OBLIGATIONS EN DROIT EGYPTIEN COMPARE AUX AUTRE DROITS DE L’ ANTIQUITE [THE LAW OF OBLIGATIONS IN ANCIENT EGYPT COMPARED WITH OTHER RIGHTS OF ANTIQUITY] 79 (1886) (“[L]’histoire du droit romain n’est plus que l’histoire d’enprunts successifs.”).

context of European rivalries at the end of the Nineteenth century.

Moreover, the clash between the two theories corresponds to a clash between an evolutionary paradigm and a diffusionist approach, the former emphasizing that social institutions evolve within a particular society, and the latter pointing to the spread of institutions through different cultures. The end of last century and the first quarter of this century have been an age of war between diffusionists and evolutionists,¹⁰⁶ the two approaches being perceived at the time as being mutually exclusive.¹⁰⁷ The Aryan Model is based on the idea of inner evolution whereas the African-Semitic Model conceives of legal history as a history of transplants and borrowings. It is quite evident that the first model is race-based (and biased), whatever the political ideas of its exponents may be, because the inner evolution is supposed to happen within one racial group of peoples, whereas the alternative approach patently recognizes the indifference of race issues to legal development.

The two models also share different ideologies toward Roman Law, and this may explain in turn the different impact they had on “professionals.” In the Aryan Model, Roman Law is still a superior final product of an original and unique history of the Indo-European race.¹⁰⁸ In the African-Semitic Model it is, implicitly or explicitly, a poor law which evolved thanks to borrowings from much more sophisticated legal patterns developed in the Eastern part of the Mediterranean basin.

Finally, in the Aryan Model there is implicit also what I might call a Continuity Model of Roman legal evolution within the Indo-European family. But adopting the competing African-Semitic point of view, one can easily employ what I would label as a Discontinuity Approach¹⁰⁹ to Roman Law because each borrowing, from Egypt or from the Middle-East, clearly represents a break with the original Roman tradition.

To understand the sharp opposition between the two models we must examine the work of the French scholars who built up the African-Mediterranean Theory: the orientalist Revillout and Lapogue.

Reviollout (1847-1913) is a puzzling and whimsical figure. He was a scholar in ancient languages, demotic, hieratic and coptic, and became nothing less than “Conservateur au Louvre” in Paris and received an honorary degree from the prestigious old University of Louvain. As such, he was an established scholar in Egyptology, but he decided to devote

106. See ROBERT H. LOWIE, *PRIMITIVE SOCIETY* 430-41 (1920); see also Jackson, *Evolution and Foreign influence in Ancient Law*, 16 AM. J. COMP. L. 372, 374 (1968).

107. See BARBARA MCNAIRN, *THE METHOD AND THEORY OF V. GORDON CHILDE* 7 (1980).

108. With some inconsistencies, supporters of this model normally believe that the final product of a “race-based evolution” can be usefully transplanted to regulate the lives of other races.

109. For a discussion of this opposition between continuity and discontinuity in historical appraisals, see *infra* note 164 and related text.

himself to the rising discipline of Egyptian *legal* studies¹¹⁰ with the explicit intent to promote a theory of the Egyptian Origin of Roman Law.¹¹¹

Revillout's central point was that Roman Law grew as a bundle of legal patterns borrowed from abroad. As such, his theory entirely rebutted the models developed by professional Romanists. In particular, he maintained three points on the African-Mediterranean transplants into Roman Law:

1. Roman Commercial Law and the Law of Obligations, which is peculiarly presented as a typical product of Roman jurisprudence,¹¹² actually derived from Babylonian Law;¹¹³

2. Public Law, and the framework of Law and Politics relations were received from Greece;

3. The Law of Persons and general Jurisprudence were of Egyptian origin.

In his projects, this theory had to be fully developed, jointly with his brother Victor Revillout,¹¹⁴ another reputed orientalist, in a new edition of the Justinian Codes tracing back the non-Roman origin of each rule, text or opinion, embodied into the Emperor's Compilation, book by book and page by page. We can see today the extent to which his project was really an essay in the global *deconstruction* of Roman Law, as well as a critique of the prevailing doctrines. He pursued a global critique¹¹⁵ of the legal history of his time.

For his theory Revillout, who was a professional Egyptologist, gained among legal historians and Romanists (who were not and normally are not specialists in Egyptian history) a bad name; even today, his ideas are presented as purely "unscholarly."¹¹⁶

Was he really a crank? Certainly he was proud and isolated. From my personal reading of him, I found that he thought himself to have broken a new path, and to be alone in the wandering.¹¹⁷ Certainly he shared quite an old-fashioned conception of the geniuses of different races: Romans

110. See EUGENE REVILLOUT, *LA PROPRIÉTÉ, SES DÉMEMBREMENTS, LA POSSESSION ET LEURS TRANSMISSIONS EN DROIT ÉGYPTIEN COMPARÉ AUX AUTRES DROITS DE L'ANTIQUITÉ* [PROPERTY AND POSSESSION IN EGYPTIAN LAW] (Ernest Leroux ed., 1897); EUGENE REVILLOUT, *PRÉCIS DU DROIT ÉGYPTIEN COMPARÉ AUX AUTRES DROITS DE L'ANTIQUITÉ* [A TEXTBOOK ON EGYPTIAN LAW] (Girard & Brière 1903). On Revillout, see HAMZA, *supra* note 64, at 54.

111. See EUGENE REVILLOUT, *LES ORIGINES ÉGYPTIENNES DU DROIT CIVIL ROMAIN* [THE EGYPTIAN ORIGINS OF ROMAN CIVIL LAW] (Librarie Paul Geuthner, 1912).

112. See ZIMMERMANN, *supra* note 46, at 1.

113. See HAMZA, *supra* note 64, at 54.

114. See *id.* at 54-55.

115. On a definition of global external and global internal critique, see KENNEDY, *supra* note 8, at 92-93.

116. HAMZA, *supra* note 64, at 56.

117. See REVILLOUT, *supra* 102, at Part v ("La science du droit égyptien, créé par moi, progresse chaque jour par suite de mes nouvelles études.").

were pure Indo-Europeans as were the Dorians, and they were essentially fit for the war; the Babylonians, by contrast, he conceived of as having peculiar genius for commerce; Egyptians had a special capacity for moral speculation.¹¹⁸ These categories notwithstanding, he was not what we would understand today as a “racist.” With respect to India, Revillout denied any debt of “our” civilization to the “Indians” and attributed no importance to the sharing of a “common blood”; but at the same time Revillout’s discourse really strikes his audience by affirming that “we” have nothing to share with the Jews “except” our religious attitude.¹¹⁹

Plunging deeper into the details of Revillout’s theories, the reader sees oddities begin to emerge. For example, he maintains that even the drafters of the Twelve Tables, the first piece of Roman legislation,¹²⁰ were inspired by the experience of the Egyptian tyrant Amasis of some decades before, who is presented as a kind of an Egyptian Cromwell.¹²¹ It is hard to hew to this story, particularly because it is so much sound and fury. Its source criticism is embryonic, the narrative is biased exactly as in the works of unrecognized geniuses, who must stand up against all the world with a feeling of revenge. There can be no doubt, in any case, that Revillout based his work on a diffusionist approach¹²² as opposed to the model of organic inner evolution of the Aryan theory; an approach today easily dismissed as outdated. But in the years around the end of last century, it provided a rival alternative to the old prevailing evolutionarist approach.¹²³

My point is not to show that he was good, even if he was a well-recognized scholar in his day. What is important is to recognize that a Revillout proposed a new paradigm, and to understand what the reaction was. Thus I assume once again a “neutral” attitude, because I think it suffices to show, in the next section, that if his theory had defects, the reaction it provoked was no better.

According to Hamza, Revillout was not alone.¹²⁴ Another prominent French orientalist, Professor Lapogue,¹²⁵ independently pursued a similar approach. Stressing the influence of Assyrian law, Lapogue argued two points, the first relating to the Roman Republic and the second to the great Jurists of the Empire. His first point is that the “foreign Praetor”¹²⁶ in

118. See *id.* at Parts v- vi.

119. *Id.*, at Part vi (“[N]ous ne tenons rien de l’Inde, si ce n’est peut-etre un sang commun, et que le juifs ne nous ont guere fourni que leurs traditions messianiques.”).

120. See ROBINSON, *supra* note 10, at 2.

121. See REVILLOUT, *supra* note 110, at 21.

122. See P. Haider, *Vergleichende Voelkerkunde*, in F. HAMPL & I. WEILER, VERGLEICHENDE GESCHICHTSWISSENSCHAFT [COMPARATIVE HISTORY] 185 (1978).

123. See LOWIE, *supra* note 106, at 21.

124. See HAMZA, *supra* note 64, at 55.

125. On the prominence of Lapogue, see HAMZA, *supra* note 64, at 55.

126. The *Praetor* was the Roman magistrate encharged to superintend jurisdiction. See H. F. JOLOWICZ, HISTORICAL INTRODUCTION TO THE STUDY OF ROMAN LAW 46-50 (1939). He was

Rome transplanted into Roman Law large portions of Oriental legal systems.¹²⁷ His second point is that a further major transplant occurred during the age of the great classical jurists, since none of them (especially Papinian and Ulpian¹²⁸) was of Roman origin. But the bulk of Lapogue's theory is that the jurists' work was dedicated to the widening of Roman Law by transforming it from the law of the city of Rome into a "global" law reaching across the Empire by including many of the practices of the provinces within the framework of Roman categories. This point is more appreciated than it could have been given the colonial discourse which dominated Europe at the end of last century.¹²⁹

The work of Lapogue seems more sound than the whimsical suggestions of Revillout on the XII Tables, but it was immediately associated with them and treated with irony.¹³⁰ This was unfair. Lapogue had reached independent results, and developed independent arguments. The strategy adopted against him used the worst parts of Revillout's appraisal to cast doubt upon his theories. To attack Lapogue, critics stressed Lapogue's admittedly weak contention of a spread of patterns from Assyrian Law, and it was easy to show that he came to his conclusions on the basis of a single cuneiform tablet.¹³¹ But the criticism was unfair. It is not that Lapogue reached a conclusion on the basis of a single document, but rather that the analysis of a single newly discovered document led him to advance hypotheses which needed to be tested. He proposed a new model of Roman Law origins, but his proposals were dismissed before they were really examined. Lapogue had in fact proposed several arguments based on analysis of the Roman legal process, for which a large mass of documents was available, but his work was rejected *ab initio* for his suggestion of an "Assyrian connection," for which he possessed just a single document. Thus, the uniqueness of the Assyrian source was used to cast a doubt on his whole work.

The counter-attack mounted by the traditional Romanists is a

not a judge in the modern sense of the word. *See id.* A Roman civil trial, until well into the empire, always took place in two stages. *See id.* The *Praetor* was charged, in the first stage, to settle the issue in question. *See id.* Then, in the second stage, the actual trial took place and the issue settled by the *Praetor* was decided by a judge (*judex*) who was not a magistrate, but a private person appointed for the purpose. *See id.* In 242 B.C.E. a division of duties was established between two Praetors, one (*praetor urbanus*) superintending the jurisdiction between citizens, and the other (*praetor peregrinus*, "foreign" praetor) who handled disputes between foreigners or between citizens and foreigners. *See id.*

127. *See* G. Lapogue, *Le Dossier de Bunanitun*, in *Nouvelle Revue Historique de Droit Francais et Etranger* 10 (1886).

128. *See infra* note 346, 349 and accompanying text.

129. *See* discussion *infra* Part II.F (entitled "Redaction and Deromanization").

130. *See* HAMZA, *supra* note 64, at 55, with reference to LUDWIG MITTEIS, REICHSRECHT UND VOLKSRECHT IN DEN _STLICHEN PROVINZEN DES R_ MISCHEM KAISERREICHES [STATE LAW AND POPULAR LAW IN THE EASTERN ROMAN EMPIRE] 13 (B.G. Teubner 1891).

131. *See* HAMZA, *supra* note 64, at 55.

cornerstone of how the actually received ideas on Roman Law and the West came together, so I analyze the details of these reactions in the next section.

B. Reaction to Revisionism: The Professional Resistance

The “African-Semitic” hypothesis produced a strong reaction in the world of professionals. This reverse trend was led by Gilson in France, and in Germany by such eminent scholars as Mitteis and Goldschmidt. The thrust of their reaction was to praise Roman “originalism” and “capacity of renewal,” and this emerged as a strategic response to interfering non-professionals. Roman Law, they argued, may have borrowed patterns from abroad, but it was Roman legal genius and the supreme capacity of Roman Law which transformed these borrowings into refined legal conceptions. By treating exogenic contributions as raw legal materials, their contribution could be minimized or ignored.

This “Uniqueness Model” was built in France by Gilson after Glasson’s approach to the coexistence of various Mediterranean and Middle-Eastern Laws. Glasson, especially in the second edition of a work on marriage and divorce,¹³² mixed the historical approach with comparative analysis. But in his approach, comparison did not involve an appraisal of borrowings. His approach could not avoid considering the relative importance of African-Mediterranean Laws, but he tried to master and control the meaning of their very existence through a typological approach:¹³³ a framework based on the independent lives of different laws without any consideration of the possible reciprocal borrowings and transplants. We must stress the fact that in Glasson’s work there is no room for the “Aryan Model”:¹³⁴ his typological approach allowed Roman Law to grow independently from any other pre-existing law.

The stress on the autonomy of Roman Law well-rooted in this approach was clearly stated by Gilson some twenty years later.¹³⁵ At the very end of nineteenth century he could not deny the borrowings that occurred in Roman Law through the practice of international jurisdiction exercised by the *Praetor*.¹³⁶ But, with the help of a metaphor, he etherized their possible impact on the purity and uniqueness of Roman Law. He used the metaphor of the “organic assimilation” of these traits from abroad,

132. ERNEST GLASSON, *LE MARIAGE CIVIL ET LE DIVORCE DANS L’ANTIQUITÉ ET DANS LES PRINCIPALES LÉGISLATIONS MODERNES DE L’EUROPE* [MARRIAGE AND DIVORCE IN ANCIENT AND MODERN EUROPEAN LAW] (A. Durand, 2d ed. 1880). On Glasson, see HAMZA, *supra* note 64, at 55.

133. See L.J. CONSTANTINESCO, *RECHTVERGLEICHUNG BAND I* [COMPARATIVE LAW] 126 (1971).

134. HAMZA, *supra* note 64, at 55-56.

135. See J. GILSON, *supra* note 84, at 24.

136. See *supra* note 114 and accompanying text.

which did not change the “autochthonous” character of Roman Law.¹³⁷ It is important to our argument here to report his own words:

By the contact with foreign legal conceptions, which occurrence is now well established, [Roman Law] renewed itself. As an organism it assimilated these foreign elements, which did not deform the Roman legal system, but on the contrary contributed to make it more lively and young.¹³⁸

It's easy to extract from this quotation three different elements: First, the borrowings from the African-Mediterranean legal world are taken for granted and well-established, not by an outsider or a supposed crank, but by one of the leaders of the profession. Second, we see the Romanist pre-supposition that foreign elements could only “deform” an originary and pure Roman Law. It is impossible to conceive that Roman Law could receive an improvement from African-Mediterranean laws. (Clearly the discourse slights from scientific toward biased aesthetic values.)

Finally, in this aesthetic framework the problem of the “contact,” and possible “contamination” of Roman Law is solved by the use of a metaphor, a mere rhetorical device: thanks to Roman genius the contact resolved in an organic assimilation, showing the fabulous capacity of renewal¹³⁹ of Roman Law *even vis-à-vis* such risky contacts with cultural “others.”

We confront here the major characteristics of the myth of Roman Law: its capacity for renewal and assimilation, and ability to remain a unique and excellent legal system.

This approach has been indeed shared by such later outstanding scholars as Lambert and Appleton.¹⁴⁰ Both Lambert¹⁴¹ and Appleton,¹⁴² studying the Law of Inheritance and Wills, stressed the autonomous character of Roman Law in such a way that the very existence of borrowings became the solid proof of its uniqueness and superiority. We can admire the making of this doctrine as a masterful work of cultural defense.

On the German side, we encounter even greater achievements of cultural defense in the works of Mitteis and Goldschmidt. The two pursued

137. HAMZA, *supra* note 64, at 56.

138. GILSON, *supra* note 84, at 10 (“Au contact de ces idées juridiques étrangères dont la persistance est aujourd’hui nettement établie, il a renouvelé sa substance. Mais, comme les organismes, il s’est assimilé ces éléments étrangers. Ceux-ci n’ont pas déformé le système romain, ils l’ont au contraire, vivifié et rejeuni.”).

139. For a restatement of such capacity of renewal, see Johnston, *supra* note 42.

140. See HAMZA, *supra* note 64, at 56.

141. E. LAMBERT, LA TRADITION ROMAINE SUR LA SUCCESSION DES FORMES DU TESTAMENT DEVANT L’HISTOIRE COMPARATIVE [FORMS OF WILL IN ROMAN LAW IN LIGHT OF COMPARATIVE HISTORY] (1900).

142. E. APPLETON, LE TESTAMENT ROMAIN. LA MÉTHODE DU DROIT COMPARÉ ET L’AUTHENTICITÉ DES XII TABLES [WILLS IN ROMAN LAW. COMPARATIVE LEGAL METHODOLOGY AND THE QUEST FOR AUTHENTICITY OF THE XII TABLES] (1902).

two very different strategies, both directed to sterilize possible influences from Asia and Africa on Roman Law. One strategy was based on the role of Greek culture in the transplant of African-Semitic patterns; the other was grounded on general economic considerations. Both analyzed and strongly challenged the works of Revillout.

Mitteis is considered the founder of the School of *Antike Rechtsgeschichte*, the study of Ancient Mediterranean Laws, through a seminal work on the “vulgar” popular law applied in the Eastern part of the Roman Empire.¹⁴³ He did not deny the great impact of Eastern models on Roman Public Imperial Law (a point we shall discuss in detail below), but astonishingly enough, he attributed these patterns to the Greeks. He lent crucial importance to the Greek influence on the development of post-classical Roman Law.¹⁴⁴ The point is that the form of the Sacred Empire adopted to govern ancient Rome in the Post-Classical Age (after the third century C.E.) had been existing in Western Asia and Asia and in Egypt.¹⁴⁵ The Greeks never developed it. But when Alexander conquered both Egypt and the Middle East his descendants adopted this form. In Mitteis’ theory it was the influence of the Greek Hellenistic Ideal upon Roman Law which explains the final adoption of this form as the form of the late Roman Empire. Mitteis’ strategy is clear: Asian and African Models were adopted first by the Greeks and then, centuries later, by the Romans, and the Roman borrowing was a transplant from Greece, within the Indo-European Family.

It’s like confusing the milkman with the cow. Since everything which was Egyptian, or Assyrian, or Persian, has been filtered by Greek culture, all this became a Greek Ideal and so the Romans were indebted to the Greeks and not to Greek predecessors. Here again we find the “German fondness” for Greece.¹⁴⁶ Indeed such a prominent scholar as Paul Koschaker perceived the strategic character of this theory and showed how it could help to avoid “dethroning” Roman Law.¹⁴⁷

Goldschmidt’s strategy was quite different. He stressed the economic unity of the Ancient Mediterranean world as a whole,¹⁴⁸ thinking that this unity could justify the use of a “genetic” method in studying the legal institutions of the Egyptians, Babylonians, Assyrians, Greeks and Romans. Thus Goldschmidt was prepared to see some Roman institutions as outsprings of previous Eastern or Egyptian conceptions, and to examine the African-Mediterranean Model proposed by Revillout on this ground. But

143. MITTEIS, *supra* note 30, at 13.

144. See HAMZA, *supra* note 64, at 56.

145. See discussion *infra* Part II.C (entitled “The Origin of the State”).

146. Norton, *supra* note 81.

147. Koschaker, *supra* note 95, at 274.

148. See I LEVIN GOLDSCHMIDT, *HANDBUCH DES HANDELSRECHTS* [HANDBOOK OF COMMERCIAL LAW] 43 (Stuttgart, F. Enke, 3d ed. 1874).

Goldschmidt strongly and openly criticized Revillout's works not on the ground of historical findings, or by means of source criticism, but rather just because the French orientalist had not realized that the "Rechtsschoepfung", the Law-Making capacity, "[w]as peculiar to the Roman genius."¹⁴⁹ His theory is so imbued with pre-conceptions of Roman superiority in Law, that this unexamined pre-conception is openly stated as the pillar of the theory. He did not contest the appearance of the germs of many commercial institutions in Babylonian, Egyptian, Phoenician and Greek Law; he maintained, however, that these institutions received an "adequate legal form" only in Roman Law. Thus, he did not deny the borrowings themselves, but maintained that Roman genius alone transformed these borrowings into working legal institutions. It is again Rome's inexplicable "uniqueness" which transforms, like King Midas's hand, mud into gold. That is why Goldschmidt can rebuff Revillout's and Lapouge's theories as "dreams and fairy tales"¹⁵⁰ and reaffirm "unambiguously . . . the supremacy of Roman Law."¹⁵¹

The continuous discoveries, including the finding of the Stele of Susa in 1901, with the text of the Code of Hammurabi,¹⁵² gave growing momentum to the African-Semitic hypothesis, so that Mueller, a well-reputed Austrian scholar, proposed the Model of a common Mediterranean law, of which Roman Law would have been only an instance.¹⁵³ But once again his theory, presented just as an in-progress tentative explanation, was slashed down by legal historians as idle and unsound.¹⁵⁴ The main argument against him was always an appeal to Roman uniqueness in developing "primitive" ideas eventually shared with other ancient civilizations.

At the end of this section I wish to anticipate what is more fully developed in the second part, reporting that today source criticism, based on a direct appraisal of many ancient legal documents, is producing a shift in thinking and making point for Revillout. In a recent American appraisal of hundreds of Egyptian legal documents Cruz-Uribe concludes as follows:

I do believe that Revillout was correct in his approach . . . and that a new examination of the material, using Revillout's premise as a starting point, is in order.¹⁵⁵

149. *Id.* at 38 n.72; *see also* HAMZA, *supra* note 64, at 57

150. *Id.* at 52.

151. *Id.* at 59.

152. *See infra* note 332 and accompanying text.

153. *See* W. MUELLER, DIE GESETZE HAMMURABIS UND IHR VERHAELTNIS ZUR MOSAISCHEN GESETZGEBUNG, SOWIE ZU DEN 12 TAFELN [THE CODE OF HAMMURABI COMPARED WITH MOSAIC AND ROMAN LAWS] (1903).

154. *See* Piero Bonfante, *Il Codice di Hammurabi e le XII Tavole* [The Hammurabi Code and the Twelve Tables], in 1 MÉLANGES CORNIL 119 (Gand ed. 1926).

155. EUGENE CRUZ-URIBE, SAITE AND PERSIAN DEMOTIC CATTLE DOCUMENTS: A STUDY

Such revisionism, is nowhere supported by “experts” in Roman Law, with the outstanding exception of Hamza. Rather, it is to be developed by independent ancient law scholars outside the academic circles of Romanists.

C. The “Western Canon”: Tradition and Dissemination

Now that we have reconstructed a history of the historical consciousness¹⁵⁶ of the Western legal tradition as such, we are equipped to discuss the tenets that lie behind the package of the so-called Western legal tradition.

My point is neither that Revillout and Lapouge were right, nor that they were cranks. I am not at all interested in their reputation, any more than I am interested in the reputations of the other German scholars we have encountered. Besides, I do not think that we have, to this day, enough knowledge of the Ancient world to fully support their theories. I just want to stress that the responses of professionals to the African-Semitic Hypothesis have been “poetic” ones— metaphors, rhetorical tricks, aesthetic arguments— which certainly do not match their own alleged scientific standards. What is interesting to me is this form of embarrassment displayed by professionals, leading them to deny their own conventional “scientific” tenets. The professionals do not feel at ease, and so they tend to use tropes¹⁵⁷ instead of arguments to make their points.

We have seen that professional legal historians admitted a longer and growing number of borrowings, but they refined a model where these borrowings are inserted within a framework of “ever-renewing” Roman Law. This model, I maintain, is the same one we see at work today in Johnston’s or Zimmerman’s theories.¹⁵⁸ It is a model aimed at showing, but *also* based upon, a continuity and greatness of the Roman tradition which they place beyond dispute. The previous Aryan Model has been abandoned, and the most exalted praise of Roman uniqueness is no longer openly recited, but in the course of the debate, a newer, even stronger model is elaborated.

I will try to sketch this model and its built-in protections against external critiques, as well as its importance for the actual understanding of the Western legal tradition.

This model is based, first of all, on the very idea of tradition as a living and regenerating body of conceptions and ideas. To discuss it, we may rely here on the same theory of Berman about traditions, as the last general effort to reassemble the package of the Western legal tradition. According to this theory, to speak of a “tradition” of law in the West is to

IN LEGAL FORMS AND PRINCIPLES IN ANCIENT EGYPT 80 (1985).

156. See WHITE, *supra* note 18, at 1.

157. See *id.* at 31-32.

158. See Johnston, *supra* note 42; see also ZIMMERMAN, *supra* note 46.

call attention to two major factors:¹⁵⁹ first, that legal institutions developed continuously over generations and centuries, with each generation consciously, even if not necessarily deliberately, building on the work of previous generations toward particular goals; and, second, that this process of continuous development is conceived as a process not merely of change but of organic growth.¹⁶⁰ In this model, a tradition is a “real” thing existing out there: something we can observe. It is something in which we participate, something to which we contribute as it evolves. But a “tradition” is not a result or a creature of an our own strategy. It is not conceived as a peculiar product of a framework we impose on external facts to try to create from them a meaningful picture.

If this is the case, I simply maintain that this idea of tradition, still cultivated in law, clashes with the “framework notion of understanding” that now predominates in the human sciences.¹⁶¹ I think that the grouping together of various elements, differing in time and space, and then stating that the whole of these elements make up a single unity – a single unified tradition—is the result of adopting a “framework.” The adoption of a framework depends on a theory. We must have a theory justifying the framework we use. The framing of a theory is a purposeful activity. Theories are not impressed upon us by impudent external facts. We adopt a theory to pursue a purpose. This simply means that a theory depends on our strategies. That is why, in the end, the “existence” of a tradition is the outspring of our present strategies. “Traditions” which appear or claim to be old are often quite recent in origin and sometimes invented.¹⁶² The “course” of history, the narrative of human agency from past to present, is an illusion. Our past is in a way always an invention of our present.¹⁶³

If we adopt this Framework notion of historical understanding we are prepared to appraise two alternative and opposite theories: a model of history as tradition and continuity, and an opposite “discontinuity” approach.¹⁶⁴

It is quite interesting to note that, whereas Western legal historians have adopted in the last ten years a marked bias in favor of continuity,

159. BERMAN, *supra* note 4, at 5.

160. *See id.* at 5-7.

161. William Outhwaite, *Hans-Georg Gadamer*, in *THE RETURN OF GRAND THEORY IN THE HUMAN SCIENCES* 23 (Quentin Skinner ed. 1985).

162. Eric Hobsbawm, *Introduction: Inventing Traditions*, in *THE INVENTION OF TRADITION* 1 (Eric Hobsbaum & Terence Ranger eds. 1996).

163. Mark Philip, *Michel Foucault*, in *THE RETURN OF GRAND THEORY*, *supra* note 146, at 78.

164. I derive this distinction between continuity and discontinuity in “histories” from my reading of MICHAEL FOUCAULT, *THE ARCHEOLOGY OF KNOWLEDGE* (Alan Sheridan Smith trans., Random House, 1972) (1969). You may find similar suggestions in HAYDEN WHITE, *THE CONTENT OF THE FORM NARRATIVE DISCOURSE AND HISTORICAL REPRESENTATION* 109-84 (1987).

without an open debate on the merits of this bias, and its implications,¹⁶⁵ such a debate happened in the 1980's among Marxist legal historians who openly posed the question of discontinuity in development,¹⁶⁶ with a strong emphasis by some radical scholars on discontinuity in the structuralist spirit.¹⁶⁷ I have the feeling that the political dimension of historical accounts, by which I mean the approach chosen to mediate between the historical field and an audience, can easily emerge from this opposition of attitudes. A radical society is much more ready to legitimate itself on a discontinuity, and radical historians can more easily be open to recognize major breaks, and revolutionary moments, in the "Course of History." But if this is true for radicals, the reverse is also true for non-radicals engaged in a project of genealogical legitimization, where a recall to the past can serve to manage the issues raised by dramatic changes. And indeed, the continuity approach, which leads us to "observe" the existence of traditions, is based, at the very root, on a tendential but systematic denial of change in history.¹⁶⁸ The Continuity approach always internalizes change within an "evolving" tradition, and strategic choices tend to be presented more as responses to a past context with strong constraints, than as deliberative and purposive projects of more or less political nature aiming at designing the future.¹⁶⁹

Now we can perceive how feeble this approach is in fact. It is feeble because its very foundation lies in the desire to see continuity, and an unwillingness to admit change. But it is quite easy to simply reverse this approach. Since it is based on putting continuity in the foreground, and changes and breaks in the background, we can adopt the delegitimizing move to reverse the grounds. So we can contrast the evolutive model with a kind of "archeological" discontinuous¹⁷⁰ approach to the dissemination¹⁷¹

165. These implications and merits are sometimes discussed by Western historians outside the legal field. See, e.g., *STUDIES IN SOCIAL DISCONTINUITY* (Charles Tilly, ed., 1972).

166. See VLADIMÍR VAVRÍNEK, *FROM LATE ANTIQUITY TO EARLY BYZANTIUM* (Academia Praha ed. 1985) (reflecting a symposium on continuity versus discontinuity in the Formation of Byzantine Society, organized by the International Committee for the Promotion of Classical Studies in the Socialist Countries).

167. See A.P. KAZHDAN & G. CONSTABLE, *PEOPLE AND POWER IN BYZANTIUM: AN INTRODUCTION TO MODERN BYZANTINE STUDIES* (1982). For a Western critical survey of Structural History, see CHRISTOPHER LLOYD, *THE STRUCTURES OF HISTORY* 66-88 (1993).

168. On the conservative use by lawyers of history as "continuity and tradition," see Robert W. Gordon, *Critical Legal Histories*, 36 *STAN. L. REV.* 57, 57 (1984).

169. In this kind of approach when conscious design is admitted, it is tentatively managed in a "scientific" way, see Robert C. Clark, *The Interdisciplinary Study of Legal Evolution*, 90 *YALE L.J.* 1238 (1981), with a strong emphasis on "testability" and "predictions."

170. CHARLES C. LEMERT & GARTH GILLAN, *MICHEL FOUCAULT: SOCIAL THEORY AND TRANSGRESSION* 41 (1982); see also MICHEL FOUCAULT, *LANGUAGE, COUNTER-MEMORY, PRACTICE* 154 (D.F. Bouchard ed. 1977).

171. On the use of "dissemination" as a practice in humanities, see JACQUES DERRIDA, *SPURS: NIETZSCHE'S STYLES* (Barbara Harlow trans. 1979).

of events. The idea of discontinuity is indeed well established in Foucault, according to whom history becomes effective to the degree that it introduces discontinuity into our very being. I think that his approach is peculiarly important here because it casts “[s]erious doubt on the value of a specifically ‘historical’ consciousness,” stressing “the fictive character of historical reconstructions.”¹⁷² Thus we can see how the paradigm of discontinuity is linked with the pattern of dissemination, and opposed to the evolutionary model.

From this point of view, events, like statements, are to be seen in a dispersion, and it is clear that they do not come together by themselves in forming a theory. They are assembled by real people with the cement of a narrative, and according to a strategy of assemblage. They are manufactured and processed in a theory. Every theory is a construction, an artifact, and construction entails exclusion. History, indeed, is a form of writing, having to do with discontinuity as a core feature of events.¹⁷³ If we remember that the understanding depends on adapting a framework, the grouping of events depends on a theory, and the adoption of a theory depends on a strategy, we can easily pursue the challenge of questioning why the continuity model is chosen rather than the alternative model of discontinuity. Thus, from my own viewpoint, the interest in praising Roman and Western original legal genius, as opposed to borrowing from other civilizations, is attributable to the larger project of sustaining retroactively the alleged “cultural” superiority of modern industrial society. A new rich needs, after all, a genealogy to show that it is not as new as it appears to be.

I shall try to show in the second part of this work why there are good reasons to adopt the opposite views and to abandon this prejudice. Here I still want to stress how this discussion is crucial not only for legal history but for Comparative Law as well. Dispersion, and dissemination are one with diffusion. To disperse is to scatter, to venture out, to spread abroad, to diffuse, as the sprinkling of water drops, or the casting of seeds in sand, rocks or grass. Thus, the problem of dissemination and discontinuity in history involves the problem of the dispersion of legal traits.

As I have said before, I presume that Watson’s theory of legal transplants¹⁷⁴ fits well in this framework, and can be very useful. Watson’s theory is normally challenged as conservative, or worse.¹⁷⁵ But I think it can be turned into a powerful tool for a critical theory of legal history. The delegitimizing role Watson’s theory can play has not been properly understood, and therefore its revolutionary potential has not been appreciated. I do not espouse all of Watson’s assertions, and I dissent on

172. WHITE, *METAHISTORY* *supra* note 18, at 1-2.

173. See JACQUES DERRIDA, *MARGINS OF PHILOSOPHY* 291 (Alan Bass trans. 1982).

174. See WATSON, *supra* note 13.

175. See Ewald, *Comparative Jurisprudence (II)*, *supra* note 468.

many points. Like all theories, it is a package, and we can deconstruct it by using some features and rejecting others. I also think, however, that we retain the bulk of Watson's transplant theory if we adopt the reading of it which follows. What I do now is to try to give a radical interpretation of the theory of legal transplants, instead of a conservative one, displaying how this form of conservatism can be used for delegitimization and critique.

If one postulates an inherently close relationship between law and the society in which it operates, legal transplants ought to be virtually impossible. Watson rejects this idea; he postulates that law develops mainly by borrowing and that the history of law is characterized by a prodigious amount of borrowing.¹⁷⁶ Legal systems are normally amalgams of patterns received by other systems. Borrowing is common throughout social life, and thus the prevalence of borrowed elements in law is hardly explicable entirely in terms peculiar to law. Legal borrowing calls for special explanation only insofar as it differs from other kinds of cultural diffusion. What is needed in the study of the diffusion of legal ideas is not simply a catalog of borrowed "traits," but an examination of the devices for cultural sharing and selection through which legal "unity" is constructed and sustained. From this standpoint the essence of a culture is contained in its contradictions, the adoption of foreign elements, and the ideological presentation of these elements as composing a unity.¹⁷⁷ Ultimately, Comparative Law should aim to produce a general theory about law and legal change and the relationship between legal systems and rules and the society in which they operate.¹⁷⁸ As Roscoe Pound noted, "[h]istory of a system of law is largely a history of borrowings of legal materials from other legal systems."¹⁷⁹ I think that this is a perfect statement of a critical view of the law and of legal tradition.

The conservative flavor normally is perceived in what I call Watson's "serendipity approach" to legal change. Chance, he argues, plays a major role in determining what law will be borrowed:¹⁸⁰ legal transplants have not usually been the result of a systematic search for the most suitable model; social and economic factors have a much more attenuated effect than is normally supposed in theories of law and society, law is largely autonomous operating in its own sphere.¹⁸¹ Besides, Watson emphasizes in his accounts the absurdity and casual occurrence of many transplants, aiming, one senses, to mock every effort to build a theory. In this sense he

176. See WATSON, *supra* note 13, at 6; WATSON, LEGAL ORIGINS, *supra* note 16, at 293.

177. See WATSON, COMPARATIVE LAW AND LEGAL CHANGE, 37 CAMBRIDGE L.J. 313, 326 (1978).

178. See *Id.*, at 321-34.

179. ROSCOE POUND, THE FORMATIVE ERA OF AMERICAN LAW 94 (1938).

180. WATSON, *supra* note 13.

181. See ALAN WATSON, THE EVOLUTION OF LAW, 119 (1985).

is a theoretical scofflaw who produces a mass of possible counter-examples to quiet every imaginable theory.

I think that the criticism of law's autonomy singled out by Watson is misconceived and politically naive. Watson's premise is that the law is largely autonomous *because* it is largely the product of a law-making élite relatively insulated from social concerns and constantly in search of legitimacy. From this point of view his theory of legal autonomy can be used as strong critique of the existing and unlegitimated governing élites of lawyers,¹⁸² especially in Western countries.¹⁸³ The theory gives us a picture of law as a bundle of borrowings pursued by insulated élites, who constantly deny the fact, and who present highly sophisticated theories of interpretation and scholarly elaborated genealogies of evolution, which are intended as strategies of legitimization. And if it is true, as Watson maintains, that both Roman and English legal history furnish striking examples of legal rules often out-of-step with the needs and aspirations of society, or any particular group or class within society,¹⁸⁴ it becomes apparent that lawyers, and élites, *especially* in the West, are claiming a legitimization they *do not* deserve.¹⁸⁵

This reading of Watson's theory may well be intended as a strong basis for critique, as well as it shows how Comparative Law can be used for delegitimizing projects. I think that my reading shows how, using Watson's viewpoint alone, without any further reference to French philosophers, the dispersion of events may be seen as ideologically packed in a unity by a biased genealogy, and by a professional elite in search of legitimacy.

Such a reading of the theory of transplants, a theory promulgated by Watson, one of the leading Romanists, can be used perfectly to cope with the problem of continuity and discontinuity in legal evolution, and so can be used *against* the conventional theories of professional Romanists.

182. See KENNEDY, *CRITIQUE*, *supra* note 8, at 284, on the emphasis on the role of élites as a distinctive feature of progressive historicism in comparison with neo-Marxian analysis.

183. For a use of Watson's theory pointing at "borrowings" as "techniques" of legal elites in collaboration with political leaders, with reference to Islamic law, see Donald L. Horowitz, *The Qur'an and the Common Law: Islamic Law Reform and the Theory of Legal Change*, 42 AM. J. COMP. L. 543, 570 (1994).

184. For a restatement of the theory embodied in Watson's reply to his critics, see Alan Watson, *Legal Change: Sources of Law and Legal Culture*, 131 U. PA. L. REV. 1121, 1136-46 (1983).

185. I think that the basic strategy of these elites is that of "filling the gaps" in search for legitimating authorities, to be found abroad if not available at home. This does not bar the pursuit of more elaborate and politically motivated strategies. It represents just the basic form of self-legitimization, and it is patently based on a hidden logic of prestige and exclusion: legal systems are divided into prestigious and contemptible, and solutions are borrowed from the former, and maybe transplanted to the latter. It is a kind of an "alimentary chain," maintained by the last in the chain. On the role of "prestige" in legal borrowings, see Rodolfo Sacco, *Legal Formants: A Dynamic Approach to Comparative Law*, 39 AM. J. COMP. L. 1 (1991).

In these terms, if we adopt a Continuity approach¹⁸⁶ to Roman Law and the Western legal tradition, we can maintain that every new piece of borrowing from abroad, or every apparent break with the past is indeed a renewal of the old, or an original appraisal transforming the former element into a purely Roman achievement. If we adopt a view centered on the receiving country, we may always maintain that genius may find its expression also in the readiness to absorb and assimilate notions and techniques from the outside. It is also certainly true that “[w]hen texts from one legal system are received into another, the use made of the text in the recipient system will be a function of the needs, values and system of meanings of the latter, not the former.”¹⁸⁷ This is certainly true, because borrowing is a creative and selective activity. But the point is exactly that the system found inspiration abroad and so internal cultural strategies could unfold because of the external “contact” or “contamination.” We cannot know if these systems would have succeeded otherwise.

It must be clear that this is not a problem of praising or blaming the borrowing system. I don’t blame it. I do not stamp it with *a badge of inferiority* for having borrowed. If this be so, it is solely because the Western legal historians *choose to put that construction upon it*. For me it is just a question of source criticism.¹⁸⁸ But if we look for roots it is evident that it is important from whence the source came, as well as why and how it was received. If genealogies are produced by insulated elites for the sake of legitimization, hiding the bundle-like nature of the legal systems, this represents a typical exclusion through denial of unwelcome contacts with unwelcome civilizations, civilizations to which we do not want to be indebted.

II. A Critique of the Western Genius

A. Defamiliarizing the Western Family

My point about Discontinuity developed at the end of the first part, *supra*, is peculiarly important in relation to the link between modern European laws and ancient classical Roman Law. As we saw, it has been the pivotal point of Zimmerman¹⁸⁹ to reaffirm this direct descendance.

But the pattern of Discontinuity is shared, I think quite correctly, by

186. See *supra* note 164 and related text.

187. Bernard S. Jackson, *Modeling Biblical Law: The Covenant Code*, 70 Chi.-Kent L. Rev. 1745, 1755 (1995).

188. See L.A. REYNOLDS & N.G. WILSON, *SCRIBES AND SCHOLARS: A GUIDE TO THE TRANSMISSION OF GREEK AND LATIN LITERATURE* 207 (Oxford, 3d ed. 1991), according to whom “source criticism” is the tendency in ancient literature history where the business is to follow back the threads of transmission and try to restore the texts as closely as possible to their original form.

189. See Zimmerman, *supra* note 47.

such eminent Roman Lawyers as Peter Stein,¹⁹⁰ according to whom Zimmerman's emphasis on the classical law militates against a proper understanding of the roots of modern civil law.

If we share the framework notion of understanding adopted in humanities, and discussed above in the previous section, we are freed to look for the needs which the theory of uniqueness and continuity of Roman Law satisfies. First of all, once Roman Law is viewed as but a bundle of traits borrowed from abroad, it becomes just another iteration of a broader Mediterranean law, and so it loses its special place in modern legal studies. Second, if Roman Law is not a continuing tradition from ancient times to present, it is patently false to say that modern law is rooted in it. Too many breaks occurred in history from Roman times to now. These breaks can be softened only by the very "metaphysical" idea of an underlying evolving tradition with changing details, but unchanged in its essence. Once again Roman Law is to lose its special status in legal scholarship.

Then, recalling the reading of Watson's theory of elites in the field of law set forth above, we can single out very special reasons to maintain the Continuity Model: these reasons are strictly linked to the survival of Romanists as professionals. They have a vested interest in maintaining the Model, they are biased, and I think that their special interest must be taken into account in judging alternative theories and models.

Such particular interest of a sub-group is not without impact on the general picture of the law. If modern Western law is to be rooted on Roman uniqueness, we can still perceive Western legal history as a unit evolving from Roman times through the Middle Ages to its actual predominance as "the" modern law *par excellence*. Western law split in two major families, Common Law and Civil Law, but traditional British isolationism is now overwhelmed and quite superseded by Comparative Law efforts to establish both the common origin and the present merging of the two families into one system marked by local variances.¹⁹¹ From this point of view it is true that Comparative Law, coupled with traditional Roman-based legal history, becomes a project of global cultural governance in the field of law.¹⁹² A major strategy of this project is the exoticization of legal cultures different from the Western one. Babylonian, Egyptian, and Syrian law are exotic, whereas Roman Law is not, even if it was based on slavery and a lot of magic.¹⁹³

Our view changes significantly if we simply abandon the Continuity

190. See Peter Stein, *Reinhard Zimmerman's The Law of Obligations: Roman Foundation of the Civilian Traditions*, 38 AM. J. LEGAL HIST. 94 (1994) (book review).

191. See the critique of the mainstream theory in Pierre Legrand, *European Legal Systems Are Not Converging*, 45 INT'L & COMP. L.Q. 52 (1996).

192. See Kennedy, *supra* note 5, at 581.

193. See discussion *infra* Part II.B (entitled "Contract, Magic and Exotic").

model and adopt a Discontinuity approach.¹⁹⁴ This approach, which I link to modern ideas about interpretation and the historical work, may also be justified with reference to Watson's theory of legal transplants, as we did in the previous section, and to a standard form of source criticism: a kind of critique normally adopted outside legal history.¹⁹⁵

The Discontinuity model presents a theory that Roman Law (I would say as every law) comes from a number of different sources, and that it was carried out over a period of many centuries by persons who had various motives and who culled and patched and rewrote and amplified past records for newer purposes. The work thus produced is not a coherent and unified tradition evolved from "original" sources, but from a series of various institutional settings, and different cultural landscapes. These different settings and their different sources are in dispersion, which the condense-evolutionary model try to manage by denying the dispersion as well as the breaks.

From this viewpoint, the "renewal" of Roman Law through the ages does not demonstrate a peculiar capacity in Roman Law itself, but rather the peculiar capacity of later lawyers, especially in the Civil law, to adopt newer rules and solutions and to attach them to the authority of the old Roman texts.¹⁹⁶ Coptic, Ethiopian, or Chinese texts would have worked as well. The "recall to Rome" does not reflect the quality of Roman products, but the strategy of legitimization that dominated in Europe.

The shift in approach I suggest here has various consequences for the "ideology" of Western law. The first is that Western law is a patchwork no less exotic than others. The second is that Western law is derived not only from Roman Law, but from other ancient laws as well. This suggests a more globalized view of Western institutions, and of their origins. Indeed, it intimates that "Western" law is not nearly so "Western" as we have been led to believe.

My strategy in this second half of the work is to critique current "ideological" accounts of Roman Law by showing its "primitivism," stressing its exoticism, and displaying how much its original characters were foreign to the present Western mind. I demonstrate that, even when held up to the standards adopted by those who praise it, Roman Law is defective. Indeed the best way to undercut a rival theory is to rely on the same tenets. For this I rely sometimes even on old evolutionary patterns to

194. See FOUCAULT, *supra* note 164 and related text.

195. On source criticism, see REYNOLDS & HAZARD, *supra* note 188. See also JOHN B. GABEL & CHARLES B. WHEELER, *THE BIBLE AS LITERATURE* 84-87 (2d ed. 1990). Source criticism is now seen even as quite outdated in these areas of study; see the various approaches used in GEORGE AICHELE ET AL., *THE POSTMODERN BIBLE: THE BIBLE AND CULTURE COLLECTIVE* (1995); but it can still be effectively used as a weapon of critique in the old-fashioned province of legal history.

196. On the transformation of Justinian Roman Law by later European lawyers, see BERMAN, *supra* note 4, at 129.

show the contradictions in traditional literature when Roman greatness is at stake.

My argument is centered upon few but central examples: the theory of contracts, that of the State, the settling of disputes, and the role of professional elites in shaping the legal culture in ancient times.

In so doing I can rely on accepted views of legal historians showing that a radical critique can be based on their own accounts, merely by abandoning their biases. Thus it is not necessary to rely upon new theories, or new findings, but simply to employ a new reading of the available doctrines.

(1) *Rome and the West*

Here I sketch a basic account of Roman legal history, something which is not properly part of the argument but which must be outlined here to orient the reader to what follows. I rely predominantly on the standard account made by the well-known expert in Roman Law, O.F. Robinson.¹⁹⁷

Tradition has it that Rome was founded in 753 B.C.E. and ended with the death of the Emperor Justinian at 565 C.E.. This span of roughly “[t]hirteen centuries may be conveniently divided into four basic periods: The Monarchy, the Republic, the Principate, and the Dominate.”¹⁹⁸ The opening of the second, third and fourth periods are marked by violent crisis which gave birth to new arrangements.

The times of Monarchy are too far remote and obscured by fabulous stories, and do not pertain directly to the history we deal with here. Nevertheless, under the constitutional arrangement of this period we find three basic elements: the king, who was supreme magistrate, the chief priest, chief judge and commander in chief, the Senate, which was the assembly of the heads of noble clans, and the popular assembly, which was the group of all freemen apt to serve in the army. Our story begins later when this arrangement was already entirely superseded by a new republican constitution.

According to the standard presentation supplied by Robinson, from 366 B.C.E. until the last century B.C.E., the Roman constitution was stable in the form of an aristocratic republic with three basic elements: magistrates, Senate and people.¹⁹⁹ But the whole republic was essentially dominated by a few important families still shaped in a clanic framework.²⁰⁰ The magistrates exercised the executive and administrative power, they were elected annually, and each magistracy was collegiate.

197. See ROBINSON, *supra* note 67, at 3.

198. J.A.C. THOMAS, TEXTBOOK OF ROMAN LAW 13 (1976).

199. See ROBINSON, *supra* note 67, at 3.

200. See PARENTÉ ET STRATÉGIES FAMILIALES DANS L’ANTIQUITÉ ROMAINE [KINSHIP AND FAMILY STRATEGIES IN ANCIENT ROME] 254 (Ecole française de Rome, J. Andraeu & H. Bruhns eds. 1990) (plunging the roman family system into a wider Mediterranean common scheme).

The Senate was an advisory assembly composed by the heads of the great families and of former magistrates. The people, namely all male adult citizens, met when summoned by magistrates in various assemblies, elected the new magistrates, and passed or rejected laws proposed to them. Jurisdiction over citizens was the job of the Praetor.²⁰¹ After 242 B.C.E., a second Praetor was created to deal with cases involving foreigners. It is remarkable to note that these institutions were properly the institutions of the *city* of Rome, and that, though ultimately adapted to the role of governing an Empire, until the Late Empire Rome remained essentially an enlarged city-state.

Beginning in 133 B.C.E., a major revolution occurred within Roman society due to many factors beyond the scope of this work.²⁰² For our purposes it is enough to recall that the old clanic arrangement collapsed and that a single clan, the *gens Julia*, to which Caesar belonged, emerged as a ruling family.²⁰³ Augustus, the first “emperor” to emerge, made a new constitutional settlement marking the start of the Principate.²⁰⁴ “In this period the assemblies, the Senate and the magistracies all continued in theory to function as they had before.”²⁰⁵ No new theory of government was erected and the “emperor” formally remained one of the magistrates, the first in preeminence among the senators. (*Princeps senatus* from whence comes the label of “Principate” used to denote the period). The emperor was also the commander of a more or less reluctant army. Though lacking the formal assumption of fresh legal powers, imperial authority penetrated all departments of government, and, above all, the new system was recognized as normal and necessary.

In 212 C.E., the *Antoninian Constitution* extended Roman citizenship to all the inhabitants of the Empire, and the old city structure collapsed. This fact was of great importance.²⁰⁶ We shall often refer to it as the Globalization of Roman Law. Until 212 C.E. Roman Law was indeed the law of the Romans alone, and other peoples of the Empire lived to a great extent under their own national systems. After, Roman Law was globalized and it really became the legal framework of the whole empire, but it came to be reframed on new basis.

The third century was a period of economic and political turbulence.²⁰⁷ “In the first 262 years of Roman rule there were some twenty-five emperors, and then in the next 50 years a further twenty-one.”²⁰⁸ In this

201. See ROBINSON, *supra* note 67, at 3.

202. See P.A. BUNT, *THE FALL OF THE ROMAN REPUBLIC* (1988).

203. See RONALD SYME, *THE AUGUSTIAN ARISTOCRACY* (1986).

204. See ROBINSON, *supra* note 67, at 9.

205. *Id.* at 10.

206. See Wolfgang Liebeschuetz, *The End of the Ancient City*, in *THE CITY IN LATE ANTIQUITY* 4 (John Rich ed., 1992).

207. See ROBINSON, *supra* note 67, at 2.

208. *Id.*

century Roman power was a closed system, and as major immigrations of German tribes infiltrated the West, the Eastern part of the Empire increasingly assumed more economic and political prevalence. We shall often refer to this crisis as the Great Crisis of the third century, or the Great Crisis alone. It marked a major break in Roman history.²⁰⁹

At the end of the century, an Illirian²¹⁰ general, Diocletian (284 - 305 C.E.), restored a central authority on a new constitutional basis, starting the period of the Dominate.²¹¹ He transformed the imperial power into a sacred monarchy with a strong central bureaucracy, and even removed the capital from Rome.²¹² Diocletian tried to ground the monarchy on the old religion but, seven years after his death, in 312 C.E., Constantine the Great preferred to rely on the new Christian faith²¹³ which had spread among the Greek-speaking elites of the Eastern part,²¹⁴ and he finally founded a New Rome at Constantinople, present Istanbul, on a peninsula between Europe and Asia. The Latin-speaking West, whose armies were in practice made up of Germans, and whose religion became Catholic, was finally separated from the Greek-speaking orthodox East in 395 C.E. at the death of Emperor Theodosius. After some decades, starting from 476 C.E., the German generals governing the Western armies²¹⁵ no longer assumed the imperial title,²¹⁶ and the empire split into various new "European" kingdoms. The Eastern part, reorganized by Justinian, lasted for another 1,000 years, until the Turks ultimately conquered Constantinople.

(2) *Egypt and the East*

As in the previous section I gave a brief sketch of Roman legal history, here I do the same for the other Mediterranean laws involved in the argument, and especially for Egyptian law because of its peculiar relevance. This brief account is not properly part of the argument, but is restricted to notions relevant to this work.

"Mediterranean" as a geographic region can well be used also as spatial concept of common historical evolution of different peoples, from

209. See PETER BROWN, *THE MAKING OF LATE ANTIQUITY* 2 (1978) (arguing that the third century B.C.E. must lie at the center of any account of late Roman history).

210. The Roman province of Illiria covered approximately the area of the former Yugoslavia.

211. See STEPHEN WILLIAMS, *DIOCLETIAN AND THE ROMAN RECOVERY* (1985).

212. See *id.* at 41.

213. See ANDREW ALF LDI, *THE CONVERSION OF CONSTANTINE AND PAGAN ROME* (Harold Mattingly trans. 1948). On the advent of Christianity within the imperial structure, see also R. MCMULLEN, *CHANGES IN THE ROMAN EMPIRE 124-55* (1990).

214. See PETER BROWN, *AUTHORITY AND THE SACRED ASPECTS OF THE CHRISTIANISATION OF THE ROMAN WORLD* 3 (1995).

215. I do not delve into the investigations on the final ruin of the Western empire. For a complete review of the most important theories, see *THE FALL OF ROME: CAN IT BE EXPLAINED?* (Mortimer Chambers ed., 1963).

216. Remember that in Latin the title "emperor" merely meant commander-in-chief of an army.

the general²¹⁷ as well as from the legal point of view.²¹⁸ The sphere of Ancient Mediterranean law is huge, covering more than three thousand years of history.²¹⁹

Egyptian ancient history can be divided conveniently into three basic *dynastic* periods: the Old (2695-2160 B.C.E.) Middle (1991-1785 B.C.E.) and New (1540-1070) Kingdoms.²²⁰ After that date, the history of the country was marked by invasions from other peoples, and the kingdom became absorbed into the Persian Empire, until this empire was in turn conquered by the Greeks led by Alexander the Great. This, in 332 B.C.E., started the so-called Ptolemaic period, named for Alexander's general Ptolemaeus, who became king after Alexander's death.

The literature on law in the area of the Eastern Mediterranean, including the African coast where Egypt lies,²²¹ has been growing quite slowly during this century with the appearance of some European essays,²²² Pirenne's three-volume *Treatise on Egyptian law*,²²³ the contributions of Aristide Théodoridès,²²⁴ and some comparative analyses which have focused in particular on Jewish law.²²⁵ Finally, we are now seeking a revival of the subject in the American literature,²²⁶ which has displayed a growing interest in legal institutions in the region.

Ancient Egypt is defined as a water-based society centered on a

217. See generally FERNAND BRAUDEL, *THE MEDITERRANEAN AND THE MEDITERRANEAN WORLD IN THE AGE OF PHILIP II* (Sian Reynolds trans., 1972).

218. See WALTER SELB, *ANTIKE RECHTE IM MITTELMEERRAUM: ROM, GRIECHENLAND, AEGYPTEN UND DER ORIENT [ANCIENT MEDITERRANEAN LAWS]* (1993).

219. Geoffrey P. Miller, *Foreword: The Development of Ancient Near Eastern Law*, 70 CHI.-KENT L. REV. 1623, 1623 (1995).

220. See BARRY J. KEMP, *ANCIENT EGYPT: ANATOMY OF A CIVILIZATION* 14 (1989).

221. For a bibliography until 1945 of works in English, see ADOLF BERGER, & A. ARTHUR SCHILLER, *BIBLIOGRAPHY OF ANGLO-AMERICAN STUDIES IN ROMAN, GREEK, AND GRECO-EGYPTIAN LAW AND RELATED SCIENCES, 1939-45* (1945).

222. See, e.g., ERWIN SEIDL, *AGYPTISCHE RECHTSGESCHICHTE DER SAITEN-UND PERSERZEIT [EGYPTIAN LEGAL HISTORY]* (Glueckstadt, J.J. Augustus, 2d ed. 1968); BERNADETTE MENU, *DROIT, ECONOMIE, ET SOCIETE DE L'EGYPTE ANCIENNE: CHRONIQUE BIBLIOGRAPHIQUE, 1967-1982 [LAW AND SOCIETY IN ANCIENT EGYPT: A BIBLIOGRAPHY]* (1984); BERNADETTE MENU, *RECHERCHES SUR L'HISTOIRE JURIDIQUE, ECONOMIQUE ET SOCIALE DE L'ANCIENNE EGYPTE [LEGAL, ECONOMIC AND SOCIAL HISTORY OF ANCIENT EGYPT]* (1982).

223. See JACQUES PIRENNE, *HISTOIRE DES INSTITUTIONS ET DU DROIT PRIVÉ DE L'ANCIEN EGYPTE [HISTORY OF ANCIENT EGYPTIAN LAW]* (1932); see also JACQUES PIRENNE & ARISTIDE THÉODORIDÈS, *DROIT EGYPTIEN [EGYPTIAN LAW]* (1966).

224. See, e.g., Aristide Théodoridès, *The Concept of Law in Ancient Egypt*, in *THE LEGACY OF EGYPT* 290 (J.R. Harris ed., 2d ed. 1971).

225. See, e.g., JACOB J. RABINOWITZ, *STUDIES IN LEGAL HISTORY* (1958) (comparing Jewish and Egyptian law).

226. See, e.g., Ross VerSteeg, *Law in Ancient Egyptian Fiction*, 24 GA. J. INT'L & COMP. L. 37 (1994); CRUZ-URIBE, *supra* note 141; David Barrington Taylor, *Law under the Pharaohs*, 6 POL'Y L. REV. 66 (1980). For a comparative perspective, see Robert C. Ellickson & Charles DiA. Tharland, *Ancient Land Law: Mesopotamia, Egypt, Israel*, 71 CHI.-KENT L. REV. 321 (1996).

desert floodplain.²²⁷ Egypt arose as a state by coordinating large-scale economic projects, public works,²²⁸ and the production of bronze, the strongest known metal of the time. All this required a strong central administrative organization. Generally, though, the ancient Egyptians are not regarded as contributing a great deal to jurisprudence. Yet the fact is that there are numerous legal documents among the earliest extant hieratic papyri.²²⁹ Throughout the various dynastic periods we find legal instruments. Here and there are record of cases; and a code of laws is mentioned as early as the Middle Kingdom.²³⁰ Thanks to cuneiform records, evidence of the history of law in the ancient Middle East now extends back to the early third millenium, and the very earliest records reveal a highly organized legal system.²³¹ Indeed there is no better documented ancient system than Egypt's. We are provided with a rich and detailed array of primary sources displaying an articulated practice of both public and private law.²³² We can now speak of a highly developed legal system evolving steadily over many generations.²³³

Our present knowledge of law in ancient Egypt is based on Hieroglyphic, Hieratic, Demotic, Aramaic, and Coptic documents. Hieroglyphic was the Egyptian script first attested in the late fourth millenium. Hieratic is the script gradually developed from Hieroglyphic about 2500 B.C.E., changing the formal pictorial Hieroglyphic into a cursive script. Demotic is the script that was developed for the rapid writing of legal and business documents after 650 B.C.E.²³⁴ Aramaic, which is peculiarly important for a comparison of law in antiquity,²³⁵ was a West Semitic language, originally spoken in parts of what is now Syria, that became the *lingua franca* of the Assyrian, Neo-Babylonian and much of the Persian empires. It replaced the Canaanite dialects and Hebrew in the East Mediterranean during the middle of the first millenium B.C.E.. Thus many of the documents written in Aramaic reflect broad commercial

227. See KARL W. BUTZER, EARLY HYDRAULIC CIVILIZATION IN EGYPT : A STUDY IN CULTURAL ECOLOGY xii-xv (1976); see also Ellickson & Thorland, *supra* note 226, at 332.

228. See KARL A. WITTFOGEL, ORIENTAL DESPOTISM: A COMPARATIVE STUDY OF TOTAL POWER 49-100 (1957); see also RICHARD A. POSNER, THE ECONOMICS OF JUSTICE 144 (1981).

229. THE METROPOLITAN MUSEUM OF ART, TEN COPTIC LEGAL 3 (A. Arthur Schiller ed., 1932).

230. See W.M. FLINDERS PETRIE, SOCIAL LIFE IN ANCIENT EGYPT 77 (1923).

231. Raymond Westbrook, "What is the Covenant Code?", in THEORY AND METHOD IN BIBLICAL AND CUNEIFORM LAW: REVISION, INTERPOLATION AND DEVELOPMENT 15, 20 (Bernard M. Levinson ed., 1994).

232. J.G. Manning, *Demotic Egyptian Instruments of Transfer as Evidence for Private Ownership of Real Property*, 71 CHI.-KENT L. REV. 237, 237 (1995).

233. See Nili Shupak, *A New Source For the Study of the Judiciary and Law of Ancient Egypt: "The Tale of the Eloquent Peasant"*, 51 J. NEAR E. STUD. 1 (1992).

234. See GEORGE R. HUGHES, SAITE DEMOTIC LAND LEASES 46 (1952).

235. See REUVEN YARON, INTRODUCTION TO THE LAW OF ARAMAIC PAPYRI (1961) (comparing Jewish law and the law of Egypt).

practices of developed business law.

Coptic, which came much later, was the language of the Christian inhabitants of Egypt until the late Middle Ages. Coptic law from a comparative point of view is almost unique. It represents the last stage of a mixture of legal systems that were in existence for five thousand years. Coptic law began with the Arab conquest (641 C.E.) extending to about the tenth century C.E., when Arabic law supplanted it. There are many hundreds of Coptic texts, and therefore the documentary evidence we have to rely on is plentiful.²³⁶ In various different instances, Coptic documents can give us information about very old practices. For instance, the institution of sale in ancient Egypt, prior to the conquest of the Romans, but preserved by them, is the foundation of the institution among the Copts.²³⁷

Two periods will be of special interest in the ongoing argument: the Ptolemaic period and the period of Greco-Roman Egypt.

The Egyptian Ptolemaic period corresponds to a broader Mediterranean framework of civilization which is known as Hellenism, and which represents a complex fusion of Greek, Near-Eastern and Egyptian patterns. Hellenistic Kingdoms, including the Ptolemaic kingdom of Egypt, came to an end when Rome took over the entire area in the last decades B.C.E. at the very foundation of the Principate at the time of Emperor Augustus.²³⁸ Thus Hellenism is crucial in the passing from ancient to Romanized Egypt, and of course relevant from the standpoint of a theory of possible legal transplants.

Hellenism is indeed a biased word. The word was invented by John Gustavus Droysen in 1831 in a letter to his Belgian friend W.A. Arendt.²³⁹ The subject of the letter was an interpretation of the Acts of the Apostles (6:1) where mention is made of a split in the Christian community of Jerusalem. The "Hellenists" in the community were murmuring against the "Hebrews," and Droysen understood the former to be Oriental Greeks, while it is now clear that Paul meant to contrast the "Jews speaking Greek" with the "Jews speaking Hebrew or Aramaic." But five years later, in 1836, Droysen's *Geschichte des Hellenismus* [A History of Hellenism] made this solecism a received truth. It is quite clear that the term Hellenism emphasizes the role of the Greek elites and correspondingly denies the contributions of non-Greek cultures.

Such a terminological confusion goes right to the root of the matter: Hellenism has been defined as the era in which Greek culture spread eastwards to India, an assertion open to serious question.²⁴⁰ As we saw,

236. See THE METROPOLITAN MUSEUM OF ART, *supra* note 229, at 3.

237. See *id.* at 4.

238. See ERICH S. GRUEN, *THE HELLENISTIC WORLD AND THE COMING OF ROME* (1984).

239. See MICHAEL AVI-YORAN, *HELLENISM AND THE EAST: CONTACTS AND INTERRELATIONS FROM ALEXANDER TO THE ROMAN CONQUEST I* (1978).

240. See *id.* at 3.

when Alexander died his generals succeeded him and split the immense territory they conquered into different kingdoms. But the whole of these realms formed a common civilization based on a newer common culture. This process has been labeled “Syncretism,”²⁴¹ a word derived from the Greek, denoting the gathering together of different patterns. Indeed the model of historical reconstruction today prevailing in Anglo-American literature is that of interaction between Greek and African-Asian patterns.²⁴² The two principal carriers of Hellenism were language and institutions: a simplified form of Greek language known as the “Koine” became the *lingua franca* of this empire and remained so even after the Roman conquests.²⁴³ The Eastern part of the Roman empire always had Greek, not Latin, as its common language. The problem is, from where did the common institutions of this amalgam culture come? Now that we have sketched a bit the units of the narrative we can delve into the examples we have chosen to contrast Roman and African-Mediterranean laws.

We shall commence by considering the magic and defects of Roman Law of contracts, and then the practice of Egypt and Middle-eastern countries. Then we shall discuss the rise of the State.

B. Contract, Magic and the Exotic

The domain of contract is of peculiar interest to our inquiry since no part of Roman Law has been so admired or so influential as the law of contracts.²⁴⁴ And it is indeed this portion of Roman legal skill that is proposed still today as a ground for a new common European legal framework.²⁴⁵

Notwithstanding such shared admiration, even Watson concedes that we can properly criticize Roman contract law for major defects which lasted for centuries and of which Roman Lawyers were aware, or at least ought to have been aware.²⁴⁶

First of all, the Romans never developed either a general theory of contract, nor a law of contract; they confined themselves to a law of individual *contracts*.²⁴⁷ It is thus apparent that the Civil law tradition moved in the *opposite* direction from original Roman Law. Traditional Romanists typically try to deny this defect, even as they must acknowledge

241. SIR WILLIAM TARN & G.T. GRIFFITH, *HELLENISTIC CIVILIZATION* 339 (3d ed. 1952) (a classic scholarly work on this subject).

242. *See, e.g.*, *HELLENISM IN THE EAST: THE INTERACTION OF GREEK AND NON-GREEK CIVILIZATIONS FROM SYRIA TO CENTRAL ASIA AFTER ALEXANDER* (Amélie Kuhrt & Susan Sherwin-White eds., 1987).

243. *See* GABEL & WHEELER, *supra* note 36, at 148.

244. I quote directly from ALAN WATSON, *SOCIETY*, *supra* note 16, at 12.

245. *See* Zimmermann, *supra* note 47, at 148.

246. *See* WATSON, *supra* note 16, at 12.

247. *See* BERMAN, *supra* note 4, at 129 (asserting that it was the later European jurists who made a theory of contract law out of particular types of Roman contracts).

that it is one. For instance, Buckland and McNair concede that “in Roman Law a general law of contract . . . has had to be collected and *brought to the surface in modern times. It is at best latent in the ancient books.* The jurists dealt almost exclusively with various particular contracts.”²⁴⁸ What does it mean that something is “at best latent” in ancient books and “had to be collected in modern times”? It is quite clear that contract theory never existed for the Romans, and that it was built, by collection, in modern times. Notice that this is the reasonable result of applying a plain kind of source criticism,²⁴⁹ as it is used elsewhere *except* in the field of legal history.

It is also clear that such a denial of historical criticism can be explained only by the existence of a constraining discourse whose principal interest is the exclusion of standard criticism when Roman greatness is at stake. We can also perceive the difference between adopting a continuity model or a more sound and plain dis-continuity approach. If we use the former we can say that something *brought to the surface in modern times* was *latent* in the Roman books, which is meaningless from a standard historical criticism, as if we would *bring to the surface* some Roman religious belief that remained *latent* for the Romans themselves. If we adopt the latter approach it becomes evident that a general law of contract is a modern achievement, eventually legitimated by reference to some Roman text.

Buckland and McNair go even further, citing the fact that although the Roman jurists dealt *exclusively* with the particular contracts, they “regularly” made use of analogies from other contracts,²⁵⁰ as “proof” of the existence of a latent wider theory. It is to me extraordinary that such reasoning has never been subjected to withering critique. It is exactly the necessity of using analogies from other contracts that proves the lack of a general theory, whereas this use does not really mean anything more than that all contracts were contracts. Certainly the Romans perceived the various contracts as similar, since they used for them the same label, but they never went further, as is confirmed by the necessity of the use of analogy, which properly means similarity without identity. The jurists just saw analogies, namely parallel resemblances among the contracts, and that is all. The “denial” of this fact is much more interesting, and we shall return to it.

So we must examine particular contracts precisely because of the lack of a law of contract in Roman jurisprudence.²⁵¹ I select two of the

248. W.W. BUCKLAND & ARNOLD D. MCNAIR, ROMAN LAW & COMMON LAW: A COMPARISON IN OUTLINE 265 (F.H. Lawson ed., 2d ed. 1965) (emphasis added).

249. See REYNOLDS & WILSON, *supra* note 188 and related text.

250. *Id.*

251. Hereinafter I rely on the same analysis worked out by WATSON, SOCIETY, *supra* note 16, at 13-15.

instances dealt with by Watson because of their importance: the oldest of Roman contracts, the *stipulatio*, and the sale. Both also have been much discussed in modern literature. The former can make clear the exotic and magic pervading ancient Roman Law as well as other ancient laws, and the latter can display proper technical defects of Roman legal thought. Once again we can rely on Watson to strengthen our theory.

In the case of *stipulatio*, the contract was formed by question and answer:²⁵² “Do you promise?” “I do so promise.” The parties had to be face to face, and formalities had to be followed precisely.²⁵³ Only one verb could be used, “Spondesne . . .?”, “Spondeo.” No other verb produced a legal effect. It is not difficult to see at work here a belief in the magic of a word. Exactly that word, and that word alone, can be effective. It is true that later Roman Law evolved to abolish such verbal solemnity, but it lasted for centuries.²⁵⁴ We can stress the change, or we can point to the original magic form. But to stress the change is a not-too-orthodox move when one is pleading the superiority of an original system.²⁵⁵ How can we claim such a superiority by praising the fact that the system finally evolved away from its very premises?

To make clear that formalities in the *stipulatio* were purely magic and exotic we can consider that formalities in contracts have two basic functions. They mark the end of negotiations, and they provide evidence for the contract and its terms. Yet formalities for *stipulatio* perform only the first function and not also the second. This grave weakness of the *stipulatio* was well-known to the Romans, yet it was never directly remedied.

Though the early history of this contract is obscure, its sacred character, and also its defects as a legal device, can be traced back, according to many scholars, to the very use of the verb *spondeo*, which derives from a Greek verb meaning “I make a drink offering,”²⁵⁶ which marked a kind of an oath, and since a Roman oath was the calling of a god to witness, there was no need of other evidence about the terms of the contract. This form of sacred oath became a legal tool but the jurists were not able to correct it.

The second example concerns the law of sale. For the Romans it was a consensual contract, so that it was valid simply because of the agreement of the parties, without any requirement of form. Although these contracts are presented as “one of the great Roman inventions,”²⁵⁷ we must recall that there were only four consensual contracts: sale, hire, partnership and

252. See J. INST. 3.15.

253. For this account of Roman contract law see WATSON, SOCIETY, *supra* note 16, at 12-15.

254. See *id.*

255. See *id.*

256. See *id.* at 15.

257. *Id.* at 14.

mandate, which is not too many for a highly-developed system of contracts.

The major defect of Roman sale was the lack of inherent warranties. The buyer could not rely on the worthiness of the seller's title. Nor was the seller held to give an implied warranty that the item sold was free from serious latent defects, except when the sale was made in the market-place and concerned a slave or a beast of burden. The jurists tried to develop a general liability of the seller, but this process was still in its infancy in the classical period. The buyer could build protection for interests only by making stipulations with the seller, and hundreds of texts show that this was commonly done. But then in practice a sale transaction would cease to have the advantages of a consensual contract, and the parties would need to be face-to-face and make resort to the magic we have reported.

Like Watson, we can wonder if the concept of inherent warranty was too refined or advanced for the Romans: "The straight answer is No!"²⁵⁸ For example, according to Watson's account an inherent warranty against eviction was contained in the *mancipatio*, another magic ceremony²⁵⁹ required to transfer the property on land.

It is thus clear that the contract of sale was essentially confined to the sale of goods by letter or messenger, without the parties meeting. However, the impossibility of creating warranties other than by stipulation could make it more difficult for a seller to get a reasonable price for his goods. Where a stipulation could not be taken a merchant might well hesitate to buy at distance. The failure to have inherent warranties in the contract of sale "[c]ut down many of the advantages of the contract."²⁶⁰

I think that this account is peculiar for a critical appraisal of Roman Law. It is also peculiar for the pro-Roman bias shared even by such eminent scholars as Watson. In his book, Watson relies mostly on examples derived from Roman Law, and early English law, to elaborate a general theory of disharmony between private law and the needs and desires of society, making implausible the existing theories of legal development and of the relationship between law and society. Here we can see at work a typical bias: if Roman Law, and even the Glorious Early Common Law, was defective, then "The Law" itself is necessarily defective. This bias does not allow for the simpler theory placed within our grasp by Watson's findings: Roman Law (and eventually early English law as well) had a peculiar capacity to evolve and cope with serious organizational problems, at least up to the end of the second century C.E. when the original character of it was finally lost in favor of the more

258. *Id.* at 14-15.

259. *See id.* at 15. *Mancipatio* is a kind of symbolic sale, requiring the two parties (transferor and transferee), five witnesses, a pair of scales, and a piece of bronze. The transferee had to solemnly assert his property on the thing, and to strike the scales with the piece of bronze. *See* JOLOWICZ & NICHOLAS, *supra* note 114, at 143-44.

260. WATSON, SOCIETY, *supra* note 16, at 15.

progressive and well-developed law of the provinces.²⁶¹ The major defect here lies in the capacity of Roman jurists to shape new forms better fit for society. The same can be repeated for the English examples cited by Watson: probably the defect lies in the Western professional élites, as we suggested above. Whereas I think that Watson's theory of élites is correct, I presume that his theory goes too far when depicting an inherent nature of the Law as an autonomous realm. It is peculiarly the Roman and later Western law based on professional insulated élites which suffer such defects.

I think that the primitivism of the Roman Law of contracts can be better perceived when we compare it to other ancient Mediterranean laws.

In order to underscore the primitivism and exoticism of Roman Law, we have to treat the matter within the framework that was created after Hellenism. As we said before, the Greco-Roman period of Egyptian civilization is indeed of crucial importance since it is coexistent with Roman classical law. And since we must recall that, in accordance with the principle of personality, which was predominant in antiquity, Egyptian law prevailed in Egypt for the Egyptian people,²⁶² just as the Greek population was subject to Greek law.²⁶³ So the two legal systems of Egypt and Rome were closed to one another for some centuries. In fact, there can be no doubt that Egyptian law was still operating during the Roman era, during which the indigenous Egyptians continued to form a separate group from the Hellenes living, as in the Ptolemaic epoch, under its native law. What is amazing is that Egyptian national law remained in force even after the Antoninian Constitution.²⁶⁴ This suggests a peculiar independence and persistence of this system of law, so that Egyptian institutions survived and had eventually some influence on contemporary Roman practice. Besides, the Roman administration attained the legislation of the autonomous cities such as Alexandria, one of the major cultural centers of the ancient world.²⁶⁵ So both in the Ptolemaic and Roman eras a clear distinction was made between Greek and Egyptian law and a system of rules of conflicts between the two laws was developed to cope with practical issues. In the domain of contracts, the principle was that the language in which the document was written determined the governing law.²⁶⁶ Parties could then decide to use Roman, Greek or Egyptian law by framing the agreement in

261. See *infra* pp 549-55.

262. See RAPHAEL TAUBENSCHLAG, *THE LAW OF GRECO-ROMAN EGYPT IN THE LIGHT OF THE PAPYRI 332 B.C.E. - 640 C.E.* 2 (2d ed. 1955) [hereinafter, 1 or 2 THAUBESHLAG, *GRECO-ROMAN EGYPT*]. I prefer to quote from the first edition to stress the date of its findings, largely understated or ignored among the Romanists.

263. See *id.* at 5-6.

264. See *id.* at 7.

265. On the cultural relevance of Alexandria, see GABEL & WHEELER, *supra* note 36, at 148-49.

266. See TAUBENSHLAG, *supra* note 262, at 19-20.

the chosen language. An advantage was given to Greek law in criminal cases, because if the matter at issue involved members of various nationalities it was Greek (not Roman) law which was to be exclusively applied.

The question of mutual influence of Greek, Roman and Egyptian law is highly complex. What scholars have traced is that many contractual clauses, *especially* in the field of guarantees, were copied from Egyptian institutions, resulting in the formation of a law composed of elements of all three systems.²⁶⁷ This is particularly important for our argument since we have seen in the previous section that even relying on Romanists' accounts the law of guarantees in the Roman Law of sale and commercial transactions was quite poor. Defects of Roman Law could survive, despite being out of step with the needs of society, because private parties could decide to use other systems of law. Roman Law was, then, the law of Roman citizens, but Romans could also use other laws.

I think that it is important to notice that we are not referring here to new findings, but to facts known at least from the end of the last War. We are simply making a foreground/background shift, a critical move which alters the meaning of available data. If we study Roman Law, not as an insulated system, according to the old German paradigm, but as one among other systems of law in the Mediterranean basin, we immediately reach a very different view of the entire subject. Roman Law was the law of a restricted group, bound to old forms, but it was not the law of the Empire. Quite certainly it was not the most relied-upon law for commercial transactions, especially in the most economically developed regions of the old Mediterranean world, the African coasts and the Near East. From this viewpoint, the overwhelming importance attributed to Roman Law in law schools in the West seems peculiarly ideological, and out of step with reality.

After the Great Crisis of the third century,²⁶⁸ we find in Egypt fragments of the works of the major Jurists, or scholars in Roman Law: Gaius, Paulus, Papinian and Ulpian,²⁶⁹ even though the Egyptian system remained in force after the *Antoninian Constitution*. This fact shows a cultural activity in legal scholarship which suggests that a foundation was laid in Egypt for a Roman Law of provincial character. It is important to note that it was largely a cultural movement since on the whole imperial legislation was rarely imposed on local peregrine law. From this movement there emerged a mingled system, if we are to rely on Taubenschlag's unbiased acknowledgment that the gradual Romanization of the local law has been counterbalanced by a similar "Hellenization" of the

267. See *id.* at 21-27.

268. See *Infra* Part II.F (entitled "Redaction and Deromanization").

269. See TAUBENSCHLAG, *supra* note 262, at 26-27.

Roman Law.²⁷⁰ We can also note that his acknowledgement does not give full credit due to Egypt since he refers to Hellenism, with a subsequent emphasis on (Indo-European) Greek components. In any case, we can state after him that in advanced fields such as commercial law the influence of “Hellenistic” law on Roman Law was “powerful” and of “paramount importance.” This influence can be observed in the development of principles of contracts in favor of third parties, and in the fact that the rules on assignments and the law of independent contractors developed in Greco-Egyptian law were finally raised by Justinian to the level of imperial law.²⁷¹

Until now we have made reference to a late period of Egyptian law, but if we look back to previous times on the basis of recent literature, we find an already well-established system of contract even in the Egyptian dynastic periods.²⁷² From the very end of the last century it has been well known among specialists that the historical record preserved a number of contracts, which have been described by Erman as all couched in the same strictly regular form:

Contract concluded between *A* and *B*,

that *B* should give *x* to *A*,

whilst *A* should give *y* to *B*.

Behold, *B* was therewith content.²⁷³

In contrast with Roman practice, this form really looks like a modern contract. It is written, it displays consideration, and there is no magic. We feel it is not exotic, whereas Roman stipulation has nothing in common with our legal conceptions. This feeling grows stronger still if we examine the details of old documents. The clauses dealing with transfer of property are normally of the following form:²⁷⁴

“I have sold it to you for silver”

“I have given it to you for silver”

“I have given to you the cow together with her offspring”

If a Roman were to transfer property on a cow, instead of drawing up a document with standard forms, clearly stating the consideration of the bargain in a modern-like rational approach, he had to be face to face with the other party, and to recite a kind of a little drama in the presence of five witnesses: the *mancipatio*.²⁷⁵ He also required a pair of scales and another citizen to hold them, and a piece of copper. The ceremony consisted in the

270. *Id.* at 46.

271. *See id.* at 51.

272. *See* ADOLF ERMAN & HERMANN RANKE, LA CIVILISATION EGYPTIENNE [EGYPTIAN CIVILIZATION] 196 (French trans. Paris, Payot & Rivagles, 1994).

273. VerSteeg., *supra* note 226, at 66.

274. CRUZ-URIBE, *supra* note 155, at 43 (providing a precise account of the documents, and the correct transliteration of the Egyptian text).

275. *See supra* note 229 and accompanying text; *see also* JOLOWICZ, *supra* note 114, at 143-49.

transferee's grasping the thing to be transferred, or a part of it to magically symbolize its presence, and saying "I assert that this thing is mine according to the Law of the Romans, and be it bought to me with this piece of copper and these copper scales." Then he had to strike the scales with the piece of copper and to give it to the transferor "by way of price." Notice that the piece of copper had no connection with the real price even if there has been a preceding sale. It was given equally when there was no sale at all. It was a piece of magic. Moreover, if the parties made some mistake in the symbolic drama no property was transferred. Such was the ceremony in the classical age! It is quite amazing to note that the Romanists praise the requirement that five witnesses be present as a method to prevent future disputes,²⁷⁶ as if a written document would have not worked better. Besides, whereas in ancient Egypt a written document could easily testify to the transfer of possession, a Roman citizen, in case of a transfer of land, for example, had to walk on the land to take possession!²⁷⁷ And the evolution through which he had no longer to walk on the whole land, but just to jump on a clod is considered a major achievement of the Roman genius for legal affairs! Given this comparison between the two systems, I think that ancient law scholars are a bit too shy in affirming that the Egyptian conceptualization of law was "certainly" not the same as the Roman, *although* the Egyptian legal system was appropriately sophisticated for an advanced culture.²⁷⁸

What we say of Egypt could hold as well for other ancient Near-Eastern laws. For instance, we found a well-developed system to calculate interest and compound interest in Assyrian Law²⁷⁹ never found in Roman Law; as well as a developed system of tablet recording of debts as negotiable instruments to cover guarantees.²⁸⁰ In addition, merchant caravans were organized as single business units where all expenses, taxes, losses and profits from the sales were added and apportioned among the participants,²⁸¹ an achievement that was reached in Europe only during the middle ages.²⁸² Today we also know of a mature legal system in Sumer,²⁸³ and indeed the basic pattern of contractual transactions found in Sumerian legal documents of the third millennium survives throughout the cuneiform record into Aramaic and demotic documents.²⁸⁴

276. See JOLOWICZ & NICHOLAS, *supra* note 126, at 145.

277. See *id.* at 152-53 (discussing the transfer of possession in relation to conveyance of land).

278. CRUZ-URIBE, *supra* note 155, at 101 (emphasis added).

279. See Klaas R. Veenhof, "In Accordance with the Words of the Stele": Evidence for Old Assyrian Legislation, 70 CHI.-KENT L. REV. 1717, 1722-24 (1995).

280. See *id.* at 1724-29.

281. *Id.* at 1731.

282. On the financial organization of medieval business, see ROBINSON ET AL., *supra* note 67, at 100-105.

283. See Westbrook, *supra* note 231, at 28.

284. See *id.* at 22; see also YOCHANAN MUFFS, STUDIES IN ARAMAIC LEGAL PAPYRI FROM

We have not the space to discuss this matter in detail, but if we today compare the development of Roman Law with that of Egyptian or Near Eastern laws, we have an increasing sense that the predominance of Roman Law in the legal studies cannot be other than the product of the outworn heritage of a German paradigm which was already out of date at the beginning of this century. The “survival” of Roman studies, and their “renewal” can thus be explained only on an ideological basis; that is, as a false consciousness of reality at the service of governance projects. This conclusion is reinforced by further consideration of the theory of State and the settling of disputes discussed in the next sections.

C. The “Origin of the State”

In the previous sections we discussed a central problem for private law, namely the development of contract law. Now we handle a second major example related to public law, namely the development of a coherent conception of the State from a legal point of view.

The first issue to confront is when, if ever, did Roman Law develop a conception of the State? One of the major characteristics of Roman Law to the modern observer is, indeed, a total lack of public law. The point here is so clear and uncontroversial that we can see it admitted even in traditional literature: “[t]he Roman Law did not provide a clear and functional definition of the state.”²⁸⁵

A major point in a theory of the State is its independence from the particular person or the particular family of the actual ruler: the very fact that the State exists in itself as an independent corporation. Such an existence can be assured only by assuming rules for governance, and legitimization of authority.²⁸⁶ In relation to Roman history, we have to draw a clear distinction between the Principate and the Dominate which emerged after the Great Crisis of the third century C.E.

The Principate began as an extraordinary magistracy, and it never entirely lost this character. Consequently at no time was there any acknowledged legal system of succession. Given the troubled history of succession, even normally biased Romanists had to recognize this central failure of the Roman constitution.²⁸⁷ It is indeed common knowledge that the troops, especially the imperial guard, played a considerable part in the matter, and on more than one occasion armies from different parts of the Empire, each willing to raise its leader to the throne, had fought the question out by force of arms. Sometimes the Senate was able to exercise a real choice. The number and strength of the factions, and especially of the

ELEPHANTINE (1969).

285. Mayali, *supra* note 28, at 1469.

286. See ROBERT NOZICK, ANARCHY, STATE AND UTOPIA 113 (1974) (describing as “crucial” the state’s monopoly over the use of force in a territory).

287. See JOLOWICZ & NICHOLAS, *supra* note 126, at 353-55.

“armed men” might make all the difference to their carrying their nominee to power, *and* it made no difference to the legal quality of their act. If there were several nominees, each was legitimate until it was overthrown by another.

The point is that no rule was established and that no theory has been developed to cope with this central problem. Here, the “non-capacity” displayed by Roman lawyers to develop a doctrine if not a practice is peculiarly shocking. Even the greatest master of Roman constitutional history had to say that there never was a system of government which had lost so completely the conception of legitimacy as the Augustan principate,²⁸⁸ and described it as autocracy tempered by legally permanent revolution.²⁸⁹

The Great Crisis which occurred during the third century C.E., from the assassination of Alexander Severus (235 C.E.) to the accession of Diocletian (284 C.E.) was a time of confusion and disaster. But the internal order was re-established and thereafter the Empire was ruled for the most part by a number of comparatively stable dynasties. The model of constitution we can find in the fourth century is indeed totally different the previous original Roman constitution. We can now easily distinguish a first empire, emerging from the Republic and lasting until the third century C.E., and a second empire build up in the fourth century on the ground of quite different governing principles. The striking difference from the past and the foreign origin of these principles are acknowledged even in traditional literature:

The methods adopted to achieve stability were, in the main, three - the transformation of the imperial power into a monarchy *on an Oriental* model, the territorial division among co-regents and the reorganization of the administrative machine.²⁹⁰

In the new model, imperial dignity became a sacred matter: the emperor was no longer theoretically a first among equals but a remote and sacred figure, enveloped in ceremony.²⁹¹ A real cult of the emperor as god was established,²⁹² and then transformed after the Constantine reform and adoption of Christianity in 312 C.E. into a doctrine of the emperor as god’s agent. Diocletian’s administrative reorganization put all the Empire on the same footing. There was no longer a specific Roman Law distinct from what was available in the provinces. Constantine finally separated civil from military office. The Emperor and his officials now headed the whole civil administration, with all the jurisdictional powers. A minister of

288. See 2 THEODOR MOMMSEN, R_MISCHES STAATSRECHT [ROMAN CONSTITUTIONAL LAW] 844 (1887).

289. See *id.* at 842.

290. JOLOWICZ & NICHOLAS, *supra* note 126, at 421 (emphasis added).

291. ROBINSON, *supra* note 10, at 17.

292. For a description of the evolution of the cult, and its earlier appearances, see generally LILY ROSS TAYLOR, THE DIVINITY OF THE ROMAN EMPEROR (1931).

justice was appointed and a permanent bureaucracy was provided for the government. Besides, as we have already seen, finally the state backed private parties in the settling of disputes.

Here we have a clear conception of an imperial state, with a sacred monarchy and a strong bureaucracy, both equally lacking under the traditional Roman constitution. Such a sacred monarchy separated military and civil administration, and took over bureaucratic control of society.

Whatever one may think of autocracies, it is clear that, from the point of view not of a modern critical attitude, but from the standpoint of a traditional evolutionary paradigm, the creation of a central state was an achievement. It is also quite clear that the Roman constitution was transformed from chaos to an ordered set of principles and practices by means of cultural borrowings from “oriental” models. The point is, where did these models come from?

In the provinces of the Eastern part of the Empire, which became dominant after the third century crisis,²⁹³ that form of governance which is normally called “Hellenistic” survived.²⁹⁴ Such form of power organization, as we saw, derived from the conquest performed by Alexander the Great of the Persian and Egyptian empires in 332 B.C.E.. So what we have to do now is to investigate (1) the eventual Egyptian or Asian forms in Hellenism, and (2) their possible later embodiments in a Roman renewed system of governance after the Great crisis. Let us start with the first issue.

Scholars have been divided on the point of the “originality” of the power organization in the Hellenistic states, and once again we can contrast two models. The first model points openly at the African-Asian origin of the Hellenistic monarchy: Hellenistic kings were the heirs of the Egyptian Monarchy.²⁹⁵ On the other hand we found theories denying totally this origin, and pointing to an autonomous Greek creation: Hellenistic Monarchy was a pure Greek military government which assumed religious forms only to better control local populations, using also the already existing bureaucratic organization, especially in Egypt.²⁹⁶

We can contrast this approach even with a conventional point of view, which I assume here in order to strengthen my theory. As far as lawyers are interested in *forms*,²⁹⁷ especially in the conventional approach, it is

293. Recall that the capital was displaced by Diocletian to Spalatum, in Croatia, and to Byzantium (Istanbul, Turkey) by Constantine. See WILLIAMS, *supra* note 211, at 148 & 205.

294. G. W. BOWERSOCK, *HELLENISM IN LATE ANTIQUITY* (1990).

295. See PIERRE LIVKQUE, *LE MONDE HELLÉNISTIQUE* 54 (1969); see also C. W. MCEWAN, *THE ORIENTAL ORIGIN OF HELLENISTIC KINGSHIP* (1934).

296. See ANDRI AYMARD & JEANNINE AUBOYER, *L'ORIENT ET LA GRÈCE ANTIQUE* 396 (6th ed. 1967).

297. See P. S. ATIYAH & ROBERT S. SUMMERS, *FORM AND SUBSTANCE IN ANGLO-AMERICAN LAW: A COMPARATIVE STUDY OF LEGAL REASONING, LEGAL THEORY AND LEGAL INSTITUTIONS* 7 (1987).

important to note that even the supporters of the autonomous Greek creation concede that Hellenistic Kingdoms assumed the forms of Egyptian and Persian monarchies. They add that these clever Greek kings decided to use the already-existing bureaucracy, *especially* in Egypt. Now I maintain that from a standard point of view the form of the power and the organization of administration are the essence of a power structure. Thus we have to address two points: (a) the character of the Ruler as a sacred person and as an owner (*deus et dominus*), and, (b) the unfolding of a central bureaucracy. In the following discussion I would show simply that:

The Egyptian state shared these traits

These traits were in Hellenism

After the third century crisis the Roman empire emerged sharing these traits. We can understand this story by viewing it through the political multiculturalism prevailing in the African-Asiatic side of Mediterranean civilizations, which imported into the so-called Western world patterns of non-Western origin. Moreover, it is apparent that the birth of a doctrine of the State, undeveloped in Roman approaches, must be seen as a major achievement from a traditional evolutionary viewpoint.²⁹⁸

Given these remarks, we can recall that the common feature of governance in Hellenism was based on King-Worship, the organization of a central court as a set of officials strongly linked to the monarch, as it was before in Asia and Egypt.²⁹⁹ The King-Worship was first borrowed by Alexander himself, who assumed the titles of the Pharaohs and the Persian emperors, and was proclaimed son of the major Egyptian god (Ammon). At the head of the king-worship stood Alexander, whose priesthood was held by the greatest in the land. Nothing similar had ever existed in ancient Greece, whereas the sacred character of Egyptian monarchy is well known and has been the subject of much study.³⁰⁰ What is unbelievable is the bias used to describe the Egyptian system as “[e]ven more alien to us in the West than the Mesopotamian . . . a dictatorship of a god-king,”³⁰¹ as if that system did not become the basis of Hellenistic Kingdoms,³⁰² and, as we shall see, was transplanted even into the Roman empire. There is in such accounts an ideology of the West which is not rooted in history, nor in

298. See JOHN L. COMAROFF & SIMON ROBERTS, *RULES AND PROCESSES: THE CULTURAL LOGIC OF DISPUTE IN AN AFRICAN CONTEXT* 5 (1981) (describing the evolutionary model). *But see* DAVID COHEN, *LAW, VIOLENCE AND COMMUNITY IN CLASSICAL ATHENS* 5 (1995) (critiquing the evolutionary model).

299. See MCEWAN, *supra* note 295, at 47-49.

300. See, e.g., R. A. SCHWALLER DE LUBICZ, *LE ROI DE LA THÉOCRATIE PHARAONIQUE [THE PHARAOH AS A THEOCRATIC KING]* (1961).

301. D. BRENDAN NAGLE, *THE ANCIENT WORLD: A SOCIAL AND CULTURAL HISTORY* 24 (3d ed. 1996).

302. See TAYLOR, *supra* note 292, at 247 (tracing the idea of the “god-king” from Persia rather than Egypt).

practices, but just in fantasy.

What was the symbol of power in Hellenism? The Macedonian Dynasty came to be considered as the legal successor of the native dynasties of the Pharaohs, borrowing from the older practices the diadem, scepter and signet ring as power-symbols.³⁰³ According to this conception in the Ptolemaic Monarchy, an official cult of the living rulers was established, the image of the king started to adorn the coinage, his acts were dated after the years of his reign, sacrifices were offered for his health and welfare, his birthday became a state-holiday, and his death an occasion for universal mourning³⁰⁴—all things to which we remain astonishingly accustomed. This was of course a hereditary monarchy and the order of succession was controlled by a system resembling that for private estates.

All these features were later borrowed by the Romans. As we saw, with the conquest of Alexandria on August 1, 30 B.C.E., the Ptolemaic kingdom fell to the victorious Augustus, who took over the country as a successor of the previous Monarchy, so that upon the new Roman ruler the same honors were bestowed as upon his Egyptian and Greek predecessors.³⁰⁵ Within the Roman system of government, the land was entrusted to a *prefect* who acted as a local delegate of the Emperor.³⁰⁶ The prefect became a replica of the Ptolemaic king as the head of the entire civil and military administration of the country. When, after the Great Crisis, Diocletian restored to the empire the conception of “Owner and God” of the Empire (“*Dominus* and *deus*,” from which comes the period appellation “Dominate”), though this conception was foreign to the Western part of the empire it was no novelty in Egypt, where they had always attributed to their kings such power. We have a signal of the integration of Egyptian conceptions within the Roman form of government in a leveling of the differences between Egypt as a province and the rest of the Empire. Indeed, when Diocletian assumed the new pattern of governance he deprived Egyptian cities of their special privileges.

To summarize, the conception of the emperor’s divinity developed at a time when Rome was in close contact with the ideas of the Eastern world, and in particular with political ideas preserved in the kingdoms of Egypt and the Middle East.³⁰⁷ It is important to recall that this concept of the ruler as sacred persisted after the Christianization of the Empire, even if it was reshaped in Christian terms.³⁰⁸

We must stress the fact that Egyptian principles and forms of

303. See TAUBENSCHLAG, *supra* note 262, at 562.

304. See *id.* at 562-63.

305. See *id.* at 567-69.

306. See NAPHTALI LEWIS, LIFE IN EGYPT UNDER ROMAN RULE 9 (1983).

307. See TAYLOR, *supra* note 292, at 1.

308. Christian emperors claimed to be the supreme *spiritual* leaders of Christendom. See BERMAN, *supra* note 4, at 88-89.

government were strikingly opposite to Macedonian original tradition. Macedonian tradition was based on a military assembly, acting as the representative of the people's sovereignty, which played its part in deciding matters pertaining to succession.³⁰⁹ Though at the very beginning the role of this assembly was not completely theoretical, in time its significance sank to that of a mere formality.³¹⁰ We easily can perceive how Egyptian and Macedonian monarchies were grounded upon opposite principles, whereas there is a strong analogy between Macedonian and Roman institutions; both in Hellenism and in the late Empire, the assembly of the army electing its commander was superseded by a hereditary monarchy. It is part of the normal "Indo-European" bias to praise the first form as a kind of assembly of free men against the slavish institutions of Eastern monarchy. But it is like praising a kind of "Pinochet theory" of freedom preserved through recurrent military coups, giving the army a pivotal role in constitutional choices. Besides, as I already have suggested, this traditional praise of Macedonian and Roman military assemblies clashes with equally traditional evolutionary accounts. Certainly from the viewpoint of an economic theory of the State,³¹¹ the Egyptian form was more effective than the Roman or Macedonian; it proved indeed to be quite effective in the Eastern Roman Empire, which adopted it and was able to last for 1,000 years more. Not a bad record in the history of empires.

The second major point we are to cope with is the unfolding of bureaucracy.³¹² Ancient Egypt has been defined as a Provider state centered on a bureaucratic organization of societal governance.³¹³ The material acquisition of Egypt—conspicuous wealth, palaces, temples, and conquest—all depended on a particular skill in the administration of resources.³¹⁴ Whatever one may think of bureaucracies, it is quite evident that in an evolutionary biased pattern they represent an improvement:³¹⁵ bureaucracies, in this context, may mean efficiency³¹⁶ and also the capacity for public enforcement of rules, in striking contrast, for instance, with the largely private Greek system of enforcement.³¹⁷

309. See TAUBENSCHLAG, *supra* note 262, at 564.

310. See *id.*

311. See, e.g., POSNER, *supra* note 228, at 143-45.

312. See generally T.F. CARNEY, BUREAUCRACY IN TRADITIONAL SOCIETY: ROMANO-BYZANTINE BUREAUCRACIES VIEWED FROM WITHIN (1971).

313. See KEMP, *supra* note 220, at 109-11.

314. See *id.* at 111.

315. It's enough to recall Weber's well-known theory stressing the importance for "development" of formal rationality, bureaucracies, and the shaping of law by trained legal specialists. See MAX RHEINSTEIN ON LAW IN ECONOMY AND SOCIETY 304 (Max Rheinstein ed., 1966).

316. Remember that when Augustus took over the "centralized" Egypt, it was the richest grain lands of the time. See SHERMAN LEROY WALLACE, TAXATION IN EGYPT FROM AUGUSTUS TO DIOCLETIAN I (Princeton Univ. Press 1938).

317. See DOUGLAS M. MACDOWELL, THE LAW IN CLASSICAL ATHENS 53-67 (1978).

Bureaucracy in ancient Egypt was confined to a powerful clergy, which is normally contrasted with Romans' commitment to lay lawyers to govern society³¹⁸ with the standard pro-Western bias. But the caste of Egyptian bureaucrats was not indeed too priestly. The so called "priests" who performed these tasks of government were laymen³¹⁹ who spent part of the year in the service of the "temple" and the remainder in their normal secular occupations. The "temple" is here to be understood more as a public building than as a house of prayer. The priests played no ethical role. Rather, their principal function was assisting the pharaoh in his most important function: the maintenance of the divine order of creation (*ma'at* in Egyptian terms). It was a technical role requiring ritual cleanliness, not inner purity. This personnel formed an administrative structure and a particular regime which remained quite unchanged³²⁰ during Hellenism and the Roman rule. The take-over of Egypt involved but slight change in administration,³²¹ and the same system was for all practical purposes continued into the Roman period without any significant change. As a matter of fact, it was Rome that in the moment of crisis had to use the survival of these models to renew the agonizing Empire.³²²

Thus if we finally look at these findings we can see how much the late empire was built thanks to the patterns preserved in Egypt and the Near East, and by abandoning the previous Roman organization. This movement is the more apparent if we then consider the hard core of the Roman legal process: the mechanics of dispute resolution.

D. The Mechanics of the Law

Having seen the defects and primitivism of Roman contract law, and having seen how a coherent conception of the State was foreign to the Roman legal mind until after the third century crisis, when it assumed a clear alien form, we can raise now the fundamental question: Has Roman Law existed at all?³²³ I presume that we cannot say of a system of rules or

318. See *infra* at 543-45.

319. D. BRENDAN NAGLE, *THE ANCIENT WORLD. A SOCIAL AND CULTURAL HISTORY* 28 (3d ed. 1996).

320. Sometimes this stability is presented with the typical bias of indicating that Egypt was a system without evolution, or development, just marked by repetition as a main (and negative) cultural feature. See *id.* at 24.

321. See WALLACE, *supra* note 316, at 1, 7.

322. Jacques Pirenne, *L'apport Juridique de l'Egypt à la Civilisation* [Egyptian Legacy to Legal Culture], in 1 *STUDI IN ONORE DI EDOARDO VOLTERRA* 153, 163 (Milano, Dott. A. Giuffrè ed., 1971).

323. See Paul Veyne, *L'empire Romain* [The Roman Empire], in 1 *HISTOIRE DE LA VIE PRIVÉE* 164-171 (Philippe Ariès & George Duby eds., Paris, Editions du Seuil 1985). This work received two different English versions in 1 *HISTORY OF PRIVATE LIFE: FROM PAGAN ROME TO BYZANTIUM* (Philippe Ariès, G. Duby, Paul Veyne eds., Belknap Press 1987) and *PAUL VEYNE, THE ROMAN EMPIRE* (Arthur Goldhammer trans., Belknap Press 1985) [hereinafter "THE ROMAN EMPIRE"].

principles that it is a legal system, if it is not able to enforce the entitlements it assigns, or the rules of which it is composed. So we can legitimately wonder: did the mechanics of Roman Law allow people to get justice? I insist that this question does not depend on any actual or universal definition of justice or law. It is simply a matter of knowing whether Roman Law was in fact enforcing *its own* rules. Was the machinery of Roman justice designed to make rules enforced?

That is an obvious fundamental question, but to cope with it adequately we must contrast the different accounts made by Romanists and by historians who don't share the bias of the formers toward their professional subject matter. Thus I propose to the reader first the standard lawyers' account of the Roman legal process, and second an account taken from well known historians. From the contrast between the two accounts it will emerge how much the Romanists' version of the story is biased in favor of a presupposed Roman skill for legal matters, totally refuted in the historians' account. This bias can be explained once again only in ideological terms, and once that it is "revealed" it must be abandoned in favor of alternative views.

In the lawyer's account,³²⁴ someone who (until some time after 200 B.C.E.) wished to make a claim, the pursuer (or plaintiff), had to summon the defender simply by an oral request. It was up to the pursuer to persuade or force a reluctant defender. The parties had to appear together before the Praetor to start the first stage of the trial. The pursuer had to speak the appropriate form of his claim in set words. After the question at issue was set (*litis contestatio*), the Praetor appointed an arbiter (*judex*) to whom the case was sent. The arbiter had to investigate the facts and to give his judgement. If it was in favor of the pursuer, it was always in a definite sum of money. Execution required the authorization of a magistrate, but had to be put into effect by the pursuer.

Now let's examine the historian's account of the same story.³²⁵ Let's presume to have as property our grandfather's small farm. A wealthy neighbor likes this property, and enters it with his slaves, driving ours off and beating them to death. How would the law handle this situation (until some time after 200 B.C.E.)? According to Roman Law our neighbor committed a tort – a private wrong. It is then up to us to file a complaint in court, *and* to make the defendant show up in the courtroom. So we must take him among his slaves, bring him away, and jail him in the basement up to the day in court. If we do not succeed the trial cannot start. We can succeed only becoming a client of some rich Patrician. If we submit to him, he will become our Patron, and will send his slaves to capture the neighbor, so the trial can start. The magistrate will not solve the case, he will encharge a private person as an arbiter. Let's presume that this arbiter

324. See ROBINSON, *supra* note 10 at 80-84 (1997).

325. See Veyne, *supra* note 323, at 164-71.

gives judgment for the restoration of our property. According to Roman Law of the time, the court could not issue an order of restitution. The court could only condemn the defendant to pay damages. Then we should have to seize (physically, and so by way of our Patron) the defendant's goods, sell them to the public, take for ourselves the value of the small farm, and give the excess to the neighbor.

Would one really desire such convoluted and difficult justice? If Voltaire said he was glad that the Promised land, a rocky desert and a sick river, has not been promised to him, I would say that I am glad that my rights are not assisted by Roman justice. It is a justice designed for powerful clan bosses. Indeed it can hardly be denominated a legal system, since it's a mechanism of legal enforcement. It is quite clear that the enforcement of the law actually depended merely on the social strength of the parties.³²⁶ It was a way of pursuing vengeance with the slight intervention of a magistrate to make sure that certain magic forms had been properly respected. No technical discourse, or biased narrative, can at the very end deny this elementary truth. And indeed modern Romanists sometimes admit it³²⁷ even if with some *pruderie*: "[A] pursuer who was socially or economically inferior to the defender must have had difficulties."³²⁸

There is another related point I would stress. Normally Roman Law is presented without any emphasis on exoticism and magic, whereas this emphasis is placed on accounts of Asian or African customs. This strategy is clearly directed toward a narrative of Roman Law as the root of our modern ideas, and toward a marginalization or exclusion of other ancient laws from serious consideration.³²⁹ I would briefly recall the obvious, namely that as we have already seen for contracts, Roman Law, far from being "rational" in the modern sense, was also in the practical procedural field, full of magic and exotic. Recall that the plaintiff had to speak the appropriate form of his claim in set words. It is Gaius himself who tells us that a man who wished to sue for the destruction of his vines lost his case because he used the word "vines" rather than the word "trees," according to the Law of XII Tables (XII T 8.11).³³⁰ It could be quite easy to produce examples by the sackful. I would be clear on the point that I am not blaming Roman Law for having done so in second century B.C.E.; I am simply pointing out the fact that it is odd indeed to praise Roman Law as a unique forerunner of modern justice, since, fortunately, things moved

326. See PETER GARNSEY, *SOCIAL STATUS AND LEGAL PRIVILEGE* 189 (1970).

327. See J.M. KELLY, *ROMAN LITIGATION* 6-12 (1966) with reference as to later times.

328. ROBINSON, *supra* note 10 at 80, where about the Roman procedure of summons we find "[s]ometimes clearly a defender will have simply ignored the pursuer."

329. On exoticization as a strategy of Comparative Law, see Kennedy, *supra* note 5, at Part IV.D.1.

330. ROBINSON, *supra* note 10, at 81 (citing G. INST. 4.11).

exactly in the other direction: the law evolved not on this ground but *against* these ideas. But what then? Did Roman Law evolve from this primitive stage of magic organization of private vengeance?

After the second century B.C.E., the mechanics we have described evolved toward the so-called "Formulary system," dominant from roughly 150 B.C.E. to the end of the second century CE.³³¹ Now the pursuer had to frame his claim in a draft writ (a formula) to request that the Praetor to grant him a relief. In any case, it was *still* the pursuer's problem to get the defender to court. Once there, the defender might accept the formula proposed, or might argue for its modification. Only when the parties agreed on a writ as a basis for the lawsuit would the Praetor appoint the arbiter and issue the decree empowering the trial. In principle, condemnation was always in money terms, and execution was still an affair for the successful pursuer to put into effect.³³² As we may easily see, the "new" system was clearly an evolution of the former, but it turned out to be even worse for the pursuer. Having to frame his claim in one of the admitted writs, and having to reach an agreement with the other party on the proposed formula, he needed still more the aid of a powerful Patron to manage the process. So the defects of Roman Law we are examining were not confined to an early stage, but lasted through the centuries as long as the dominant pattern remained purely of Roman origin.

It was only after the Great Crisis of the third century that the machinery of justice changed dramatically toward totally new forms finally based on the active intervention of the State. The new form is known as *cognitio* and it was no longer left to the Praetor and the private arbiter, but it was administered by an imperial official who was in charge of the whole process. The pursuer now had to hand in court a written pleading, and the summons was issued with the backing of the court. Regular courts were organized and the witnesses wanted by the parties were summoned by the court under penalty and interrogated by the judge.³³³ Execution could also be backed with official power. And, the judgement was no longer necessarily limited to money damages. The judge could order the restoration of property, or specific performance.

As we may see, the new system was conceived under a totally different set of ideas. Where did these ideas come from? It is well established that *cognitio* was the kind of jurisdiction normally exercised in the provinces, and an influence from Hellenistic practice is considered probable.³³⁴ Moreover any distinction between the proper Roman Law (*jus civile*) and the "foreign law" disappeared.³³⁵ It is quite evident that a great

331. *Id.* at 85.

332. *See id.* at 88.

333. *See id.* at 90-96.

334. *See id.* at 95-96.

335. This was a consequence of the *Antoninian Constitution* which in 212 C.E. extended

modernization of the law occurred, and that the new legal process of the Late Empire marks a major break with the previous mechanics of the law.

Only after the Great Crisis did Roman Law become effective, independently of social or political power of the parties. That is to say that only when Roman Law lost its original character in favor of the more "Oriental" traits of the Late Empire, did it become fit for the "Western" ideology of law. Notwithstanding these obvious points, the traditional professional Romanists' bias for superiority of what is Roman led authors to speak of the new effective system as a "distortion" of the original process.³³⁶ I would rather say that if we finally abandon this bias we can see how much our view of the law, and especially of legal enforcement of established rights, must pay more credit to the Eastern part of the Mediterranean basin than to Rome, where these practices had been quite unknown. I think that the strength of the ideology we are exposed to in the law schools can be measured by how hard we find it to acknowledge that Roman Law was in practice ineffective as a legal system, and that the idea of legal enforcement of rights came on only when original Roman Law was "distorted" by provincial practices.

E. A Theory of the Rising Jurists

Now we reach the distinctive feature of Roman and Western law: the development of a legal science and a lay profession, represented in Rome by the "*jurists*" as a leading characteristic of this tradition, as contrasted with all other ancient and exotic laws.³³⁷ By this I mean the very existence of an independent class of lay lawyers as a central gear of societal governance and legal evolution.

From this point of view, Western law would clearly be the recipient of a Roman achievement, being based on such elites of independent professionals.

Moreover the theory of Roman jurists serves to deny the importance of borrowings: even if they occurred they become relatively unimportant because the eventually borrowed institutions would have been transformed by the jurists into truly *legal* institutions, and it was the jurists alone who really elaborated sophisticated doctrines and theories. Thus the existence of Roman jurists, and their cultural role in the making of law, becomes essential in defending the alleged supremacy of Rome in this field of societal governance.

We have thus to investigate who these jurists were, and why and how they came on. First of all, according to the conventional account, the

Roman citizenship to practically all free inhabitants of the Empire. See ROBINSON ET AL., *supra* note 67, at 3.

336. JOLOWICZ & NICHOLAS, *supra* note 259, at 398.

337. SCHULZ, *supra* note 22, at iv ("Roman legal science is the purest and most original expression of the Roman genius.").

jurists specialized not so much in acting on other's behalf in courts, as did orators, like the well known Cicero,³³⁸ but in giving advice on legal matters. They discussed, and more importantly, they wrote about legal problems. In such a way there emerged a class of learned authors who left us a scholarly literature about law: something which can *prima facie* legitimately be seen as a unique trait of Roman legal culture. It is the literature which emerged from the jurists, and which became the Late Empire Law Codes, and finally into the Justinian's compilation,³³⁹ especially in the Digest.³⁴⁰ Since the Digest became from the 12th century on the basic textbook in European universities,³⁴¹ it is this literature which became the common ground of the Western legal evolution. Generations of lawyers have been instructed on the basis of Roman literature, and the schemes and categories used by Roman Lawyers became the form, and sometimes the substance, of the modern Codes of continental Europe. It is hard to overstate the importance of their scholarly work, if we recall that, for example, even Langdell, starting the American university legal education, was surveying the common law doctrines with reference to Roman jurists' theories.³⁴²

The bulk of Roman greatness is the science of the law. It is also the major mark of its distinction. But here I want to show that the emergence of jurists in ancient Rome was due to essential defects of the Roman legal process, that we cannot any longer disregard the possibility of an independent academic legal tradition outside Rome, and that probably the major achievements in Roman legal development were reached by non-Roman Lawyers in the context of a de-Romanization of the law of the Empire. So, once again, I have to jeopardize the entire package of received ideas challenging both Roman, and so Western, pretensions of uniqueness and supremacy in law.

A first point to be stressed is the *social* origin of the jurists. A striking difference of Roman society is that the jurists did not belong to a middle class milieu, as normally lawyers do in modern societies. Even if they are quite wealthy they are not born princes, or tycoons. Roman jurists on the

338. See generally BRUCE W. FRIER, *THE RISE OF THE ROMAN JURISTS 185-86* (1985)

339. The Justinian's Compilation, finally brought into force in 529 C.E., is fourfold: the Institutes issued as an elementary textbook for law students, the Digest being the compilation of the authoritative juristic writings, the Code as a collection of imperial legislation, and the Novels embodying Justinian's own statutes.

340. On the instructions of Justinian, the compilers edited both the juristic extracts and the imperial legislation; thus the law preserved in the Compilation is neither the authentic law of the classical period, nor a simple statement of the law of Justinian's own day, but a layered amalgam, reflecting the strategies of redaction. See ROBINSON ET AL., *supra* note 67, at 3.

341. See *id.* at 42.

342. See generally 2 C.C. LANGDELL, *A SELECTION OF CASES ON THE LAW OF CONTRACTS* 987 (2d ed., 1879).

contrary were men of the upper classes,³⁴³ they came from Roman nobility.³⁴⁴ The jurists about whom we hear in the ensuing Republican period (from the mid-third century B.C.E.)³⁴⁵ were nearly all members of the Senate - the 300 leading men of the state. These were rich and powerful men of prestige, many of whom had been consuls. Why did such wealthy and influential men become jurists? And why did the Roman legal process need jurists?

I think that the reason for their emergence within the upper class springs from two major institutional defects of Roman Law which we have already partially examined. The first is the lack of regular courts and professional judges. The second is that until the post-classical period Rome had no law schools.³⁴⁶

The Roman system was so primitive and defective that a room for jurists was allowed confining the administration of the law to powerful private citizens. As we have seen the Roman process was split into two parts: the first, behind the magistrate, and the second, the real trial, entrusted to a non-professional arbiter. The lack of professional judges required the jurists to advise not only the parties but even the lay judges who decided cases. Since even the magistrate was not a professional, but a politician in career, he too needed the advice of someone learned in the law. The jurists came together as a hidden informal profession of experts advising all the people involved in the litigation process, precisely because no system of courts was established.

This explains why there were jurists. But I would add an explanation of why they belonged to the upper class. If we recall the mechanics of Roman Law we must remember that there was no public enforcement of summons and executions. Why should learned and powerful men waste time on developing a sophisticated legal scholarship in a context where all depended on the respective social strength of the parties at stake? The fact is that in practice a man had to become the client of one of these powerful men to succeed even in summoning the defendant. Behind the legal process there was the Patronage,³⁴⁷ and it is Patronage which really explains the features of Roman Law.³⁴⁸ Patronage is a social system dividing the inhabitants into patrons and clients, the former protecting the latter in their social activity. This was quite a widespread model of societal

343. ROBINSON ET AL., *supra* note 67, at 1.

344. See SHULZ, *supra* note 22, at 42.

345. See ROBINSON, *supra* note 10, at 43.

346. See *id.*

347. See PATRONS AND CLIENTS IN MEDITERRANEAN SOCIETIES (Ernest Gellner & John Waterbury eds., Duckworth 1977); SAMUEL N. EISENSTADT & LUIS ROMIGER, PATRONS, CLIENTS AND FRIENDS: INTERPERSONAL RELATIONS AND THE STRUCTURE OF TRUST IN SOCIETY (1984).

348. Remember that in some Civil Law countries even today, a counselor is called a *patron* of his client.

organization in the Mediterranean region: normally in a system dominated by patronage there is no need for written laws to enact justice, and instead of judges in the modern sense of the word, the patrons employ a system of middlemen - arbiters - who on their behalf can distribute justice among the various groups.³⁴⁹ This picture matches exactly with an unbiased description of the Roman legal mechanics. And we must note that the pro-Roman bias is so strong that sometimes it is maintained that the patronage system itself is of Roman invention!³⁵⁰ The fact is that because of the lack of legal enforcement of rights, we have seen in the previous section, the Roman system remained based on patronage, and perfected its mechanisms, whereas it was superseded by different schemes in other countries.

If we adopt the Patronage model to explain Roman legal history we can see that members of the upper class had a personal interest in litigations: they were the law. They could assure summons and executions. They were the living oracles of the law in the proper sense in which they were powerful clan bosses privately charged with enforcing rules. Thus, I think that we can explain jurists on the basis of the mechanics of law and its defective character in the settling of disputes.

From this point of view we can also investigate which kind of literature was that of the jurists. Every piece of writing is a *kind* of something, and indeed since the jurists came from the most respected Roman families, this imparted to their science a distinctive atmosphere which was not "dissipated" till the end of the classical period.³⁵¹ Republican jurisprudence was as pronounced an aristocratic literature as the republican administration was an aristocratic system. Jurisprudence was a national science, because it was controlled by the same men as was the political administration, among them was no place for non-Romans. The jurists sprang out of the members of the priestly colleges charged with the development of the sacral law.³⁵² At the beginning they were pointiffs. A movement toward secularization of law leading to distinguish private from sacral law began as early as the third century B.C.E., even if in the second century the pointiffs continued to be prominent consultants in private law. A single family, the *gens Mucia*, exercised a kind of de facto monopoly on the profession, and at least three well known jurists of the time belonged to this family: P. Mucius Scaevola, P. Licinius Crassus Mucianus, and Q. Mucius Scaevola, with whom we reach at once the climax and the end of pontifical legal science. It is supposed that it was the *Hellenistic tendency* to specialization which led to the abandonment of

349. See Niels Peter Lemche, *Justice in Western Asia in Antiquity, or: Why No Laws Were Needed!*, 70 CHI.-KENT L. REV. 1695 (1995).

350. See RONALD SYME, *THE ROMAN REVOLUTION* 369-86 (1939).

351. SHULZ, *supra* note 22, at 23. I think that the reader can appreciate the bias.

352. See *id.* at 40-41.

private law by the pointiffs, and to the rise of a purely lay legal literature. Indeed in no period known to us was Roman legal science entirely exempt from Greek influence. In the last two centuries of the Republic it became pervaded by the intellectual movement of multicultural Hellenism.³⁵³ So even the birth of Roman legal literature was derived from a *contact* with the East. The point is well established in the most pervasive book written on the argument "Roman legal science contained in itself great potentialities . . . but . . . there was needed the solvent energy of Greek forms. The immensely important result was nothing less than that Roman legal science developed into a professional science of the Hellenistic type, within the framework of Hellenistic science."³⁵⁴

We can appreciate both the acknowledgment of the "contact" and its etherization through reference to the Greek (Indo-European) forms, and the conventional biased confusion between Hellenism and Greek culture.³⁵⁵ The contact is admitted but it is referred to as Greeks. Indeed, the Greeks never developed an autonomous science of the law, and a peculiar legal profession,³⁵⁶ and it is quite out of step to assume that a contact with them produced the outspring of the Roman legal science. It was the contact with "Hellenism" which produced a change,³⁵⁷ and certainly it was a peculiar Roman change, but I think that Rome has not been alone in developing a "legal science." We have to compare these findings with accounts of the other ancient Mediterranean laws. It is conventionally admitted that in the other countries legislation was not lacking but it was lacking science. It is conventionally denied that there was something which might be known as an Egyptian or Semitic legal science. Thus the genius and skillfulness for legal studies remain conventionally confined to Indo-Europeans.

This traditional denial must now be reexamined in light of new theories of the Near Eastern Law Codes as academic works. According to this theory such codes are not to be intended as pieces of legislation but as scientific literature, which is merely presenting the law.³⁵⁸ They represent a legal library for judges, a reference work for the courts.³⁵⁹ They were didactic texts that only later became law-texts.³⁶⁰ As such the ancient codes, like for instance the Mesopotamian law codes are to be seen as part of a learned tradition.³⁶¹ In such a framework the premise upon which this

353. *See id.* at 38. *See also* PETER STEIN, *REGULAE JURIS: FROM JURISTIC RULES TO LEGAL MAXIMS* 54 (1966).

354. *Id.* at 38-39.

355. *See* AVI-YORAN, *supra* note 239 and accompanying text.

356. *See* GEORGE M. CALHOUN, *INTRODUCTION TO GREEK LEGAL SCIENCE* (1944).

357. STEIN, *supra* note 353, at 23.

358. *See* Westbrook, *supra* note 231, at 15-36.

359. *See* Raymond Westbrook, *Biblical and Cuneiform Law Codes*, 92 *REVUE BIBLIQUE* 247, 255 (1985).

360. *See* Bernard S. Jackson, *From Dharma to Law*, 23 *AM. J. COMP. L.* 490 (1975).

361. *See* Lemche, *supra* note 349, at 1696.

theory is based is that the law of ancient Israel was an integral part of a much wider legal tradition. The tradition in question covered the area of the Ancient Near East where cuneiform writing and learning prevailed, but its influence was felt even beyond these bounds. It is not only a question of similar legal forms³⁶² employed in the practice, but of similarity of legal institutions and intellectual activity surrounding the law, displaying a connection definitely not coincidental, and far beyond inevitable similarity in the problems facing societies. The seven codes known to us from cuneiform sources³⁶³ and the legal corpus of the covenant code (Ex 21,2 - 22,6) and of Deuteronomy (Dt. 21,1 - 25,11)³⁶⁴ are all immediately recognizable as belonging to a single literary genre. Recent research has shown that these codes are in origin at least scientific treatises on the law.³⁶⁵ They derive from the realm of Mesopotamian science, a form presumably invented by Sumerians and carried via the Babylonians to every corner of the Near East where cuneiform writing penetrated.

What is the more relevant to us is the theory that scribal schools were established to teach the language and its cuneiform script to local scribes as far afield as Egypt and Anatolia.³⁶⁶ Such scribal schools³⁶⁷ were little more than mere cram schools on the art of writing; they may truly be described as the universities of the Ancient Near East,³⁶⁸ where also law was studied and taught.

According to Westbrook,³⁶⁹ the teaching method was as follows. The starting point was a decision in a case, with preference to borderline cases. Facts and decision were recast in a hypothesis: If J does *a*, then the legal effect is *b*, and the issue was then examined by the technique of variation, changing the details of circumstances, and with a further set of variations imposed on the facts within the discussion. This way of teaching law is astonishingly similar to what we call the "Socratic" method with reference to the Greeks.³⁷⁰ Everything is especially familiar if compared with the

362. See J. MUFFS, *STUDIES IN THE ARAMAIC LEGAL PAPYRI FROM ELEPHANTINE* (Leiden, SDIOAP, 1969).

363. Codes Ur-Nammu (CU) (c. 2100 B.C.E.), Codex Lipit-Ishtar (CL) (c. 1930 B.C.E.), Codex Eshunna (C.E.) (c. 1770 B.C.E.), Codex Hammurabi (CH) (c. 1750 B.C.E.), Assyrian Laws (AL), Hittite Laws (HL), Neo-Babylonian Laws (NBL). See MARTHA T. ROTH, *LAW COLLECTIONS FROM MESOPOTAMIA AND ASIA MINOR* (1995). See MARTHA T. ROSS, *LAW COLLECTIONS FROM MESOPOTAMIA AND ASIA MINOR* (1995).

364. This theory is challenged by Bernard S. Jackson, *Modeling Biblical Law: The Covenant Code*, 70 *CHI.-KENT L. REV.* 1745 (1995), but he also recognizes the existence of a "wisdom" dimension of law in the Middle East, which is our point here.

365. See RAYMOND WESTBROOK, *STUDIES IN BIBLICAL AND CUNEIFORM LAW 2* (1988).

366. See *id.*

367. See A. LEO OPPENHEIM, *ANCIENT MESOPOTAMIA* 243-56, 272-75 (1964).

368. See WESTBROOK, *supra* note 365, at 3.

369. See *id.* at 4.

370. See *id.* at 3. Even Westbrook is led by the prevailing bias of the conventional discourse to state that the scribes' approach is "foreign to us", and that, in comparison with Greeks, they

exotic of the noble Romans writing on law on their behalf as clan big bosses, namely as private enforcers of the law in a patronage societal system. In addition, the great emphasis on Roman jurisprudence hides the fact that in Rome there were no law schools, and nothing similar to the scribal schools, until the late empire, when they were established, of course, in the East.³⁷¹

Thus the basic building blocks of the ancient codes have been derived from school problems, and in various systems the set of problems form a canon that was handed on from one system to another through the scientific tradition.³⁷² Ancient codes were school texts to be used in training judicial officials.³⁷³ If we hold this theory we can see how the existence of a cultural activity in the field of law has not been a Roman invention, and that the teaching of law was much more exotic in Rome than elsewhere in the Mediterranean basin. This is my tenet at the end of this section. In the next section, I fully restate this understanding of Roman jurisprudence to investigate what happened at the end of the Classical period, when the major literature of jurists were produced.

F. Redaction and Deromanization

As we saw at the end of the previous section, my theory is that there was a Mediterranean, non-Roman, and non-Greek, scholarly tradition of legal studies, long before it started at Rome, and that these legal studies were regularly organized into the scribal schools. On the contrary a Roman jurisprudence was born outside any stable organization as a response to major defects in the legal process, and it was entrusted to members of the nobility. Thus I conclude that Roman Law was not at all unique, and also that its jurisprudential tradition has been based on schemes totally foreign to the subsequent Western legal tradition.³⁷⁴ The Roman original tradition of legal studies was not unique, it is not linked with, and so it is not at the root of what we still call the Western legal family. It was a specific Roman product originated by specific Roman defects: the lack of a judiciary, and the lack of law schools, since the Romans have shown to have *not* been able to organize such institutions.

This peculiar Roman setting lasted throughout the Classical period but with growing changes. At the beginning of the Principate, the jurists were

“lacked analytical tools”, and were “incapable of creating general categories or of defining terms.” *Id.* Greek method is vertical Mesopotamian forced to proceed horizontally.

371. On the teaching of law at Beyrouth and Constantinople, and Justinian’s compilation as a stop to juristic “development”, see 1 F.H. LAWSON, *MANY LAWS: SELECTED ESSAYS* 86 (1977).

372. See WESTBROOK, *supra* note 365, at 4.

373. And not as law library in courts polemica non importante per noi as well as wisdom law the argument is the existence of a totally non roman cultural tradition on law. See Lemche, *supra* note 349, at 23.

374. On the sharp difference between Roman jurists and later European civilians, see SCHULZ, *supra* note 22, at 23.

still coming from Roman families but pedigree no longer counted. Labeo still was an important man having been in the circle of Brutus' friends who conspired to kill Caesar, but he never held a magistracy; Capito was but the grandson of a simple centurion.³⁷⁵ Toward the end of the Classical period Julian was of a respectable *African* family, Gaius himself must have been from some Eastern province.³⁷⁶ Another major instance is Papinian, Aemilius Papinianus, probably the most famous name in the whole history of Roman jurisprudence,³⁷⁷ a man so influential that under the "Law of Citations"³⁷⁸ his opinion tipped the balance if the authorities on either side were equal in number. From our point of view, it is important to notice that he was not a Roman. He is believed to have been a Syrian,³⁷⁹ and indeed he was the brother-in-law of Emperor Severus, whose second wife, Julia Domna, came from Hemesa, the actual Homs. Ulpian, Domitius Ulpianus, was born in Tyre.³⁸⁰ He became the emperor's chief legal adviser and held his office until 228 C.E., when he was murdered by mutinous guards. Among the three major jurists of Rome, Papinian, Ulpian, and Paul only the latter is deemed to have been a Roman. Later in the Dominate Tribonian, for instance, the great chief compiler of the Digest came from Paphlagonia, and Justinian himself was Illiric.

From the time of Emperor Vespasian, a new type of jurist appeared. These new jurists were constantly in office and increasingly in receipt of salaries. The old conception of the aristocratic jurist changed; they became men intimately connected with government and ceased to be independent aristocrats to become salaried officials. Many of them were not Romans. This trend is conventionally labeled as the rise of the bureaucratic jurists.³⁸¹ Still later, in the period of Dominate, the jurists belonged to definite professional groups, and, by the fourth century, advocates became real lawyers educated in a law school, not merely in a school of rhetoric³⁸² as it was in Republican times.

Clearly something changed dramatically from the time of the first jurists where there was no room in jurisprudence for non-Romans. I maintain that at the beginning of the Great Crisis the setting was becoming un-Roman and that they were engaged in a project of *de-Romanization* of Roman Law in a much more multicultural society.

As we have seen, in 212 C.E., an edict known as the Antoninian constitution had extended Roman citizenship to practically all free

375. *See id.* at 102.

376. *See id.* at 103.

377. *See* JOLOWICZ & NICHOLAS, *supra* note 259, at 391.

378. *See infra* note 363, and accompanying text.

379. JOLOWICZ & NICHOLAS, *supra* note 259, at 399 n.1.

380. *See id.* at 402 adding with a typical bias that this perhaps means "only" that his family came from there.

381. *See* SCHULZ, *supra* note 22, at 103-04.

382. *See id.* at 267-77.

inhabitants of the Empire.³⁸³ In theory, the prevailing doctrine of personality of Law, according to which the law you use depends on your personal status, should have meant that everyone thereafter had to use Roman Law. I think that this major break in Roman history must be fully appreciated for its deep consequences, even for Roman jurisprudence. Up to this point, Roman Law was deemed to be the law of Roman citizens, namely the law of the city of Rome and its inhabitants. The “city” was a basic unit in the formation of the Roman world.³⁸⁴ Different cities had different statuses, and of course the city of Rome had a peculiar status in the Empire. Administrative and political institutions of the Principate remained, for Roman Law had a peculiar attitude *against* renewal, modeled on the ancient institutions governing the city. At the very beginning of the 3rd century crisis this basic unit collapsed. For the first time, the law of the city of Rome and its citizens became the law of the Empire.

At first sight, this might have meant a spread of Roman pattern throughout the land. But the story went the other way round, and we may perceive it in the Romanists’ accounts: because of the enormous expansion in the number of persons subject to Roman Law and of the political upheavals of the third century C.E. there was a widespread desire for “simplification” and certainty. Therefore in the late third century “elementary” legal books were published with this aim in mind, and they became to be accepted as the working manuals of the courts.³⁸⁵ It is characteristic of the Romanists’ bias to describe such adaptation of Roman peculiar institutions to the newer cosmopolitan society to be a “simplification” and to have adopted for this process the unambiguously injurious label of “vulgarization” of the Roman Law.³⁸⁶ In my theory, this process can better be described in terms of “de-Romanization”, meaning globalization of law in a multicultural society where Rome lost its place of supremacy. As we have seen the Empire was restored at the end of this century on totally different conceptions and even the capital was removed from Rome.

It is important to notice that great jurists appeared in this period because there was the need of a work conceived in Grand Style to adapt out-moded Roman doctrines and institutions to a new setting. The cosmopolitan nature of the Empire, and the breakdown of national idiosyncrasies to introduce new conceptions is openly acknowledged,³⁸⁷ but it is not linked to the question why the great jurists flourished at that time.

383. ROBINSON ET AL., *supra* note 67, at 3.

384. See CITY AND COUNTRY IN THE ANCIENT WORLD (Andrew Wallace-Hadrill & John Rich eds., 1991); see also J.H.W.G. LIEBESCHUETZ, ANTIOCH: CITY AND IMPERIAL ADMINISTRATION IN THE LATER ROMAN EMPIRE 167 (1972), for a peculiar study on the transformation of civic institutions.

385. ROBINSON ET AL., *supra* note 67, at 4.

386. *Id.*

387. See JOLOWICZ & NICHOLAS, *supra* note 259, at 419.

I presume that my theory can give a simple answer: legal efforts were geared by the attempt to break down idiosyncrasies of earlier Roman Law, with all its magic and rigidity, and to adapt it to a cosmopolitan multicultural society. If we reason in terms of discontinuity, and since the writings of these jurists are basically those inserted into Justinian's Compilation as a legacy to Europe, we can see how Western law sprang *not* from a renewal of the old idiosyncratic, city-based – and probably race-based—law developed by the Roman genius, *but* from a major effort in globalization and multiculturalism, brought about together by Romans and non-Romans, who *abandoned* the old patterns of jurisprudence for new paths.

We cannot perceive this achievement if we adopt the theory of “vulgarization,” which properly means that original Roman Law changed because of contacts with other laws, but which put on a flavor of “contamination” and impoverishment, as if there was something to lose in leaving the magic of *stipulatio* or the pantomime of *mancipatio*, or the necessity to use the magic verb “spondeo.” We can perceive the achievement only if we see it in the context of de-Romanization of the Empire. If we adopt this theory it is not at all trivial that some of the most prominent jurists were Africans or Syrians. Such a circumstance is a minor, but peculiar feature of this crucial period in the evolution of both Europe, Africa, and the Middle East.

Later on the jurists disappeared. They became absorbed in the administration but this fact, far from being a shame, was again an achievement, coupled with public enforcement of rules and the establishment of regular courts. The exoticism of the jurists disappeared, in favor of a more regular profession, and the rising of regular law schools. From the reign of Constantine on there are many lawyers, but no more jurists in the traditional sense: “only”³⁸⁸ legal advisers in the imperial service, law professors in the schools, and advocates and judges in the courts. We witness the integration of jurists within the machinery of government. This is because finally the system evolved in a modern sense, abandoning the clanic and post-clanic organization of justice. The jurists disappeared but a new organized system of courts and schools emerged which we must define, on the basis of accepted standards, and especially on the basis of conservative views, as a better administration of justice.

From this account we can perceive how far the Late Empire departed from the original Roman model in a multicultural context of de-Romanization of the law. I maintain that this process was not an organic evolution but a major break with the past marked by the revolutionary times of the Great Crisis. This process is strictly linked with the process of the *redaction* of Roman Law as it was transmitted to the later European

388. ROBINSON, *supra* note 10, at 48.

culture. Roman Law was received in Europe in the form of a given number of texts, and it was upon these texts that later lawyers worked out the European legal tradition.³⁸⁹ Of course texts do not form by themselves. Redaction did take place after the Great Crisis and there were persons who made up a finished version of the Roman texts upon which we relied. What it is important to point out is that the legacy of Roman Law to the later Western legal culture has not been made up of the old purely Roman stuff, but of the writings which emerged from the efforts in globalization. If we cast the problem of *redaction* in these terms we can appreciate what exactly Roman legacy has been. Redactors may select, may rearrange, may add necessary links, may insert explanations, and may even contribute a narrative or expository framework of their own on which to display the material. European legal culture has been grounded upon the codes of the Dominate, and it was the bureaucratic jurists of that period who composed the great collections:³⁹⁰ the codex Gregorianus, Hermogenianus; Theodosianus, which have been the major sources of the law in High Middle Ages in the West, and above all Justinian's codification, which became the standard book of the legal academic literature after the rising of Universities in the 12th century.³⁹¹

I think we must duly appreciate this work of redaction, and to see why it did take place. Roman Law was put into codes, because the codes represented a totally new mode for transmitting culture. It was like the invention of the CD-ROM, and everything to be transmitted had to be reproduced in the new format. Thus the problem of the final redaction of legal texts is part of a more general question of the transmission of the old culture as a legacy to later ages. We have henceforth to explain what kind of new format the codes provided, and what the meaning is for historical consciousness that this process of redaction took place in the period of de-Romanization.

The old legal texts were made in rolls, especially in rolls of papyri. "Papyrus paper was made from the reeds that grow in profusion along the Nile, and a long process was needed to make a sheet out of them."³⁹² "The finished sheets were pasted end to end and rolled up, twenty to a roll."³⁹³ Their mortal enemy was moisture; saved from that they can lie in the sand or in a tomb for thousands of years. Indeed many papyri survived only in Egypt because of its climate. This kind of paper was the most economic form of writing material, much cheaper than parchment or vellum, but from Spain to Syria none of these rolls have survived. Damp has been fatal, with the exception of Middle and Upper Egypt.

389. See ROBINSON ET AL., *supra* note 67, at 42.

390. See SCHULZ, *supra* note 22, at 267.

391. See ROBINSON ET AL., *supra* note 67, at 42.

392. LIONEL CASSON, ANCIENT TRADE AND SOCIETY 155-57 (1984).

393. *Id.* at 156.

The invention of the Codex created the book instead of the rolls.³⁹⁴ Codex is a Latin word simply meaning a bound volume of sheets of parchment or paper. The new method allowed for a much longer and safer transmission of collected writings. It started in the late second century but became dominant in the fourth century C.E., when the compilation of the Law Codes was made in the new setting of globalization, and the name “code” was applied to law collections. As we said it was like inventing the mobile press or the CD-ROM which preserved the old wisdom in received works. What we have is to a large extent what was saved in the codes.

Of course this was a great work of selection and exclusion. It was a conscious effort of restatement of the old. It was a process of legitimization of authorities. In the Theodosian Code we find indeed an enactment, from 426 C.E., commonly known as the Law of Citations³⁹⁵ specifying which writings could be cited as authorities, excluding all the others. This code established a rule for the practice which would remain in force until the time of Justinian,³⁹⁶ whose collection was designed to supplant all earlier laws and legal writings.³⁹⁷ Justinian’s compilation is a real “new beginning” and it was conceived to be. From this standpoint it shares the nature of a “Constitution” of the so-called Roman legacy, but it was indeed quite un-Roman. The project of re-writing of the past in the “books,” was a real exercise in deciding who was invested with the authority to speak, and who was deprived of it, and as such it was crucial in the new setting of the Eastern Empire. The legacy of the “Roman” legal world has been a legacy of “Eastern” minds.

Indeed for its later use in the European law schools the most important of collections resulted from the Digest redaction³⁹⁸ performed by the non-Roman Tribonian, under the non-Roman Emperor Justinian, in a totally Eastern setting. It is such a work that gave us the “book of our tradition”, and it is quite clear that this tradition was no longer the original Roman one. Thus my final argument is that what has been called for centuries the Roman Law legacy was indeed the final work of a redaction led by non-Roman Lawyers in a non-Roman setting, occurring after the Great Crisis, in the period of de-Romanization of the Empire. The denial of this redaction process, and of the fact that it finally took place among non-Romans, is a pure ideological account falsifying our historical consciousness and our indebtedness to the non-Romans.

394. See E.G. TURNER, *THE TYPOLOGY OF THE EARLY CODIX* (1977); C.H. Roberts, *The Codex*, 40 *PROC. OF THE BRIT. ACAD.* 169, 173 (1954)

395. See ROBINSON, *supra* note 10, at 20.

396. See JOLOWICZ & NICHOLAS, *supra* note 259, at 452-53.

397. See ROBINSON, *supra* note 6, at 20.

398. Upon which see now DAVID PUGSLEY, *JUSTINIAN’S DIGEST AND THE COMPILERS* (Tiverton, Devon, U.K., Maslands Ltd. 1995).

Conclusion: “The Closing of the Western Mind”

From the standpoint of law-in-history this paper shows that Roman Law has no claim to supremacy in the ancient world. That law was just as magic and exotic as others. Besides, the Roman machinery of justice was quite defective, and the distinctive unfolding of Roman legal science and profession was not so peculiar, due as it was to major defects in the legal machinery. In the end, it was only after the third century crisis that Roman Law evolved toward modern standards. In contrast, many traits of Egyptian and Semitic laws were probably borrowed because they proved to be “superior” to their then-existing Roman alternatives.

The myth of Roman supremacy in the field of law was manufactured by the biases of nineteenth-century historicism, which does not approach our present standards, and which can no longer be relied upon. This kind of historicism was contradictory because the Western indebtedness toward non-Western civilizations was denied, and declassified as “vulgarization,” “contamination” or “distortion” of Roman elements, when on the contrary it amounted to a series of contributions leading to improvement. This myth has been the offspring of reactionary cultural politics, and it cannot be regarded as sound scholarship, based as it was on a specific logic of exclusion of non-Indo-European imports. The conventional framework was politicized *against* possible African-Semitic contributions. Even from a conservative point of view, we should claim the adoption of a more neutral framework. I do not think that there is much politics in what I have said, whereas there is a lot of “denied” politics informing the traditional approach.

The rejection of the conventional unsound picture has important consequences for the historical consciousness of the Western legal tradition as such, which is to be seen more as a multicultural enterprise than as the peculiar evolution of one culture. And which perhaps no longer should be viewed as a single continuous tradition. This implies that the projects of governance based on the conventional picture are untenable, and must be abandoned. Traditions are often a substitute for conscious projects: the need for them and their invention is the symptom of a malaise, as it is the denial of “contaminations” by “other” races and cultures. I think that this malaise derives from the big lie of Roman jurisprudence. Thus we have to depict a new outlook of our past, blurring and maybe *reversing* the received distinction between an “us” and a “them.” Radicalism leads us to new needs, and what we need now is a new consciousness.