

THE CULTURAL EVOLUTION OF TORT LAW*

Abstract

The Institutes of Justinian and other Greco-Roman recitations of tort-type delicts and remedies are recognized as root stock of modern western tort law, common law or civil code-based alike. Long before these sources, however, both ancient and primitive cultures adopted norms and customs which defined permissible individual and group conduct, and which provided for remedies ranging from money damages to banishment.

Among the surveyed examples of ancient cultural responses to tort-type delicts were numerous instances in which both the civil wrong identified and the remedy provided for can be harmonized readily with modern tort law, whether it is practiced in common law or civil code nations or throughout the world. A broad range of such examples can be found not only in the nations or regions in which such norms obtained, but also in their specific subject areas: public nuisance, manslaughter, assault, trespass, conversion, negligence, strict liability, deceit, defamation, and even invasion of privacy. Indeed, a review of ancient tort-type law dispels any Euro-centric claim that western Europeans led in the conception and nurturance of tort principles at any point in history.

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I. INTRODUCTION

Years without number before the coalescence of human groupings into civil society, kinship groups, and later tribes and cultures, needed norms by which individual conduct could be ordered. The primary stimulus for such norm was group survival, and the ancillary motivations were the achievement of civil peace and the protection of one's person and property from wrongful harm. The means by which normative behavioral impositions operated took countless shapes, but the as a general proposition could be

classified, in roughly chronological order, as spiritualism, folk tales, folk law, mythology, religion and customary law.¹

The application of such sources as justification for modern civil decision has largely disappeared, although perhaps not entirely. An electronic search within state and federal legislative data bases for “I cannot tell a lie” or “Horatio Alger” would surely reveal a cluster of allusions, and the cyclical debate over religion in public affairs without more betrays the tenacity of religion’s influence on our public life. Withal, even though the sources of contemporary civil law have changes, the needs of the needs of modern society for a similar order and predictability in human civil affairs has not changed very much from the needs confronting our ancestors. It is therefore unsurprising that ancient examples of normative beliefs, practices, and customary law reveal sprawling similarities with modern tort law.

At the core of tort norms, and later tort law, has always been a group desire that disputes be resolved without retaliation and escalation. This rationale receives an early expression from the Greek observer Demosthenes, in the speech *Against Konon*, as it might pertain to remedies for battery and abuse: “[In] cases of battery . . . ; these, I am told, exist in order that no one, when losing, should defend himself with a stone or anything of that sort, but he should await the legal case. . . . The most trivial offence, I suppose, that of abuse, has been provided for to [ensure] that homicide should not be committed, . . . but [that] there should be a legal case for each of these, and they should

¹ For the purposes of this article, the terms “ancient” and “primitive” are distinguished in this way: “Ancient” is a designation that the example existed in antiquity. “Primitive” connotes that the example can be identified or hypothesized as existing in preliterate society.

not be decided by the individual's anger or whim."² Islamic law is also clear cut in its differentiation between excusable self-defense and culpable retaliation.³

At the same time, it would be disingenuous to deny that dissimilarities between ancient and modern approaches to civil justice are not likewise apparent at almost every turn to this inquiry. Some primitive remedies for conversion might offer not only restitution to the wronged party but also the opportunity to exact a fine, to be collected by the complainant himself, a double recovery by today's standards. Other pairings of right and remedy might at first suggest of the modern action in public nuisance, but upon evaluation be seen to depart from that rule in the designation of who may bring the claim. And a very large number of disputes are resolved not by fact-finding, application of governing norms, and an adjudicatory declaration, but rather by mediation and conciliation, which although a goal in numerous state and federal precincts cannot be described as a general rule.

As suggested, over the ages the nature of offenses that have stimulated identification as redressable wrongs has become mostly settled. The designations of the subsections in Part II to this research largely comprise them: (1) public and private nuisance and disturbing the peace; (2) unintentional killing; (3) assault and battery; (4) trespass to land and chattels; (5) conversion; (6) negligence; (7) strict liability; (8) deceit and false report; (9) defamation and false witness; and, in some cultures, (10) in some cultures, covetousness and hoarding.

Describing with confidence the range of remedies for such wrongs, much less their varied justifications, is a more difficult task. Or at least it seems so due to the

² DOUGLAS M. MACDOWELL, *THE LAW IN CLASSICAL ATHENS* 123 (Cornell 1978)(Demosthenes 54. 17-19).

³ *See* note 27 below and accompanying text.

diverse ways tort objectives are described – often in terminology that seems not so much a dispassionate description than an argument for a polemical position. Among the more interesting groupings of tort objectives can be found in a source one would not at first think of: Friedrich Nietzsche. In his *GENEALOGY OF MORALS* Nietzsche identifies a core cluster of the objectives of punishment.⁴ Winnowed of punishments suited to criminal actions, one is left with more classically civil, or only quasi-criminal, responses, *i.e.*, the types of remedies associated with torts. To Nietzsche, these include: “. . . (2) Punishment consisting of the payment of damages to the injured party, including affect compensation[;]⁵ (4) Punishment as a means of isolation of a disequilibrating agent, in order to keep the disturbance from spreading further. . . .[;]⁶ (8) Punishment as a means of creating memory, either for the one who suffers it – so-called ‘improvement’ – or for the witnesses[;] (9) Punishment as the payment of a fee, exacted by the authority which protects the evil-doer from the excesses of vengeance[; and (10)] Punishment as a compromise with the tradition of vendetta[.]⁷

A question central to this article can be framed in this way: When it comes to tort law, can it be said that “It has always been thus?” Henry Sumner Maine observed: Now the penal Law of ancient communities is not the law of Crimes; it is the law of Wrongs, or, to use the English technical word, of Torts. The person injured proceeds against the wrong-doer by an ordinary civil action, and recovers compensation in the

⁴ FRIEDERICH NIETSCHE, *THE BIRTH OF TRAGEDY/ THE GENEALOGY OF MORALS* 213 (Francis Golffing, ed.)(Doubleday Anchor 1956).

⁵ “Affect compensation” may be understood to mean damages for emotional distress.

⁶ Particularly among indigenous peoples, a person refusing to follow community norms was perceived, as is true in some instances today, to destabilize the community. As will be seen in the discussion to follow, for lesser offenses, the response might be temporary shunning. For more serious or more sustained delicts, the individual might be banned from the group.

⁷ FRIEDERICH NIETSCHE, *THE BIRTH OF TRAGEDY/ THE GENEALOGY OF MORALS* 213 (Francis Golffing, ed.)(Doubleday Anchor 1956).

shape of money-damages if he succeeds. . . . [All such Torts] gave rise to an Obligation or vinculum juris, and were all requited by a payment of money.⁸ It is noteworthy that primitive and ancient law contain numerous examples in which the society has seemingly concluded that simple corrective justice is insufficient to the objective of the joint objectives of redressing the harm done and also deterring the actor and others. For example, throughout the Tibetan Rules for Punishment, the burden imposed by the restitutionary interest of the rule, i.e., the return of the animal, and elsewhere the property, etc., is seemingly ancillary to), the punishment dimension of the rule. It might be surmised that over time the collective wisdom was that simple restorative justice had an insufficient gravitas as a deterrent if unaccompanied by a fine payable to the wronged party.⁹ In cases of incorrigibility, though, the penalty might be shunning or even banning from the community.¹⁰

I have suggested that as a general proposition, spiritualism, folk tales, folk law, mythology, religion and customary law underlay ancient law. The import of spiritualism and its more formal successor, religion, is self revealing. So too mythology with its gods, demigods, pantheism and anthropomorphism.

Customary law is sometimes called the “living law” and has reflected rules to which a particular society has assigned epochal steadfast adherence, rules that a culture

⁸ HENRY SUMNER MAINE, *ANCIENT LAW* 370 (1861).

⁹ In this sense, the diverse fines provided for in Tibetan folk law operated as punishment bearing similarities to today’s punitive damages. *E.g.*, Rule 20-22, Manchu Imperial Court’s Rules for Punishment of Tibetans, in Shih-Yu Yu Li, *Tibetan Folk Law*, J. ROY. ASIATIC SOC. G.B. & IRELAND Parts 3, 4, pp. 127-148 (1950), reprinted in RENTELS & DUNDES, *supra* note 11 at 27.

¹⁰ Few societies today maintain gulags to which persons may be banished, although with the passing of opportunities to send persons to entirely different continents, such as Australia, prisons and jails serve similarly. Excommunication in the Catholic church harkens of such themes. In the early church, excommunication carried with it the revocation of other ordinary rights in civil society. This deterrent cannot be seen to have worked terribly well, as in the year 1337 it is estimated that half of Christendom was under sentence of excommunication. 1 ERNST TROELTSCH, *THE SOCIAL TEACHINGS OF THE CHRISTIAN CHURCHES* 234 n.100a (Olive Wyon, trans.)(Harper 1960).

has followed so unflaggingly and consistently as to permit the application of no inconsistent rule. To Sir John Salmond, customary law embraces “any rule of action which is actually observed by men – any rule which is the expression of some actual uniformity of voluntary action”, irrespective of whether it is obligatory and enforceable or exists by reason of de facto observance.¹¹

What of ancient codes, such as the Babylonian Code of Hammurabi? Ordinarily early codes reflected efforts to gather, rationalize and organize already extant customary law. For all that is apparent, Hammurabi himself intended that his law reconcile wrongs and bring justice to those aggrieved. His unmistakable goal was the economic stability and enhancement of the people.¹² By way of further example, the “Rules of Punishment for Tibetans (1733)”, published by the Manchu Imperial Court, have been interpreted as “an attempt to standardize . . . folk law by removing authority from the local chieftans and monasteries.”¹³ It is not surprising that such antecedents of customary law include folk law, folk custom and folk tale.

In the many examples of primitive and ancient law to follow, it is seen that the norms of conduct, be they characterized as folk law or custom or otherwise, were enforced not by any leadership of the community but rather by the whole. Sometimes in literate societies, and invariably in preliterate ones, folk laws and customs, as well as folk tales, were dispersed and preserved orally, which has been described as a tradition that “represents the complete information deemed essential, retained and codified by a

¹¹ JOHN SALMOND, *JURISPRUDENCE* § 19 at 55 (Sweet and Maxwell, Ltd. 1929).

¹² *Id.*

¹³ Shih-Yu Yu Li, *Tibetan Folk Law*, J. ROY. ASIATIC SOC. G.B. & IRELAND Parts 3, 4, pp. 127-148 (1950), reprinted in 1 ALISON DUNDES RENTELS, ALAN DUNDES, *FOLK LAW* 520 (1995).

society, primarily in oral form, in order to facilitate its memorization and ensure its dissemination to present and future generations.”¹⁴

Of great significance too was the cultural watershed of symboling. Man’s capacity for symbolic communication accelerated the development of norms, and the characteristic of all such norms was that they confined the realm of permissible behaviors. The higher level functioning of man was more than a boon to man, it was an absolute essential to survival.¹⁵ Without symboling the communication of norms could only survive in a state of enduring retardation, and without norms human life would fall into chaos. As put by Langer, “[M]an can adapt himself to anything his imagination can cope with; but he cannot deal with chaos.”¹⁶

Early man needed norms and proscriptions to permit his very survival, and this need preceded kings, and thus the premium on keeping the “King’s peace”, and even large human groupings that could be described as units of the earliest proto civilizations, Early man needed norms and proscriptions to permit his very survival. These norms and proscriptions have been described loosely as “natural law”, and the form the foundation of all modern law. Hobbes placed the source of natural law as “reason”, writing in LEVIATHAN: “Reason suggesteth convenient Articles of Peace upon which men may be drawn to agreement. These Articles are they which otherwise are called the Laws of Nature”.¹⁷ T.E. Holland describes the rights conferred by natural law as these: “I. To personal safety and freedom[;] II. To society and control of one’s family and

¹⁴ A. Raphael, *Oral Tradition* at 1 (65th IFLA Conf. - Bangkok)(1999).

¹⁵ Of course the human mentality did not come into being and thereupon structure culture around human needs. Rather, the development of an “encephalated nervous system [and the] capacity to use symbols” did not merely permit man to develop culture, it “demand[ed] that he do so if [man was] to function at all.[.]” CLIFFORD GEERTZ, *THE INTERPRETATION OF CULTURES* 68 (1973).

¹⁶ LANGER, *PHILOSOPHY IN A NEW KEY* 287 (), quoted in CLIFFORD GERTZ, *THE INTERPRETATION OF CULTURES* 99-100 (1973).

¹⁷ HOBBS, *LEVIATHAN* ____, quoted in T.E. HOLLAND, *JURISPRUDENCE* 34 (11th ed.) (1910).

dependants[;] III. To reputation[;] IV. To advantages open to the community generally; such as free exercise of one's calling[;] V. To possession and ownership [; and] To immunity from damage from fraud.”¹⁸ The discussion to follow in the next section of this article will validate Hobbes' recitation in that it will show that the norms and customs to which man turned his attention from the earliest times bear a similarity – regular if not perfect - to the natural law described by later theorists.

II. PARTICULAR APPLICATIONS OF ANCIENT TORT LAW

A. *Nuisance and Disturbing the Peace*

Throughout primitive and ancient law are examples of strictures suggesting that the social group placed a greater premium on restoring order and good will than it did on determining that one disputant was right and the other wrong. In Australian aboriginal customary law, for example, the objective or resolution of a dispute would more often be the quieting of temper and the restoration of a placid community than it would be any strict identification of which party was at fault.¹⁹

Tibetan folk law demonstrates numerous examples of strictures against what today might be termed “public nuisance.” In the Rules of Punishment for Tibetans (1733), Rule No. 26, titled “Making Fire to Burn Wild Animals Out of Their Lairs”, vests in the individual who discovers the infraction the remedy of fining the hunter “one

¹⁸ T.E. HOLLAND, *id.* at 167.

¹⁹ Kenneth Maddock, *Aboriginal Customary Law*, Chapter 9 in *ABORIGINES AND THE LAW* at 232 (Peter Hanks, Bryan Keon-Cohen, eds.) (Allen & Unwin, Inc. 1984). Keating references the effect of “community opinion about the merits of a case as helping to decide the outcome through its influence on both the disputants and their potential supporters[.]” citing L. R. HIATT, *KINSHIP AND CONFLICT: A STUDY IN AN ABORIGINAL COMMUNITY IN NORTHERN ARNHAM LAND* 146-47 (CANBERRA: ANU PRESS 1965).

`nine'". Reposing the remedy in the person discovering the delict might at first seem like an example of the "special injury" rule in public nuisance, in that an individual may bring the claim. Yet in this "Fire" rule there is no articulated need that the reporting individual/claimant have suffered any injury at all. Perhaps the rule simply stands as an example of a public nuisance proceeding that can be brought not only by public officials but also by individuals, with the inclusion of individuals seen as a prudential device to increase deterrence by increasing detection.

Penalty provisions referencing one or more "nine" or one or more "animals" were enforceable with reference to Rule No. 39, which detailed how' these terms correlated with livestock: Rule No. 39 details how the terms "1 nine" or a "Five Animals" correlate with livestock: "One `nine' means a combination of nine animals such as 2 horses, 2 *dso*, 2 three-year-old cow 1 two-year old cow. `Five animals' means 1 *dso*, 1 cow, 1 three-year old cow, and 2 two-year old cows. The person who comes to demand these fines is entitled to receive as his fee 1 three-year old cow from the guilty. In places where horses are plentiful *dso* may be offered in their stead."²⁰

Among the Pygmies living in the Ituri Forest of the former Congo, there has long been a saying that "a noisy camp is a hungry camp."²¹ This is so because the Pygmies are hunters, and as is self-evident, unnecessary noise drives the game deeper into the forest. As it might be today, and yet for different reasons, unreasonable noise is therefore treated as a nuisance. Anthropologist Colin Turnbull records an incident in which the father of an attractive village girl chased away a suitor and persisted in his tirade by taking apposition in the middle of the village calling for others to support him, and that

²⁰ *Id.*

²¹ COLIN M. TURNBULL, *THE FOREST PEOPLE* 120 (1962).

failing, took to rattling the roofs of the surrounding huts. An elder interceded in a calm voice: “You are making too much noise – you are killing the forest, you are killing the hunt. It is for us older men to sleep at night and not to worry about the youngsters. They know what to do and what not to do.”²² Evidently displeased, the father nevertheless accepted the resolution.

Under Roman Law, the Institutes of Justinian included rules that reveal numerous strictures against the imposition of one’s will over the rights of a neighbor, and strong deterrents for the disregard thereof. Specifically as to urban estates, is Book III, Title II par. 2, as interpreted by Gaius, to which Ulpianus, there was a prohibition on the obstruction of a neighbor’s view.²³ In one notable example, pertaining to what would today be called the law of private nuisance or trespass, another provision goes so far as to detail a preference that adjoining landowners bargain in advance for agreement as to contemporaneous uses of land that might trigger dispute. In Book III par. 4, the Institutes provide that one “wishing to create” such a right of usage “should do so by pacts and stipulations.” A testator of land may impose such agreements reached upon his heirs, including limitations upon building height, obstruction of light, or introduction of a beam into a common wall, or the construction of a catch for a cistern, an easement of passage, or a right of way to water.²⁴ These last two examples reflect a clear preference for ex ante bargaining over economically wasteful ex post dispute resolution. The provision permitting the testator to bind his heirs to any such agreement is additionally efficient in a manner akin to the approach that was taken later and famously by Justice Bergen in the

²² *Id.* at 19.

²³ THE DIGEST (or PANDECTS) BOOK III TITLE II par. 2., par. 3.

²⁴ THE INSTITUTES OF JUSTINIAN BOOK III par. 4, *supra* note 80 at 84, 85.

cement plant nuisance case of *Boomer v. Atlantic Cement Co., Inc.*,²⁵ ensured that its award of damages would be indeed a one-time resolution of the dispute by requiring that the disposition of the claim be entered and recorded as a permanent servitude on the land.

B. Manslaughter or Wrongful Death

At Sura 4 the Koran prohibits, unsurprisingly, the intentional killing of a believer. In traditional Islamic law the unintended killing of another would warrant payment of a full diyet, or blood money, set at 3.8 grams of silver.²⁶ Should a believer be killed by “mischance”, i.e., accident, the responsible party “shall be bound to free a believer from slavery; and the blood money shall be paid to the family of the slain, unless they convert it into alms.”²⁷ Killing in self-defense would be unpunished. Lawrence Rosen explained the distinction with the example of one Zeyd, who attacked Amr. Reviewed by the mufti, it was noted that Amr could have rescued himself by calling for help, thus denying him the privilege of self-defense.²⁸

There are numerous Eastern examples of the treatment of unintentional killing as an offense redressable in money or other damages. In ancient India, if a person were accidentally killed by an animal-drawn vehicle, the driver would be subjected to “the same liability as a thief [.]”²⁹ In China, for injuries resulting in death, traditional law distinguished between intentional killing and accidental killing. T’ang Code Article 339 provided that “All cases of accidentally (kuo shih) killing or injuring someone follow the

²⁵ 257 N.E.2d 870 (N.Y. 1970).

²⁶ HAIM GERBER, *STATE, SOCIETY AND THE LAW IN ISLAM* 36 (SUNY 1994).

²⁷ Sura 4, ll. 90-100, *THE KORAN* (J.M.Rodwell, Trans.)(Everyman 1994).

²⁸ GERBER, *supra* note 25, *citing* Lawrence Rosen, *Responsibility and Compensatory Justice in Arab Law and Culture*, in *SEMOTICS, SELF AND SOCIETY* 101-19 (Benjamin Lee and Greg Urban, ed.)(New York 1989).

²⁹ *THE LAW CODE OF MANU* 145 (Patrick Olivelle, trans.)(Oxford 2004).

manner in which the death occurs and treat as redeemable.”³⁰ By “redeemable” is meant that the offense may be expiated by the payment of money to the victim’s family. The analogous provision in the Ch’ing Code describes accidental killing (wu sha) in the context of hunting for game (his sha). It states that for an accidental killing the punishment should be the same as for a killing in a fight, except that “redemption is permitted”. The Ch’ing Code gives such examples as an accidental death “where one is shooting wild animals or for some reason is throwing bricks or tiles”; “climbing and one’s fall causes others to fall; navigating a boat by sail, riding a horse that becomes frightened, driving a cart downhill, or lifting an object when “one lacks the strength to sustain it and someone else is harmed[.]” In each such instance, when “there has been no intention to harm”, the Code provides that “the sentence is to conform with the punishment for killing or injuring in a fight”, but redemption is permitted, with “the money to be given to the family of the person killed or as a contribution to funeral or medical expenses.”³¹

C. Assault and Battery

It is an historical verity that intentional battery is an offense that creates a high risk of retaliation, or self help, an yet some Native American groups even made allowance for it, while at the same time providing for the intercession of village council.³²

³⁰ GEOFFREY MACCORMACK, *THE SPIRIT OF TRADITIONAL CHINESE LAW* 38 (Georgia 1996)

³¹ *Id.* at 39 (citations omitted).

³² *ASIAN INDIGENOUS LAW: AN INTERACTION WITH RECEIVED LAW* 251 (Masaji Chiba, ed.)(Methuan 1986) (indigenous law governing the Konyak Nagas of India).

Other Indian groups, in contrast, demonstrate “a general disapproval of `retaliation as a means of obtaining justice’”.³³

Putting aside its punishment of death for one who strikes his mother or father,³⁴ under the Torah one who inflicts a direct nonmortal blow to another will not be liable if the victim is able to get up and about, “even with a stick”, providing an interesting early invocation of the principle *de minimis non curat lex*. If, however, the injury is sufficiently serious that the victim is temporarily incapacitated, the aggressor “must compensate him . . . for his enforced inactivity, and care for him until he is completely cured”.³⁵ This approach contemplates not only recovery for economic loss (compensation for “enforced inactivity”), and also rehabilitation expenses.

In Islamic law, compensatory justice for injurious battery might provide for damages according to a schedule keyed to the severity of the harm, rather as might modern workers compensation. Liability might be according to *diyyet*, or blood money.³⁶ Full blood money due for the unintentional death of the victim was set at 10,000 *dirham*, or 3.8 grams of silver.³⁷ Serious injury to the hand, the leg or the eye was compensable with half blood money. Loss of a tooth might warrant 1/20 blood money.³⁸

The Koran is not pacifistic by any means, and does not feign to offer by its rules remedies to persons that may avoid injury by resort to self-help, or by means of retaliation. While the Koran explains that God does not countenance attacking others

³³ *Id* at 253 (law of Gond in India).

³⁴ “ Anyone who strikes his father or mother must die. Anyone who abducts a man-whether he has sold him or is found in possession of him-must die. Anyone who curses father or mother must die.” THE JERUSALEM BIBLE , EXODUS 21: 15 (Doubleday 1966)(hereinafter the “BIBLE”).

³⁵ *Id.*, EXODUS 21: 18-19.

³⁶ GERBER, *supra* note 25 at 33.

³⁷ *Id.*

³⁸ *Id.* at 35

first, Muslims may fight for the cause of God against those who fight you [.]”³⁹ Is it then paradoxical that it may be true that, as some scholars claim, “that the function of law in Islam is merely to get people back on the negotiating track.”⁴⁰ This perception pertains instead to a goal that the state attend to affairs of government, not religion, and that Islam attends to religion, and not to the state, and that it is in these subject matters that the “negotiating” ideal obtains.⁴¹ Within the tribal customary law of the Awlad Ali of Egypt, for battery resulting in injury *diyah*, or blood money, would be paid to the family of the victim, together with *kebara*, calculated in money and animals.⁴²

Under The Rules of Punishment for Tibetans, battery could incur variable fines depending upon the severity of injury. A fine of three “nines” would be levied for a fight resulting in an injury to the eye, hand, or foot, although if the injury was such as could be cured, the fine was one “nine”, as was true also for a fight causing the loss of teeth, or an abortion (one “nine”). When hair would be torn off, the fine was five animals.⁴³

In ancient Indian law, the “low born” were treated very differentially than were the Brahmins. For injurious assaults against one of a superior caste, punishment ranged from amputation of the limb injured by the assailant, banishment or exile, or for spitting on one’s superior, the cutting off of the assailant’s lips.⁴⁴ Other aggression causing injury

³⁹ Sura 2 ¶ 186, THE KORAN.

In the classical Islamic theory of the state. The state was seen not as the instrument for the application of law, nor were the courts . . . envisioned as vehicles for economic redistribution or the consequences of a particular political order.
LAWRENCE ROSEN, THE ANTHROPOLOGY OF JUSTICE 61 (Cambridge, 1989), *quoted in* GERBER, *supra* note 25 at 59 (SUNY 1994).

⁴² ASIAN INDIGENOUS LAW, *supra* note at 65.

⁴³ Rule 28, Rules of Punishment for Tibetans, in Shih-Yu Yu Li, *Tibetan Folk Law*, J. ROY. ASIATIC SOC. G.B. & IRELAND Parts 3, 4, pp. 127-148 (1950), *reprinted in* RENTELS & DUNDES, *supra* note 11 at 520.

⁴⁴ CODE OF MANU *supra* note 28 at 144.

and pain to another (or to an animal) called for the king to “impose a punishment proportionate to the severity of the pain.”⁴⁵

Lastly, pursuant to Greek law, striking another gave rise to a private cause of action in battery (*dike aikeias*). If liability would be found, it would ordinarily be against the one striking the first blow. The penalty would be an amount payable in money damages as assessed by a jury.⁴⁶

D. Trespass to Land and Chattels

In the authoritative and ancient work Manu, entitled alternatively “The Law Code of Manu” or “Manava Dharmasastra”, the text references ancient Indian law governing the trespass of animals. For such fields surrounding a settlement as are left open, any farm animal damage to crops should not be punished. To receive any protection for one’s fields, a person “should erect a fence over which a camel cannot look and cover any hole through which a dog or pig could poke his head.”⁴⁷ For damage caused by herded livestock to such fenced land, a fine of 100 should be imposed – and if the livestock are unherded, they should be impounded. For livestock damage to other fields, “one and a half Panas should be assessed for each animal”, and the owner of the land should be compensated for any crop loss.⁴⁸

Prior to the laws of Hammurabi⁴⁹ there were published the laws of King Ur-Nami and Lipit-Ishtar. Read together as principal sources of the law of ancient Babylonia, there is seen an emphasis on the protection of person, property and commerce from

⁴⁵ *Id.* at 144 .

⁴⁶ MACDOWELL, *supra* note 2 at 122 (Demosthenes 47.45-7, 47.64; Isok. 20.19).

⁴⁷ CODE OF MANU, *supra* note 28 at 141.

⁴⁸ *Id.*

⁴⁹ *Supra* note 10

forced divestiture of a right or a prerogative. Regarding navigation, a collision between two boats on a body of water having a perceptible upstream and downstream would trigger a presumption of fault on the part of the upstream captain, on the logic – faulty or not --- that the upstream captain had a greater opportunity to reduce avoidable accidents than did his counterpart, as the former would be traveling at a slower speed.⁵⁰

Anglo-American common law trespass can include numerous instances in which a landowner is held liable in trespass if a structure or an activity on the first individual's property causes damages, by diversion of water or otherwise, to the land of another. In Athenian law is found the account of *Against Kallikle*, recorded by Demosthenes, in which it appears that Kallike and a neighbor both lived on a hillside. Kallikes constructed a wall to protect his land from water runoff from rainfall, which wall served this purpose, but also diverted water onto his neighbor's property. For this trespass, Kallikes was fined in damages (kike blabes) a sum of 1000 drachmas.⁵¹

In ancient Athens, an action for destruction of or damage to chattels was defined in a way as to seeming merge the modern notions of trespass to chattels and conversion. An action for “damage” could be brought for any “physical damage to a piece of property, such as to destroy it or make it useless or less valuable than before, but without taking it away [.]”⁵²

Tibetan folk law includes methods of economic recovery, recovery in kind, and punitive consequences that bespeak strong deterrence objectives. Should trespassing

⁵⁰ DRIVER AND MILLS, *BABYLONIAN LAW* S 431-432, referenced in RUSS VERSTEEG, *EARLY MESOPOTAMIAN LAW* 130 (2000). The author questions the reliability of this, as to the author's limited knowledge, the downstream boat in an encounter with an upstream boat is the boat fighting the current. Irrespective, the point made is the same.

⁵¹ MACDOWELL, *supra* note 2 at 136 (Demosthenes 55), citing H. J. Wolff, *AM. J. PHILOLOGY* 64 (1943).

⁵² *Id.* at 149 (Demosthenes 21.50).

cattle damage one's field, the owner of the cattle may appropriately seize the cattle pending payment for the damage. Should the land at issue be not a field but instead a pasture utilized by nomads for the grazing of their animals, Tibetan folk law proscribes the trespassing of one nomadic tribe's cattle on the pasture of another tribe. Again the trespassing cattle may be seized pending payment for the harm done. Should the grazing be done in the course of a caravan's passage through the territory of another tribe, a pristinely market-based transaction is expected. The traveling tribe offers to the local tribal chieftain a gift of "grass money", to compensate for the grass the herd is expected to graze.

The 1733 Rules of Punishment for Tibetans published by the Manchu Imperial Court contains provision for trespass to or conversion of another's animals. Pursuant to Rule No. 30, "Injury to Other People's Animals", provides that should the animal of another be killed, the perpetrator is fined one "nine", and also must pay the full value of the animal to the owner. If a horse is shot and killed, two horses must be given in compensation. If the horse is only injured, a fine of a two-year old cow is levied.⁵³

In ancient India, should a cart or coach kill a large animal (such as a cow or an elephant) its owner (if the driver was unskilled) would be fined half the amount that would be applicable if the offense had been theft. For the similar death of a small farm animal, the fine would be 200; for a "beautiful animal" such as a bird, the fine would be 50, and for a donkey, a sheep or a goat, 1 Masa.⁵⁴

E. Conversion or Theft

⁵³ Shih-Yu Yu Li, *Tibetan Folk Law*, J. ROY. ASIATIC SOC. G.B. & IRELAND Parts 3, 4, pp. 127-148 (1950), reprinted in RENTELS & DUNDES, *supra* note at 27.

⁵⁴ CODE OF MANU, *supra* note at 145.

In our time, we can refer to the children's expression "Cross my heart, hope to die" as an affirmation of the community's disapproval of deceit.⁵⁵ The proscription of trespass to chattels or conversion, the occurrence of which has always been common to the playground, remains imbedded in several children's rhymes that indicate the strongest community aversion to any initiative by a giver of goods to engage in self help to regain possession.⁵⁶ One such folk proscription is found in a French children's rhyme, reduced in writing as "Once given away, stays given; taking away is stealing."⁵⁷ More severe consequences are opported in a saying attributed to Dutch, Flemish, German and French children, to this effect: "Once given, taken away, go to Hell three times."⁵⁸

During the Egyptian Sixth Dynasty, from approximately 2460 to 2200 B.C., the law bled together the notions of theft as a criminal action as opposed to conversion, to be prosecuted by a civil complainant. During the reign of Pepi I, c. 2325, there was appointed a prosecutor named Weni, who presided over these and other matters, and whose recitations of the matters brought before him gives evidence of the law employed and the remedies exacted.⁵⁹ In one such suit Weni recounts being sent by the king "to prevent [the army] from taking bread or sandals from a wayfarer, to prevent any one of them from taking a loin-cloth from any village, to prevent any one of them from taking any goat from any people."⁶⁰ Upon a finding of responsibility, the remedy exacted would typically be that of requiring the thief to return any stolen goods to the victim, and

⁵⁵ RENTELN & DUNDES, *supra* note at 417-419. See brief essay of A. F. Chamberlain, including other examples.

⁵⁶ In general terms, as has often been put, "the common law does not favor self help." A.W.B. Simpson, *The Common Law in Legal Theory* 121, in 1 FOLK LAW: ESSAYS IN THE THEORY AND PRACTICE OF LEX NON SCRIPTA (Alison Dundes Rentleln, Alan Dundes, eds.)(1994).

⁵⁷ A.E. Chamberlain, *Legal Folklore of Children* 419, at *id.*

⁵⁸ *Id.*

⁵⁹ RUSS VERSTEEG, *LAW IN ANCIENT EGYPT* 161 (2002)

⁶⁰ *Id.*, quoting GARDINER, *EGYPT OF THE PHAROAHS* 96 ().

also to pay the victim damages in the amount of a multiple, often two to three times, the value of the property asported.⁶¹

In ancient Greece there was followed an approach consistent with that of so-called “civilized” societies and pre-literate societies alike throughout the world. That approach was a two-pronged response to conversion of chattels. First, the wrongdoer must give up the wrongfully gained property. Second, the perpetrator should be punished. Following successful prosecution of a claim for theft (dike klopes) The punishment might be the payment of a fine gauged at twice the value of the property. In egregious instances, an additional penalty of time in public stocks.⁶²

For some theft the remedy would be restitution in some fixed amount, or in a multiple of the value of what was stolen. The same would be required of any knowing receiver of any such stolen goods.⁶³ Among Indian indigenous groups, cash fines might be levied for petty thefts.⁶⁴

As with Native Americans, among certain African tribes theft is rare. One anthropologist assigned the reason to be that the tribal members have few individual possessions.⁶⁵ However other delicts resembling theft might be treated with great seriousness. Among the Pygmies living in the Ituri Forest of the former Congo, the men hunted and still hunt as groups, with some acting as beaters to drive game in a certain direction, and the others setting nets at agreed-upon locations. As Colin Turnbull describes it, “In a small and tightly knit hunting band, survival can be achieved only by

⁶¹ *Id.* at 162, citing McDOWELL, JURISDICTION 230 ().

⁶² MACDOWELL, *supra* note at 148-47 (citing Demosthenes 24.105, 24.114; Lysias 29.11).

⁶³ A HISTORY OF ANCIENT NEAR EASTERN LAW 81 (Raymond Westbrook, ed.)(Brill 2003)(citations omitted).

⁶⁴ ASIAN INDIGENOUS LAW, *supra* note at 239.

⁶⁵ COLIN M. TURNBULL, THE FOREST PEOPLE 120 (1962).

the closest cooperation and by an elaborate system of reciprocal obligations which insures that everyone has some share of the day's catch. Some days one gets more than others, but nobody goes without."⁶⁶ In one incident that Turnbull recorded, a member of the hunting party set up his nets in a place that garnered for him a comparative advantage over the hunters. Brought to task, the hunter returned to camp and Returns to camp and "ordered his wife to turn over the spoils."⁶⁷ Interestingly, the wrongdoer's amenability to accept this result might have been affected by his recognition that he could not, as a practical matter defy it, recognizing that he was not in a position to break away from his group, as "his band of four or five families was too small to make an efficient hunting unit."⁶⁸ More generally, for theft among the Pygmies, the frustrated nocturnal theft of food from a neighbor's pot, punishment might include public whipping or shunning.⁶⁹

All bodies of folk law contain proscriptions on conversion. For Tibetans, pursuant to the Rules for Punishment of Tibetans of the Manchu Imperial Court, a theft of domestic animals such as "dogs or pigs" could result in a fine, recoverable by the wronged party, of five "animals". Theft of other domestic animals, such as fowl, was treated variously, with conversion of fowls punishable by a fine of a three-year-old cow. Additionally, in each instance the stolen animal had to be returned.⁷⁰

For theft of personalty ("gold, silver, sable, otter skin, hides, money, cloth, food, etc.") the malefactor was required to return property "of equal value". In addition, fines

⁶⁶ *Id.* at 107.

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.* at 120-21.

⁷⁰ Rule 20, "Theft of Domestic Animals", Manchu Imperial Court's Rules for Punishment of Tibetans, in Sh ih-Yu Yu Li, *Tibetan Folk Law*, J. ROY. ASIATIC SOC. G.B. & IRELAND Parts 3, 4, pp. 127-148 (1950), reprinted in RENTELS & DUNDES, *supra* note at 525.

would be imposed, keyed to the value of the stolen goods, *e.g.*, three “nines” for the theft of a two and one half year old cow; one “nine” for a sheep; and a three year-old cow for the theft of an animal of lesser value than a sheep.⁷¹

Conversion or theft is prohibited of Muslims. As expressed in Sura 7:”Give . . . the full in measures and weights; take from no man his chattels, and commit no disorder on the earth after it has been made so good.”⁷² Muslims on pilgrimage are instructed to kill no game in the lands through which thy journey. If such game is purposefully killed, the person responsible shall compensate for it “in domestic animals of equal value (as determined by two persons in the group), or feed the poor, or fast “that he may taste the ill consequences of his deed.”⁷³ Although hunting will be prohibited for pilgrims,⁷⁴ it is lawful for them “to fish in the sea[.]”⁷⁵

The same general approach is true of customary law. Among agricultural community of the Konyak Nagas of India, conversion might be punished by fines, although the stricter penalty of banishment might be reserved for chronic offenders.⁷⁶

Folk stories too have long carried social norms from generation to generation. Joel Chandler Harris, in his writing of the Uncle Remus stories, comments upon how story and fable transport the listener from the common reality of known things into the emotive state of feeling – wherein lay the enduring power of oral history and fable.⁷⁷

⁷¹ Rule 21, “Theft of Domestic Animals”, Manchu Imperial Court’s Rules for Punishment of Tibetans, in Shih-Yu Yu Li, *Tibetan Folk Law*, J. ROY. ASIATIC SOC. G.B. & IRELAND Parts 3, 4, pp. 127-148 (1950), reprinted in RENTELS & DUNDES, *supra* note at 525.

⁷² Sura 7, ¶ 83, THE KORAN.

⁷³ Sura 5, ¶ 96, THE KORAN

⁷⁴ *Id.*, see also *id.* at ¶ 97.

⁷⁵ *Id.* ¶ 97.

⁷⁶ ASIAN INDIGENOUS LAW, *supra* note at 251.

⁷⁷ In the course of one story in which Uncle Remus finds himself obliged to feint and weave in a particular story in response to a boy’s inquiry, Harris writes:

In one Indian folk tale even a thief's theft of a mason's services creates an opportunity for some sanctimonious advice on victim responsibility. The story, entitled *The Burglar's Gift*, describes a mason who had once learned the lesson posed to The beating suspended, the mason gathered himself to go home, only to have the burglar those who do business for dishonest persons, but who found himself so in need of work that he agreed to build a cellar for a man of suspicious character, indeed, "he was reported to be a thief and burglar[.]" The mason complete the work and was invited to the burglar's home "to receive his humble reward[.]" Arriving the following morning, the mason was distressed to see that he was the only guest, and his alarm only grew greater as the burglar's tone grew hostile and he began to beat the mason. "I shall return to you every piece taken in wages," said the mason, "and the greatest reward for me is to let me go." But the appeal fell on deaf ears and the host relished every lash he gave to the mason. The latter invoked all the holy angels, the Holy Book and God to rid himself of the present misfortune. At last the burglar seemed to have got tired and stopped.

The beating suspended, the mason gathered himself to go home, only to have the burglar bid him to sit down. After a fine meal, the burglar presented the mason "a malmal (turban) and a five rupee note by way of reward." While confused at "this paradoxical behaviour of the burglar[.]", the mason accepted these gifts and asked again to go. "I shall be most happy to bid you good-bye after I place a valuable and an everlasting gift at your feet," said the burglar. The burglar continued, "You did not ask

Indeed, one of the queerest results of the old man's manner of telling stories -- the charm of which cannot be reproduced in cold type -- was that all the animals, and all of the characters that figured there, were taken out of the reality which we know, and transported bodily into that realm of reality which we feel: the reality that lies far beyond the commonplace, everyday facts that constitute not the least of our worries.
JOEL CHANDLER HARRIS, *UNCLE REMUS RETURNS* 62, 63 (1918).

me why I belaboured you so heartlessly?" To both of these declarations the mason did not respond. "Look," said the burglar, "what I gave you as tokens of my appreciation will last a short while and disappear. What I want to give you now will last for ever and is sure to pass from one generation to another, and why I gave you a beating thus was to imprint the lesson indelibly on your mind and body so that you never lose sight of the great truth. The lesson I want you to learn is that you need not fear thieves and burglars as long as your doors and windows are well bolted and hasped. On the basis of my professional experience my advice to you is that you should always keep your windows and doors properly hasped and bolted at night to be free of the fear of thieves. You will please excuse me for the beating but the lesson had to be rubbed in thoroughly."

F. Negligence

Some scholars assert that the concept of "the reasonable man" was common to all ancient cultures.⁷⁸ The historical record seems to provide support for this. For example, under ancient Mesopotamian law, for negligently cause personal injury, such as in a brawl, the wrongdoer might be responsible for the person's medical expenses, with provision too for the time he was invalidated,⁷⁹ a provision quite similar to that contained in the Code of the Covenant referenced above.⁸⁰

⁷⁸ GERBER, *supra* note at 34. The author therein references the administration of Islamic law of the Byzantine Empire, a codification of ancient customary law, which contains reference to a dispute arising from a claim of a coachman who was claimed to have beaten his horses so severely that they bolted and injured a child. From the record it appears that the coachman was permitted to interpose the defense that he had acted reasonably, and the disputants were permitted to present evidence that he had not. *Id.*

⁷⁹ LH 206; HL 10. . *See also*; Exod. 21:18-19, *discussed in* A HISTORY OF ANCIENT NEAR EASTERN LAW, *supra* note at 82.

⁸⁰ *Supra* note .

Further evidence in early Mesopotamian law of a neighbor's duty to another is found in a rule that neighbors were bound by rules that served to deter letting one's unoccupied land elevate a risk of trespass or burglary to the neighboring property. The Law of Lipit-Ishtar provided that upon notice from one neighbor that a second neighbor's unattended property provided access to the complainant's property by potential robbers, that should a robbery occur, the inattentive neighbor would be liable for any harm to the complainant's home or property.⁸¹

Rules for Punishment of Tibetans No. 26, reference earlier regarding its public nuisance implications,⁸² also provides that witnesses ("those in sight") of a "fire caused by carelessness" are "intitled to fine the guilty 5 animals." If the carelessly started fire kills an individual, the fine is one "nine".⁸³ Those carelessly handling firearms "without justifiable causes", and irrespective of injury, could be fined two "nines" for *Ch'inbu*, one "nine" for *Paibu*, seven animals for centurions, five for lesser centurions, and three for commoners and lesser elders.⁸⁴

As to private nuisance, ancient Mesopotamia the codified customary law provided specifically for redress should one's irrigation waters overflow onto another's property or crops. Particularly harsh legal consequences might be visited upon the landowner who failed to contain his irrigation canals, as flooding of the water might "result not only in leaving crops and cattle dry and parched in one point, but also widespread floods in

⁸¹ LIPIT-ISHTAR § 11, in EARLY MESOPOTAMEAN LAW, *supra* note .

⁸² *Supra* note .

⁸³ Shih-Yu Yu Li, *Tibetan Folk Law*, J. ROY. ASIATIC SOC. G.B. & IRELAND Parts 3, 4, pp. 127-148 (1950), *reprinted in* RENTELS & DUNDES, *supra* note at 526. For definitions of "nines", see above and accompanying notes.

⁸⁴ Rule No. 27, *id.* at 526.

another part of the district.”⁸⁵ In the simple case involving only damages grain, replacement of a like amount might give sufficient remedy. But an unmistakably message of severe consequences would be clear to those knowing that should the careless farmer be unable to replace the grain, the neighbors might be permitted to sell his property to sell him into slavery to achieve justice.⁸⁶

Other Babylonian law imposed upon home dwellers a duty not to permit their homes to become private nuisances, at least insofar as an unoccupied home might become a hiding place for thieves or burglars. Neighbors in turn were bound by rules that served to deter letting one’s unoccupied land elevate a risk of trespass or burglary to the neighboring property. The Law of Lipit-Ishtar provided that upon notice from one neighbor that a second neighbor’s unattended property provided access to the complainant’s property by potential robbers, that should a robbery occur, the inattentive neighbor would be liable for any harm to the complainant’s home or property.⁸⁷

The logic of the “failure to cover a ditch” cases that are a mainstay of modern casebooks⁸⁸ is reflected in Code of the Covenant provisions providing that should one leave a ditch uncovered and an ox or a donkey falls into it, he must pay the owner (although he gets to keep the dead animal as his own!).⁸⁹

Thus in order that we may receive such blessings as are identified in the maxims such as “Keep no one from a running stream[;]” or “Let anyone who pleases take a light from your fire[;]” or Give honest advice to a man in doubt[;]” Cicero writes, it follows

⁸⁵ DRIVER AND MILLS, *BABYLONIAN LAW* 50, from *EARLY MESOPOTAMEAN LAW*, *supra* note at 136.

⁸⁶ HAMMURABI § 54, in *EARLY MESOPOTAMEAN LAW*, *supra* note at 136. *See also* Raymond Westbrook, *Slave and Master*, 70 *CHICAGO-KENT L. REV.* 1631, 1644 (1995).

⁸⁷ LIPIT-ISHTAR § 11. in *EARLY MESOPOTAMEAN LAW*, *supra* note at 136. .

⁸⁸ *See, e.g.,* .

⁸⁹ BIBLE , EXODUS 21: 33-34.

that we must be willing to give likewise of the same in order to “contribute to the common weal.”⁹⁰

In Roman law, among the *delicts* of greatest importance were included damage to property, real and personal, and the *action injuriarum* for personal physical harm to others. The victim could bring an action for “profitable amends”, or money damages, or “honorable amends”, which is to say, a formal and public apology. As had been advanced in theory by Socrates, the latter remedy would most likely arise in setting in which dignitary torts, such as defamation. Committed to the identification of the delineation between “what is “just and what unjust”, the Institutes of Justinian and other sources of Roman law reflected an endeavor to “give each man his due right”, and comprises “precepts” to all Romans “to live justly, not to injure another and to render to each his own.”⁹¹ Violation of a “personal action” not sounding in contract is in *delict*.⁹²

In the law of ancient India there were rules for accidents caused by animal-drawn vehicles. If the driver was unskilled, and the accident was “due to the driver’s incompetence”, the owner of the vehicle would be fined “200” and “all the risers should be fined 100.” If the driver was skilled, he would sustain the fine.

G. *Strict Liability*

A commonly cited Law Code provision of Hamurabi treats the imposition of strict liability when one’s animal injures another: “ If an ox gores an a ox and causes its death, the owners of both oxen shall divide the value of the live ox and the carcass of the

⁹⁰ *Id.* at 23.

⁹¹ THE INSTITUTES OF JUSTINIAN BOOK I, Preamble; par. 1; par. 3, at THE INSTITUTES OF JUSTINIAN 84, 85 (J.A.C. Thomas trans)(1975).

⁹² GAIUS, THE INSTITUTES OF ROMAN LAW, Fourth Commentary par. 3 in THE INSTITUTES OF ROMAN LAW BY GAIUS 442- 443 (E. Post Trans. 1925)(J.A.C. Thomas trans.)(1975).

dead ox.”⁹³ Mosaic law too provides that “If an ox gore man or a woman that they die, then the ox shall be surely stoned and his flesh shall not be eaten.”⁹⁴ The proscription on eating the animal, which is permitted when an ox gores another ox, has been attributed described as a recognition that “the animal has killed a superior in the cosmic order, namely a human being.”⁹⁵

The Code of the Covenant addresses the issue somewhat more particularly. There is no strict liability if the ox has not gored before, the penalty will be that the ox be stoned, and its flesh uneaten. If, on the other hand, the ox “has been in the habit of goring before”, and its owner is aware of this, if the ox kills a man or a woman the ox should be stoned and its owner put to death.⁹⁶ In a seeming endeavor to ameliorate such harsh consequences, the Code also states that if instead the careless owner has assigned to him a “ransom”, he may “pay whatever is imposed, to redeem his life.”⁹⁷ Deaths of children are treated with markedly less severity, as the payment of a ransom is the sole prescribed punishment, and the goring of a slave presumptively even less severely – the stoning of the ox and the payment of thirty shekels.⁹⁸

Such forms of strict liability have persisted to this day. Using an example of Salmond’s: “If my horse or ox escapes from my land to that of another man, I am answerable for it without any proof of negligence.”⁹⁹ While this application of strict liability fortrespas may be based in a reasonable presumption of negligence upon such occurrences, Salmond suggests that it’s truer origins may be in a vicarious liability

⁹³ ANCIENT NEAR EASTERN LAW, *supra* note at 17.

⁹⁴ BIBLE, EXODUS xxxi.(21), 28,[32], *cited in* JOHN SALMOND, JURISPRUDENCE § 148 at 373 (Sweet and Maxwell, Ltd. 1929).

⁹⁵ ANCIENT NEAR EASTERN LAW, *supra* note at 77.

⁹⁶ BIBLE, EXODUS 21: 28-30.

⁹⁷ *Id.*, EXODUS 21: 30.

⁹⁸ *Id.*, EXODUS 21: 31-32.

⁹⁹ JOHN SALMOND, *supra* note at 372, *citing* *Ellis v. Loftus Iron Co.*, L. R. C. P. 10.

liability placing upon the owner of property responsibility for injuries caused by such property, such as a master's responsibility for the actions of his slaves under Roman law.¹⁰⁰

I. Defamation and False Witness

In the speech *Against Konon*, Demosthenes gives the rationale for a civil action for slander in these words: For instance, there are cases of slander; these, they say, were instituted in order that men who are abused should not be induced to hit one another."¹⁰¹

In ancient Egypt, one tired for defamation could, as today, interpose truth as a defense. Interestingly, if found liable, the libellant was not punished for this first transgression. Instead, he or she was required to take an "oath of mutilation", covenanting that they would submit to amputation of their nose, ears, or each should they engage in a further transgression.¹⁰² In the Koran, Sura 104 condemns "every backbiter, defamer." It attributes to the amassing and storing of wealth as though it might be kept by him forever. The defamer can more realistically foresee, Sura 104 suggests, "being flung into the Crushing Fire."¹⁰³

Elsewhere the Koran condemns anyone defaming a "virtuous" woman unless the author of the writing or utterance has four witnesses who support the account. Without the witnesses, in which Sura 24 is seemingly more interested in than whether or not the account is true, the responsible party will receive "four score stripes", and is barred en

¹⁰⁰ *Id.* at 373.

¹⁰¹ MACDOWELL, *supra* note at 123 (Demosthenes 54. 17-19).

¹⁰² LAW IN ANCIENT EGYPT, *supra* note at 179, citing BEDELL, CRIMINAL LAW 138 ().

¹⁰³ Sura 104, THE KORAN .

perpetuity from giving testimony.¹⁰⁴ Should a husband accuse his wife, the word of God pays no heed to the testimony of witnesses and instead requires the husband to first testify four times as to the truth of the accusation. When the husband repeats the accusation the fifth time, if he is untruthful, “the malison of god be upon him[.]” If in his fifth oath the husband speaks the truth, it will “*call down* the wrath of God” upon the wife.¹⁰⁵ Republishers of a defamation too would face a “sore” punishment.¹⁰⁶

In an example of variations in the severity of the response to a delict turning on the status of the victim, under ancient Indian law, defamation of a Brahmin by a lesser caste might be punished corporally. For more prosaic libel and slander between social equivalents, a fine would be the suitable punishment.¹⁰⁷ This differentiation seems to be the exception that test the rule of equal protection represented more generally throughout ancient law.¹⁰⁸

Pursuant to Mesopotamian law, should the slander pertain to the sexual honor of another, the punishment might be shaming or flogging.¹⁰⁹ This was true also of the Torah.¹¹⁰ Locke would later describe such rules as those of “positive morality”, or “the

¹⁰⁴ Sura 24, ¶ 4, THE KORAN

¹⁰⁵ Sura 24, ¶ 9, THE KORAN

¹⁰⁶ Sura 24, ¶ 11, THE KORAN

¹⁰⁷ “If a man arrogantly makes false statements about someone’s learning, caste, country, occupation or physical features, he should be fined 200. If a man calls someone ‘one-eyed’, ‘lame’, or some other similar name, he should be fined at least 1 Karsapana, even if what he says is true.” THE LAW CODE OF MANU 143 (Patrick Olivelle, trans.)(Oxford 2004).

¹⁰⁸ E.g. this tomb inscription of the Egyptian vizier Rekhmire (1479-1425 B.C.): I judged both [the insignificant] and the influential; I rescued the weak man from the strong man; I deflected the fury of the evil man and subdued the greedy man in his hour. . . I was not at all deaf to the indigent.” LAW IN ANCIENT EGYPT *supra* note at 23, quoting T.G.H. JAMES, PHAROAH’S PEOPLE: SCENES FROM LIFE IN IMPERIAL EGYPT 57 (1984).

¹⁰⁹ ANCIENT NEAR EASTERN LAW, *supra* note at 81, discussing LH 127; MAL A. 17-19.

¹¹⁰ BIBLE, Deut. 22:13-19.

law of opinion or of reputation”. To Locke, such rules “consis[t] of the rules imposed by society upon its members and enforced by public censure or disapprobation.”¹¹¹

H. Deceit and False Report

Prohibitions upon making of false reports have been quite common throughout legal systems or groupings or legal norms. The Koran provides that one committing an “involuntary fault” (suggesting negligence or even blamelessness) or a crime but who then “layeth [the blame] on the innocent” will be punished by being required to “bear the guilt of calumny and of a manifest crime.”¹¹²

In Tibetan folk law, deceit regarding the ownership of animals was punishable more severely than even the intentional killing of an animal. Within its rules regarding lost animals, Rule 30 of the Manchu Imperial Court’s Rules for Punishment of Tibetans provided for a fine of three “nines” for anyone “falsely claiming possession of such an animal”, and one “nine” for anyone attempting to hide them.¹¹³ In other instances too the punishment of deceit exceeded that applicable to delicts involving of demonstrably or arguably less economic dislocation. An individual falsely reporting a theft could be fined three “nines”, with the fine distributable equally “between the elder in charge and the person falsely charged.”¹¹⁴ Vigilance against deceit is manifest further in Rule 19, pertaining to land transfers. For any new transferee discover “traces” of another’s pasturage within three days of the vesting of the transferred interest, the new transferee

¹¹¹ JOHN LOCKE, ON HUMAN UNDERSTANDING Book II, Ch. 28 § 7, in SALMOND, *supra* note at § 16, p. 46.

¹¹² Sura 4, 110-120, THE KORAN.

¹¹³ Rule 30 of the Manchu Imperial Court’s Rules for Punishment of Tibetans, in Sh ih-Yu Yu Li, *Tibetan Folk Law*, J. ROY. ASIATIC SOC. G.B. & IRELAND Parts 3, 4, pp. 127-148 (1950), reprinted in RENTELS & DUNDES, *supra* note at 527.

¹¹⁴ *Id.* at 526.

must so report within three days. The transferor must thereupon “swear an oath” that there exist no competing pasturage or third-party rights on the land.¹¹⁵

The Koran reflects God’s prohibition of deceit, as followers are enjoined to “be not false in your own engagements, with your own knowledge.”¹¹⁶ Additionally, in the circumstance of a death, the Koran details the testimony that must be sworn and the accompanying safeguards against deceit. Two “just” men are to be chosen to swear as to the circumstances of the death, and included in that oath should be words to the effect that “We will not take a bribe though the party be of kin to us.”¹¹⁷ Importantly, any oath of the first two men selected can be challenged “if it be made clear that both have been guilty of falsehood[.]” Should this occur, two other men “nearest in blood” to the first affiants will speak to the truth. The scripture notes with satisfaction that the prospect of a challenge to the veracity of the first oaths will facilitate truth telling in the first instance: “Thus it will be easier for men to bear a true witness, or fear lest after their oath another oath be given.”¹¹⁸

Differing from but related to deceit, an act of “imposture” is interpreted to mean taking undue advantage of another through the device of being an “imposter”. It is logical that in defense of the faith adherents to the Koran would be sensitive to claims that they themselves were imposters for proclaiming Muhammad’s words as those of God. To this claim Sura 10 reinforces believers with the suggestion that “[I]f they charge you with imposture, then SAY: My work for me, and your work for you. You are clear

¹¹⁵ *Id* at 524.

¹¹⁶ Sura 8, ¶ 27, THE KORAN.

¹¹⁷ Sura 5, ¶ 6, THE KORAN

¹¹⁸ Sura 5, ¶ 7, THE KORAN

of that which I do, and I am clear of that which ye do.¹¹⁹ Elsewhere at Sura 22 believers castigated as imposters are reminded that they can recall to their accusers that so many of the great and accepted prophets, including Abraham, Noah and others, were so charged and ultimately prevailed.¹²⁰

J. Covetousness and Hoarding

Among certain Aleutian groups, cultural and economic norms developed to protect limited resources and to deter non-cooperative appropriation or hoarding. The indigenous tribes considered natural resources such as wildlife not the subject of private, but rather of common ownership, a form of distributional necessity among subsistence cultures.¹²¹ The harsh subsistence environment in which the Aleutians dwelt generated rules adhering to strict efficiency norms. Among Aleutian groups, in the words of one scholar, “life is hard and the margin of safety small, and unproductive members of society cannot be supported[.]”¹²² It will be seen that to the characterization of “unproductive” can be added those whose conduct disrupts the allocative efficiencies of the group. Thus, these norms penalize resource overreaching and the arrogation of resources beyond one’s needs.

The Aleutians considered that treatment of land as commonly held, rather than susceptible of private ownership, to be the most efficient manner of maximizing hunting

¹¹⁹ Sura 10, ll. 40-50, THE KORAN.

¹²⁰ Sura 22, ¶ 43, THE KORAN.

¹²¹¹²¹ This approach is carried forward today in United States recognition of collectively held aboriginal rights to certain fish, wildlife and marine mammals. Along kindred lines, the protection of similar collective rights is the every essence of the law of public nuisance, antiquarian and modern, providing, in different circumstances, remedies against interference with rights held jointly by the public in matters of health, safety and welfare. *See generally* DIAMOND, et al., at .

¹²² LLOYD at 237, quoting _____ HOEBEL, THE LAW OF PRIMITIVE MAN ____ (1954).

resources. Further, although captured game and hunting instruments might be considered private property, the community was “strongly hostile to the idea of anybody accumulating too much property for himself, and thereby limiting the amount of property that [could] be used by the community.”¹²³ The ordinary remedy might be confiscation. The influential anthropologist Hoebel identified one Aleutian grouping that sustained keeping of an excess amount of goods could be considered a “capital crime.”¹²⁴

Muslims are warned against the vice of covetousness in such language as is found in Sura 113:”SAY: I betake me for refuge to the Lord of the DAYBREAK * * * against the mischief of the envier when he envieth.”¹²⁵ Further, “Covet not the gifts by which God hath raised some of you above others. The men shall have a portion according to their deserts. The women shall have a portion according to their deserts. Of God, therefore, ask of his gifts.”¹²⁶

An Indian folk tale relates the travails that may follow one who covets the wife of another. The story is titled “The Village Teacher”, and is told in this way:

Following the passing of a village’s old and respected teacher, there arrived a new teacher “gifted with all those qualities which make us look wistfully on our departed youth: energy, health, ambition, hope and vanity.” Women lived under severe restrictions, and until recently, “their womenfolk, both Hindu and Muslim, lived in purdah and would not leave the four walls of the house except with a veil hanging down to their toes.” These restrictions were somewhat lessened for women in the city.

¹²³ LLOYD at 237 (references to work of Hoebel implicit in Lloyd’s work).

¹²⁴ *Id.*

¹²⁵ Sura 113, THE KORAN.

¹²⁶ Sura 4, , ¶ 35, THE KORAN

The vanity of the young school teacher and his condescension together prompted him to desire female companionship, and in particular a pretty and prosperous housewife. The woman's son attended the school teacher's school, and at the closing of school he would tell the boy: "Remember me to your mother". The mother, being both intelligent and perceptive, deduced the teacher's motives, and planned her response. One day the boy told the teacher that his mother would like a word with the teacher at her home, and further that her husband was expected to be away. Quite excited and dressed at his best, he arrived at the woman's house, where he was received warmly.

As he drank the proffered tea, a call came from the yard. It was the husband. The wife began to tremble. "I am undone," she said, "if he discovers you here he will kill me and not spare you either." "Have no fear," the teacher said, "he cannot be so harsh." "I know better how ruthless he is," she quickly corrected the increasingly anxious teacher, "Would to God I were dead rather than be surprised in this compromising situation." She began to beat her breast. "O quick, save my life." "Is there no other exit?" the teacher asked. "No, none. He sees you here and I am killed. He is such a rough bear. Nothing can save me unless" "Unless what?" "Unless you disguise yourself to escape his suspicion." "Most willingly. I'll do anything for your sake" the teacher answered. He was given a working woman's cloak and scarf, and was placed before a basket of maize and two millstones.

When the husband entered the home, he asked "What is that grinding sound upstairs?" "It is that deaf woman turning out maize flour", she responded. As the husband and his wife passed time in the kitchen garden and in the barn, the teacher wore

his hands to blisters pretending to be a working woman. "Revealing his awareness of the ruse, the husband said, finally, "The fellow must be tired now and feeling bitter – you had better dismiss him now. The lesson must have gone home to him." The housewife gave the teacher his clothes and he left hurriedly. The wife and her husband preserved the secret, although after this time, the people in the village It was remarked by many people the next day that the teacher had lost much of his spirit and liveliness. Some time later the housewife sent a message to the teacher asking is he should like to visit again. This time he simply responded: "Ask her if she has consumed the flour ground previously."

III. CONCLUSION

Was H. G. Wells correct when in his *OUTLINE OF HISTORY* HE offered this vision of the history of mankind's law as "based upon a confused foundation of conventions, arbitrary assumptions, and [constitutes] a very impracticable and antiquated system indeed[.]"¹²⁷ Every observer must reach his or her own determination as to this. The evidence that law, taken as a whole, demonstrates a tropism towards rationality and progressive values is probably equipreponderant with evidence that it does not.

The legal subset of tort law is at once discrete and sprawling. The above discussion of ancient and primitive law confirms what Gregory C. Keating wrote regarding accident law alone, which is that tort law "curbs the freedom of prospective injurers and enhances the security of potential victims. Risk impositions thus pit the liberty of injurers against the security of victims and the law of accidents sets the terms

¹²⁷ H. G. Wells, *THE OUTLINE OF HISTORY* 536-537 n. 1 (1929).

on which these competing freedoms are reconciled. Its task is to find and fix terms that are fair.”¹²⁸

What is the goal of the review contained in this article. It cannot be to amuse ourselves with examples of how more efficient, transparent, humanitarian, or behaviorially expert we have become as we compare modern Western law to its ancient counterparts about the globe. To begin, no responsible legal anthropologist, or for that matter no sociologist, should examine an incident of how another culture responded to a social need and do so only after removing the subject from its context, taking it, in a sense, by forceps and removing it from its carefully constructed diorama. All of us have mused at one point or another as to how incomprehensible certain things or affairs of our modern lives would appear to visitors – of this world or another – who might a thousand years from now encounter such things as stranded, a contextual relics. As is true today was true also in ancient times: very, very few legal rules have no social bona fides; very few rules are *per se* meritless.

Further, our legal exploration cannot be to congratulate ourselves that modern Western civil code and common law legal systems have seemingly achieved consistent levels of efficient and moral norms. For every arguably progressive initiative one state may take, such as the implementation of social host liability for permitting an inebriated guest to say good evening and drive away, there is a setback, such as the decisions of courts to disallow public nuisance claims to be brought against the manufacturers of

¹²⁸ Gregory C. Keating, *The Social Contract Conception of The Tort Law of Accidents*, Chapter 2 in PHILOSOPHY AND THE LAW OF TORTS 23 (Gerald J. Postema, ed.)(Cambridge 2001).

small concealable handguns and who drown counties surrounding large metropolitan areas with these weapons well knowing that the guns will end up on the city streets.

The objective of such a review is to unveil and to examine examples of how other cultures in distant times responded to a social imperative that has been constant for all of man's days: How may social groups, large and small, respond to the need to cabin individual behavior to advance common well being. What mechanisms work best to cabin or deter behavior that saps the well being of the larger group, and what inducements are most likely to increase the incidence of behavior that conduces to the public good. W

What has this inquiry revealed? What are the identifiable consistencies between the discrete but representative cultures referenced? First and foremost, it is shown that a standard of egalitarianism typically characterizes primitive groups deriving sustenance from hunting or agriculture.¹²⁹ Beyond this, perhaps the greatest consistency between and among the legal norms and rules discussed is that of proscriptions of unconsented-to taking. Whether the delict involved deprivation of another's right to their own reputation or the theft of goods, no human group, even in the earliest time, permitted one individual to take from another simply because he was stronger, more cruel, faster or less principled, i.e., simply because he could otherwise get away with it. The collective was better served by deterring such behavior with such remedies as requiring the return of what was owed, be it the return of the object or its equivalent, or the money, or in the case of a dignitary harm, the rendering of an apology or its symbolic equivalent – suffering the penalty that would accompany the false allegation had it been true.

¹²⁹ ASIAN INDIGENOUS LAW, *supra* note at 251.

A similar congruence can be seen in the treatments of trespass to land or private nuisance. If the harm to the property, or the interruption of the occupant's right to profitably exploit it, could be quantified in lost crops or otherwise, the amends would be in kind. In turn public nuisance, which in early times could often be described in general terms as behavior that detracted from good of the general community, the culprit might first receive a sound thrashing in the hopes that it would deter continued deleterious behavior. Lastly, it is seen that the remedies available under numerous law systems were quite sophisticated in the rectificatory quality of permissible awards, and included not only compensation in rough equivalence to the immediate severity of the harm suffered, but also, when appropriate, costs of care and rehabilitation, as well as lost income.

Certain progressive or humanitarian progress is also evident. In several examples discussed above the penalty for delicts ranging from manslaughter to battery to kidnapping might corporal or even death. Or the transgression might result in vendetta, or in a blood oath, binding the parties and their families to a violent continuation. With the passage of time, though, there were introduced alternative means of remedying such wrongs, to wit, the payment of money to the victim or to his or her family developments that brought the rectificatory norms into greater alignment with modern standards of corrective justice.

And so while this short article has provided, I hope, a diverting romp in the fact and the lore of ancient normative treatment of civil wrongs, it is also a praesces of the wheres, the whens, and the whos of the origins of our modern tort law. It can be seen that the carbon dating of the roots of modern common law reach back further than the rise of a lawyer class in pre-Empire England, and with regard to the modern civil code

treatments for extra-contractual harm, the origins antedate too even the Roman law that underlay the Code Napoleon.