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## THE GRÆCO-ROMAN ANTECEDENTS OF MODERN TORT LAW

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### *Abstract*

*It was not very long ago that Western law was formed from the rib of Graeco-Roman law, and our modern Western legal systems, civil code-based and common law alike, demonstrate that lineage, and the contributions of both societies, to surcease. While other cultural influences, including those from even more ancient sources may be identifiable, this article segregates Greco-Roman law for separate analysis for purposes of manageability.*

*This article tracks the law of early Greece and early Rome from their respective origins in myth and legend to their comprehensive codifications. For the disparities in form and content, there are nonetheless significant similarities. These include (1) the cohering of laws giving security to society; (2) the movement from vengeance as a remedy to compensation; (3) the identification of a great array of personal injury and dignitary wrongs, as well as wrongs to property interests for which civil remedies might be sought; (4) the introduction of fault-based liability for certain harms; and (5) the introduction of equity so as to permit the rendition of justice in circumstances in which existing law or its absence might preclude it.*

*The article concludes with the proposition that the law of ancient Greece, and that of ancient Rome, each contributed a necessary, but not by itself sufficient, foundation of the Western law that would follow. To the Hellenic contribution of ethics, dialectical reasoning and rudimentary codification would be added Roman systematization and a millennium of cultural and legal tradition that resulted in the great Graeco-Roman law traditions that have left a lasting imprint on the terrain of modern Western law.*

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### I. INTRODUCTION

All legal systems, and the norms and mores that preceded them, originate in a cultural context. The distinctive form of each system reveals a symbiotic relationship with the society and the social order it serves. The law of ancient Greece, and that of ancient Rome, developed in cultural environs that were strongly status based, with the factors of such status associated with land, lineage, sex and condition of servitude. At least as far as their respective contributions to systematization of Western law in general, and the law of delict in particular, there is no bright line at which point the

Grecian influence disappeared and the Roman *sequelae* came to dominance. As the vitality of Athenian legal contributions came to wane, their codes, and even their living jurists, were in personal contact with, and were an acknowledged influence upon, Roman “law givers”. Indeed, the Grecian philosophical influences of dialectical reasoning, and the legal codifications Draco and Solon, were contemporaneous with important developments in Roman law, and available to study by Roman Jurisconsuls.

This article tracks the law of early Greece and early Rome from their respective origins in myth and legend, through their primitive and customary law, concluding with their initial written legal recordations and their later comprehensive codifications. The review reveals significant similarities and disparities between the respective approaches. At the most primary level and at the earliest times, we see the cohering of norms, and then laws, that give order and security to society. Over time, and through revisions that are quite literally millennial, we see developed a corpus of the law of civil liability for wrongs. As importantly, the combined Graeco-Roman developments created and bequeathed to modern Western law a taxonomy of civil causes of action, the remedies therefore, and even various and valuable proto-procedural approaches that inform the Western law of delict, or tort, to this day. Throughout, in an evolution that most would describe as progressive, we see (1) the cohering of laws giving security to society; (2) the movement from vengeance as a remedy to compensation; (3) the identification of a great array of wrongs for which civil remedies might be sought; (4) the introduction of fault-based liability for certain harms; and (5) the introduction of equity so as to permit the rendition of justice in circumstances in which existing law or its absence might preclude it.

It is recognized commonly that our modern Western law derives linearly from that of early Greece and early Rome. That “body” of law is sometimes referred to in the conjunctive as “Graeco-Roman” law, a characterization that does no disservice to history provided it is accompanied with certain clarifications. As mentioned, the law of early Greece and the law of early Rome represent distinctive juridical bodies. The law of early Greece largely but not entirely preceded Roman law, and must be examined as a particular unto its own. Second, the use of the term “law” itself should be appreciated as originating almost totally as in myth, transmitted through the poetry and other literature of the ancients, axioms of conduct offered by wise men, tradition, customs, and a mixture of each of these. This was true of both the Greek and the Roman experience. Only eventually would efforts be made to consolidate the norms from these differing sources, and from the disparate regions of the respective nations, into a written form. In the Greek experience, the pressure came first from the respective kings, and later from democratic assemblies. In Rome, the impetus was exclusively imperial.

Analyses of this type have sometimes sought philosophical characterizations of the law of ancient Greece and that of ancient Rome and its fluid empire. Through imposition of a modern taxonomy onto cultural-legal norms of these ancients, inquiries have posed such questions as “Can the law of Rome be characterized as having adopted an approach of instrumentalism in its senatorial and lesser mandates?”<sup>1</sup> There is no fault to be found in such inquiries. However in my view they reap little benefit, as one can presuppose that

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<sup>1</sup> See, e.g., Abraham Bell, Gideon Parchomovsky, *A Theory of Property*, 90 CORNELL L. REV. 531 (2005), in which the authors, writing of *in rem* jurisdiction, state: “Some conceptualists advance instrumental reasons for certain ancient rules, but they fail, or do not bother, to explain the institution . . . in its entirety.” *Id.* at 535.

any written law by virtually any society has had and continues to have an objective of modifying the behavior of those subject to it.<sup>2</sup>

In the discussion to follow we will encounter examples of civil recourse that will seem to us today primitive and even barbaric. Indeed it was not until the Third Century A.D. that Roman Law took a decided turn away from its principal goals sanction and deterrence and adopted increasingly an emphasis on compensation and rectification. Throughout, however, we will also find quite progressive forms of dispute resolution, including many that as modified are today employed throughout civil code and common law justice systems alike. Particularly as these norms and laws are preserved for us, as they were for the ancients themselves, in the form of classical literature, we will find law and logic accompanied by poetry that has on its own merits endured through the ages.

A strictly Roman definition of delict (*maleficia*) is “acts involving what dominant opinion regards as wrong, and as [such] the law punished them or allowed them to be punished on this ground.”<sup>3</sup> For the purposes of this article I will approach and describe delict more narrowly to mean a civil, non-contractual harm.<sup>4</sup> This definition is not very noteworthy, and indeed will be recognized as a standard contemporary definition of “tort”. In the context of ancient Greek and Roman law, however, there is yet another benefit to my chosen definition of delict, and it is that in the periods in question there had

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<sup>2</sup> The exceptions would be quite limited, and would include such rules as bills of attainder or certain *ex post facto* laws, and these, in any event, would only be exceptions that test the rule. The former has had as its typical purpose the punishment of particular individuals or their families, and are not laws of general applicability. The latter may fail in any test as to whether they operate to correct the behavior of persons who have already committed the acts that are now proscribed, but yet do operate as a prophylaxis against the future unwanted behaviors of others.

<sup>3</sup> J. DECLAREUIL, *ROME THE LAW GIVER* 194-95 (Greenwood, Westport, Ct. 1970)(citing Institutes of Gaius 3, 181; Institutes of Justinian 4, 1-pr.). Hans Kelsen took the approach of defining any breach of a legal norm as a delict. M. D. A. FREEMAN, *LLOYD’S INTRODUCTION TO JURISPRUDENCE* (7<sup>th</sup> ed.) 2612 (Sweet and Maxwell 2001).

<sup>4</sup> As is evident from the discussion that follows, there was not then, any more than there is today, a consensus as to just what breaches or wrongs ought properly be characterized as delictual.

yet to be made the distinction between civil wrongs and certain wrongs that would be later defined as criminal. The various forms of homicide (intentional, accidental, etc.) or mayhem or serious battery are the primary examples of this.<sup>5</sup>

The effect of the absence of a criminal treatment of even intentional homicide in early Greek and Roman law was that these “crimes” were subject to “civil” trial or other resolution, that is, a dispute between the victim or his survivors and the perpetrator, rather than a trial in which the state was the party bringing the action against the alleged actor. In the descriptions and discussion to follow we will see much corroboration for the suggestion of Sir Henry Sumner Maine that ancient law is more akin to the law of civil delict than it is to criminal law.<sup>6</sup> Thus the definition of delict as a civil non-contractual wrong is further refined by the understanding that “civil” means, as pertinent to the times, only that the action was between private parties, and adjusts without more for the fact that in the earlier periods of the Grecian and the Roman legal development under discussion, distinctions had yet to be made between what would today be considered criminal wrongs, or civil wrongs, but not both.

## II. THE LAW OF ANCIENT GREECE

### A. GENERALLY

It is today widely supposed that the ancient Greeks had adopted some organizing principles of substantive and procedural civil law prior to any written recordation, or at least any surviving written evidence. Instead, the earliest moments of a Greek political order sufficient to sustain civil law, or the law relating to resolution of disputes between

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<sup>5</sup> See particularly the Code of Draco and the Code of Solon, described below Part II. D.

<sup>6</sup> HENRY SUMNER MAINE, *ANCIENT LAW* 217 (1861).

one citizen and another, comes to us in largely literary form. These forms include Homeric and other poetry, and the historo-literary recitations of the mythological origins of many ancient norms. To the Greeks, Zeus was the giver of law (*dike*) to men, and such laws or norms of behavior (*themistes*) as were explicit or implicit in the mythical accounts were described as the gifts of Zeus. It was an age that predated society of sufficient internal coherence to generate “law” as the product of communal human deliberation, or even law as the edict of a ruler or rulers with sufficient dominion to have regal declarations give order to any realm of significance. As importantly, it was also an age still a captive of the conclusion that phenomena ranging from natural forces to the consequences of human behavior were guided by edicts of gods and not men.

#### A. MYTHICAL ORIGINS

For the purposes of this article, a description of early Greek themes of justice and judging ought naturally precede any description of more particular law. The great poet Hesiod (~700 B.C.) wrote of the earliest concepts of justice, and recited how at this early time in Grecian cultural awareness, those who transgressed the will of a god or gods were answerable not to man but to such god(s). As would be expected, such legal tenets as can be identified in Greek mythology are revealed in mythic stories or fables, rather than in a narrative form that contains an “if” clause (the prosthesis), and end with a “then” clause (the apodasis) that is characteristic of law codes.<sup>7</sup> Thus the prosthesis identifies a

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<sup>7</sup> RUSS VERSTEEN, EARLY MESOPOTAMEAN LAW 3 (2000)(describing as illustrative the Code of Hammurabi. In such codes, such as, for example, the Code of Hammurabi, might be c. Thus the prosthesis identifies a circumstance or activity that the lawmakers concluded need a legal rule, while the apodasis describes the legal consequences the creation of such a circumstance or the engagement in such activity. *See generally* M. Stuart Madden, *Tort Law Through Time and Culture: Themes of Economic Efficiency*, EXPLORING TORTS 22 (M. Stuart Madden, ed.)(Cambridge 2005).

circumstance or activity that the lawmakers concluded need a legal rule, while the apodasis describes the legal consequences the creation of such a circumstance or the engagement in such activity.<sup>8</sup> This approach bears the most significant markings of code-based law throughout the ages and followed today, while not, of course, exclusively, throughout the world.

This inquiry will emphasize the contributions of Hesiod, the influential, earliest and enduring interlocutor for the most ancient concepts of Greek justice. His contribution is most pronounced for its substantial telling of tales of right, wrong, and the norms that the ancient Greeks adopted and adapted in their path from diffuse tribal groupings to the great, if small, Athens. Hesiod was an historian and poet, and his work survives as authoritative in its recitation (or interpretation) of myth as then subscribed to by Greeks of his day. He wrote that he would often visit a particular mountain known to be inhabited by the Muses, from whom he took much of his inspiration. The motivation for his copious treatment normative and proto-delictual concerns has been tied by some to a story in which Hesiod and his brother were denied justice in a matter of inheritance.

It is in Hesiod's *WORKS AND DAYS* that we find the recitation that in Greek mythology, or more properly, in the beliefs of the ancient Greeks, justice" itself, or herself, was assigned a place in the pantheon and named "virgin Justice", who sits beside her father Zeus.<sup>9</sup> It is usually vain to try to identify the first wrong recognized by a culture, although certain among them seem to invite the effort.<sup>10</sup> While Greek mythology does not insist upon this designation, it does seem as though violence of man against man

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<sup>8</sup> *Id.* at 11.

<sup>9</sup> HESIOD, *WORKS AND DAYS* ll. 248-264, in HESIOD AND THEOGONIS (Dorothy Wender, transl.)(Penguin 1976). Alternative sources of Hesiod's work are available on search engines such as [www.wikipedia.org](http://www.wikipedia.org), and Project Guttenberg, The translations will vary unimportantly.

<sup>10</sup> For example, the "original sin" of the Judeo-Christian BOOK OF GENESIS.

for might well be the “original” proscription, with robbery, deceit and defamation rounding out the group.

At the earliest of moments, to the mind of the ancient Greek, the gods ordained that man would occupy an elevated place among living creatures, and that this unique entitlement was a function of man’s capacity for reason. An early and signal virtue that such reason made available to man but not to the baser animal inhabitants was his ability to abstain from violence against other men. It is Cronos, the father of Zeus, who declares that a singular attribute of man’s elevation over beasts is that man can and should follow the “right” and forswear violence.<sup>11</sup> Here regarding an injunction of the greatest generality, to wit, avoid violence, the punishment for man’s departure from Cronos’s mandate is harsh indeed, as transgressors invite not only their own punishment but also potentially the punishment of their entire communities.<sup>12</sup> This theme of theatrical over deterrence is repeated throughout the era’s normative presentations.

As is seen similarly in Judeo-Christian scripture, in the mythos of ancient Greece deceit was the original sin, and it was amply punished by the sovereign god Zeus. The story as recounted by Hesiod is of a time in which the gods hid from man “the means of

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<sup>11</sup> WORKS AND DAYS, *supra* note 9 at ll. 238-247.

But for those who practise violence and cruel deeds far-seeing Zeus, the son of Cronos, ordains a punishment. Often even a whole city suffers for a bad man who sins and devises presumptuous deeds, and the son of Cronos lays great trouble upon the people, famine and plague together, so that[T]sh away, and their women do not bear children, and their houses become few, through the contriving of Olympian Zeus. And again, at another time, the son of Cronos either destroys their wide army, or their walls, or else makes an end of their ships on the sea.

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[T]he son of Cronos has ordained this law for men, that fishes and beasts and winged fowls should devour one another, for right is not in them; but to mankind he gave right which proves far the best. For whoever knows the right and is ready to speak it, far-seeing Zeus gives him prosperity; but whoever deliberately lies in his witness and forswears himself, and so hurts Justice and sins beyond repair, that man's generation is left obscure thereafter. But the generation of the man who swears truly is better thenceforward.

HESIOD, WORKS AND DAYS, *supra* note 9 at ll. 274-285, HESIOD AND THEOGONIS 67 (Dorothy Wender, transl.)(Penguin 1976).

<sup>12</sup> *Id.*

life”, and principally, fire, on the logic that with such tools man would provide for himself in one day enough to sustain him for a year.<sup>13</sup> However, the clever Prometheus stole fire from the gods, with later help from Iapetus, and Zeus, furiously, “planned sorrow and mischief against men.”<sup>14</sup> He bade Hephaestus to mix earth and water to make the form of a woman, in a lovely “maiden-shape”, and then instructed Athena and Aphrodite to weave into the human experience “cruel longing and cares that weary the limbs.”<sup>15</sup>

Much of Hesiod’s writing is devoted no so much to mythos as to ethos, which is to say, it can be understood as a recitation not of fable but rather of extant norms. References to gods abound even in the absence of a governing myth, for in the absence of a civil society positioned to enforce proto-legal norms, the Greeks adverted to the power of gods to smite wrongdoers. Hesiod gives these observations regarding both robbery by violence and theft by deceit:

Wealth should not be seized: god-given wealth is much better; for if a man take great wealth violently and perforce, or if he steal it through his tongue, as often happens when gain deceives men's sense and dishonour tramples down honour, the gods soon blot him out and make that man's house low, and wealth attends him only for a little time.<sup>16</sup>

Hesiod writes of also of *ex ante* precautions against later disputes as the preferable means of handling money, employment and other matters of business, to the point of advising persons to secure witnesses for corroboration of agreements as to wages.<sup>17</sup>

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<sup>13</sup> The notion of the raw efficiency of such a situation was troubling to the gods, the story relates, as in the midst of such abundance they predicted that man would put away his oxen and tools and “the fields would run to waste.” HESIOD, WORKS AND DAYS ll. 42-53, in HESIOD AND THEOGONIS, *id.*, at 6.

<sup>14</sup> HESIOD, WORKS AND DAYS ll. 42-53, in HESIOD AND THEOGONIS, *supra* note 9 at 60.

<sup>15</sup> HESIOD, WORKS AND DAYS ll. 60-68, in HESIOD AND THEOGONIS, *id.* at 61.

<sup>16</sup> HESIOD, WORKS AND DAYS ll. 320-341, in HESIOD AND THEOGONIS, *id.* at 68-69.

Hesiod devotes several passages to the delict of libel and slander, suggesting an early recognition that trafficking in harmful untruths was an invitation to a physical and even violent response. He advised: “Do not get a name either as lavish or as churlish; as a friend of rogues or as a slanderer of good men.”<sup>18</sup> When a libel or a slander occurs in the context of a legal proceeding, what today might be called “false utterance,” not only is the target of the falsity injured, but Justice herself: Should “virgin Justice” suffer “hurt” by “lying slander”, Hesiod writes, her report of this to Zeus, together with any other incidents of “mens’ wicked heart” result in an undesignated retribution.<sup>19</sup>

### 3. *Of Judges and Justice*

The historian Herodotus, better remembered for his defining history of the War, also wrote stories of the integrity (or its want) of the earliest judges and the process of judging. As a starting off point, historian Michael Gagarin chooses Herodotus’s story of Deices, the first king of Medes.<sup>20</sup> As Gagarin relates the story: “Deioce, a wise man . . . [who] already had a high reputation in his village, . . . practiced *dikaiosyne* (“justice”) . . . zealously. There was considerable lawlessness (anomie) throughout the country, and when the people of Deioce’s own village observed his qualities. ‘they chose him (repeatedly) to be their judge.’ Since he was ‘straight’ (*ithys*) and ‘just’ (*dikaios*), he

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<sup>17</sup> “Let the wage promised to a friend be fixed; even with your brother smile -- and get a witness; for trust and mistrust, alike ruin men.” HESIOD, WORKS AND DAYS ll. 370-372, in HESIOD AND THEOGONIS, *supra* note 9 at 70.

<sup>18</sup> HESIOD, WORKS AND DAYS ll. 715-716, *id.* at 82.

<sup>19</sup> See also HESIOD, WORKS AND DAYS ll. 717-721: “Never dare to taunt a man with deadly poverty which eats out the heart; it is sent by the deathless gods. The best treasure a man can have is a sparing tongue, and the greatest pleasure, one that moves orderly; for if you speak evil, you yourself will soon be worse spoken of.” *Id.* at 82.

Of gossip, Hesiod continues, at ll 760-63: “So do: and avoid the talk of men. For Talk is mischievous, light, and easily raised, but hard to bear and difficult to be rid of. Talk never wholly dies away when many people voice her: even Talk is in some ways divine.” HESIOD AND THEOGONIS, *supra* note 9 at 84.

<sup>20</sup> HERODOTUS, 1.96-98, in MICHAEL GAGARIN, EARLY GREEK LAW 20 (U. Cal. 1986).

rapidly gained a reputation as the only one who judged cases ‘correctly’ (*kata to orthon*).”<sup>21</sup> At this stage from what appears a “formal” resolution of a civil dispute depended upon the agreement of both parties to present their cases to a particular respected and “straight” man willing to undertake this task.

This premium placed on the rectitude of the judge, be he a patrician or a plebian but a wise man, is repeated frequently in the literature, and with such a frequency as to suggest that that the early Greeks were more concerned with false judges than they were with false idols. In his THEOGONY Hesiod reemphasized the need for the “straight” over the “crooked” in dispute resolution, admonishing his brother Perses to follow the path of the “straight” and to avoid the “crooked” (*hybris*). He warns of the consequences of crooked judgments, and he employs as a metaphor for the risk to a just society of corrupt judge the vivid image of justice being dragged off by “gift devouring” (corrupt) kings.<sup>22</sup> Not only would be authors of just resolutions of disputes be rewarded, but also their

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<sup>21</sup> *Id.* at 20-21 (references omitted).

<sup>22</sup> But you, Perses, listen to right and do not foster violence; for violence is bad for a poor man. Even the prosperous cannot easily bear its burden, but is weighed down under it when he has fallen into delusion. The better path is to go by on the other side towards justice; for Justice beats Outrage when she comes at length to the end of the race. But only when he has suffered does the fool learn this. For Oath keeps pace with wrong judgements. There is a noise when Justice is being dragged in the way where those who devour bribes and give sentence with crooked judgements, take her. And she, wrapped in mist, follows to the city and haunts of the people, weeping, and bringing mischief to men, even to such as have driven her forth in that they did not deal straightly with her.

HESIOD, THEOGONY ll 213-18, 220-24, in HESIOD, THE THEOGONY (Thomas Cook, transl.)(1740), available at Literature Online:

<http://lion.chadwick.com/searchFultext.do?id=Z00032040&divLevel=0&queryId=&are...> Searched August 19, 2005. *See also* HESIOD AND THEOGONIS, *supra* note 9 at 30.

Hesiod refers to Perses as his brother, but it is supposed by some that Perses is a literary character Hesiod has created to be a foil for certain of his dialogues.

communities, with prosperity and peace.<sup>23</sup> Surely no more direct encomium to justice can be imagined.<sup>24</sup>

What are the qualities or aptitudes that permit a man or a ruler to not only do justice fairly but also have the parties and the populace concur in the (overall) fairness of the justice dispensed? Hesiod is content to explain that a King's skill in resolving disputes turns upon the with the favor of the Muses. If a King has been so favored, "soothing words flow from his mouth." Hesiod continues: "And he, speaking surely, quickly and intelligently puts an end to even a great dispute. Therefore there are intelligent kings, in order that in the agora [public meeting place] they may easily restore matters for people who have suffered damages, persuading them with gentle words."<sup>25</sup> A third and final example of dispute resolution is from the Illiad, found in the trial scene on Achilles shield. The dispute is over a killing, for which a reparation has been offered but rejected, and the disputants have brought the matter for argument before a public forum for settlement:

A crowd, then, in a market place, and there  
Two men at odds over satisfaction owed  
For a murder done: one claimed that all was paid,  
And publicly declared it; his opponent  
Turned the reparation down, and both  
Demanded a verdict from an arbiter,  
As people clamored in support of each,  
And criers restrained the crowd. The town elders

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<sup>23</sup> [T]hey who give straight judgements to strangers  
and to the men of the land, and go not aside from what is just,  
their city flourishes, and the people prosper in it: Peace, the  
nurse of children, is abroad in their land, and all-seeing Zeus  
never decrees cruel war against them..

HESIOD, WORKS AND DAYS II 225-37, in HESIOD AND THEOGONIS, *supra* note 9 at 30.

<sup>24</sup> Conversely, judges, princes and others who author corrupt justice are reminded that the "deathless gods" are omnipresent and alknowing, and should there be evidence of tainted justice that "oppress their fellows" . . . "the people [will] pay for the mad folly of their princes who, evilly minded, pervert judgement and give sentence crookedly." HESIOD, WORKS AND DAYS II 248-264, *id.* at 31.

<sup>25</sup> HESIOD, THEOGONY 11.84-90, in HESIOD AND THEOGONIS, *id.* at 25-26.

Sat in a ring, on chairs of polished stone,  
The staves [skeptra] of clarion criers in their hands,  
With which they sprung up, each to speak in turn,  
And in the middle were two golden measures  
To be awarded to him whose argument  
Would be the most straightforward.<sup>26</sup>

Often the means and the effect of the settlement of a dispute could be as revealing of the underlying dignitary norms they might would be of the strictly compensatory matter. In the CATALOGUE OF WOMEN, dated as early as 580 B.C., and attributed, perhaps erroneously, to Hesiod, there is the story of Sysiphus's payment of Aithion of money and cattle to take Aithion's daughter, Mestra, as his bride. After going to Sysiphus's home, the daughter thinks the better of the arrangement and returns to her father. Sysiphus demands the return of either Mestra or his cattle. The dispute is laid before a goddess, and the poem relates: "And straightaway strife and dispute arose between Sysiphus and Aithion over the slim-ankled girl. No mortal was able to judge the case, and so they referred it to a goddess. And she unerringly settled the matter." In the course of deciding the dispute, the goddess is credited with describing the applicable norm: "[W]hen one wishes to recover the price one has paid for something [without giving up the object]," one must lose both the object and the payment, "for once payment is made, it cannot be reclaimed."<sup>27</sup> In analyzing this story Gagarin references authority suggesting that the goddess's resolution reflects an implicit conclusion that "Sysiphus was trying to use Mestra for the same purpose as Aithion was, namely cheating others out of a sale, so he rightly loses both her and the cattle."<sup>28</sup> Further to the theme of love's

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<sup>26</sup> HOMER, THE ILLIAD 18.497-508 (Robert Fitzgerald, trans)(Garden City, N.Y. 1974).

<sup>27</sup> HESIOD, CATALOGUE OF WOMEN frag. 43a31-40, available at .

<sup>28</sup> GAGARIN, *supra* note 20 at 36 n. 1, referencing J.T. Kakridis, *Mestra: zu Hesiods frg. 43a M-W*, ZPE 18-25 (1975).

labors lost, a recitation from myth assigned to Hesiod and Acusilaus, and involving the seduction by Zeus of Io, the daughter of Peiren, makes clear that pursuant to the mythic norm, at least, there should be no “heart balm” remedy for a disappointed suitor.<sup>29</sup>

A core theme of many mythic dispute resolutions was seemingly the need to (1) repose in an individual the authority to resolve a dispute in order that the agitated disputants not resort to self help. In so proceeding, it was accepted that the decision maker was enjoined to hear both disputants before entering a judgment.<sup>30</sup> In THE ILIAD Book 2 we read the take of the chariot race. Emulus, who was in actuality the fastest charioteer, comes in last, due to the intervention of Athena. Achilles at first proposes to give Eumelus second prize, to rectify the wrong done to him, leaving Diomedes, the actual first place winner, with his first place prize. All are content save Antilochus, who had finished second in actuality, and who proposes to Achilles that the order of finishing remain as it was in fact, and that the compensation due Emulus be his award of a special prize as “the best man in the race.”<sup>31</sup> It is a result that in the finest Aristotelian logic “makes straight” a wrong, and in not dislodging either Diomedes or Antilochus from their true order of finish, is probably also Pareto Optimal.<sup>32</sup>

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<sup>29</sup> AEGIMIUS, Fragment #3, Apollodorus, ii. 1.3.1:

Hesiod and Acusilaus say that she (Io) was the daughter of Peiren. While she was holding the office of priestess of Hera, Zeus seduced her, and being discovered by Hera, touched the girl and changed her into a white cow, while he swore that he had no intercourse with her. And so Hesiod says that oaths touching the matter of love do not draw down anger from the gods: `And thereafter he ordained that an oath concerning the secret deeds of the Cyprian should be without penalty for men.

Available at

<sup>30</sup> “Decide no suit until you have heard both sides speak.”, from THE PRECEPTS OF CHIRON Fragment #2 -- Plutarch Mor. 1034 E:

Available at

<sup>31</sup> HOMER, THE ILIAD Book 23, verses 287-351, *supra* note 26 at 458-465 (Richard Lattimore, trans.)(U. Chicago 1967).

<sup>32</sup> A rule is Pareto optimal when its effects benefit all parties, in essence, a win-win proposition. See MARK SEIDENFELD, MICROECONOMIC PREDICATES TO LAW AND ECONOMICS 49

### C. PHILOSOPHICAL EXEGESIS

As lay speakers for a philosophical epoch of greater significance than any other, the Hellenist philosophers defined virtue, morality and ethics in terms that remain the bedrock of Western philosophy. Putting aside only a few proponents of distracting philosophic anomalies, the Greek philosophers first identified an ideal of individual behaviors that accented study, modesty in thought and deed, and respect of law. Secondly, the Hellenist thinkers envisioned a society (at that point a city state) of harmony, accepted strata of skill and task, and, naturally again, respect of law.

The Hellenist image of a society and its individual participants was one of harmony, rewards in the measure of neither more nor less than one's just deserts, and subordination to law. Even as it is recognized generally that a democracy better fulfills the goals of a just, a moral, and an efficient polity, for a pre-democratic ideal, evaluated in recognition of its era, measures up respectably.

Hints of the political circumstances in which Stoics found themselves can be found in the graphics handed down to us from antiquity that portray the various philosophers either speaking to small groups or, from all that appears, to no one at all. There are no representations of them speaking in political groups, or advising political representatives. The reason for this seeming isolation of the philosophers from the political process is that by the time much of much of the most enduring work of the most influential Greek philosophers, political power in the Greek mainland had passed over to the Macedonians. This political powerlessness necessarily affected the focus of many of

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(1996). For a general description of Pareto optimality principles, *see generally* ROBIN PAUL MALLOY, LAW AND ECONOMICS: A COMPARATIVE APPROACH TO THEORY AND PRACTICE (1990).

the philosophers. As Bertrand Russell explained, with the imposition of Macedonian rule, “Greek philosophers, as was natural, turned aside from politics and devoted themselves more to the problem of individual virtue and salvation. They no longer asked: how can men create a good state? They asked instead: how can men be virtuous in a wicked world, or happy in a world of suffering.”<sup>33</sup>

Russell’s observation, true to a point, proves too much, as the writings of the philosophers of that era cannot be cabined so severely. Indeed, when writing not of virtue but instead, or also, of government in general or law in particular, Hellenist thinkers turned directly to such themes as (1) the justification underlying the identification and imposition of law governing civil and other wrongs; (2) the proper forum for and conduct of law givers; and (3) the essential justice of certain remedies for particular wrongs.

#### 1..THE JUSTIFICATION FOR IMPOSITION OF LAW GOVERNING WRONGS

Socrates ( 399 B.C. - ) commended abidance of existing law, a commitment that ultimately led to his rejection of opportunities to flee his death sentence. To the Thinker, a life of virtue and ethics could only be sustained in a secure, orderly and law abiding society.

Hellenist thinking cannot be reduced to the aphorism “virtue is its own reward.” Rather, there were specific rewards associated with a life of virtue, as well as real or imagined disincentives to the adoption of a baser life and the collateral degrading pursuits associated therewith. Time and time again the philosophers stated that a life of excess, be it eating, drinking or both, incapacitated the actor from realization of the contributions

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<sup>33</sup> BERTRAND RUSSELL, A HISTORY OF WESTERN PHILOSOPHY 230 (1945).

available to and expected of citizen's of virtue.<sup>34</sup> To both Plato and Socrates, the just man would be content, if not happy, and the unjust man miserable.<sup>35</sup> In addition, and more specifically, such excesses invited physical illness and impairment, a certain departure from God's, or a god's, charge to mankind. To employ only two examples from Socrates: (1) The entire structure of Socrates' ethics is permeated by the principle of avoidance of doing harm<sup>36</sup>; and (2) in parts of his lectures Socrates hypothesizes that perhaps the identifying marker of all acts of "justice" were simply "returning what was owed".<sup>37</sup>

In Plato's version of Socrates' words, individual good and justice were, in fact, *profitable*. The point could not be put more plainly is Socrates were to be described as so stating, and indeed Socrates states just this:<sup>38</sup> "On what ground, then, can we say that it is profitable for a man to be unjust or self indulgent or to do any disgraceful act which will make him a worse man, though he can gain money and power?" Happiness and profit inure to the man who, alternatively, "tame[s] the brute" within, and is "not be carried away by the vulgar notion of happiness being heeping up an unbounded tore[.]" but instead follows the rule of wisdom and law encouraging "support to every member of the community, and also of the government of children[.]"<sup>39</sup>

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<sup>34</sup> To Protagoras Socrates spoke of the physical dangers of excess, stating that "pleasure for the moment ... lay[s] up for your future life diseases and poverty, and many other similar evils[.]" PLATO'S LYSIS, in SOCRATIC DISCOURSE BY PLATO AND XENOPHON 288 (J. Wright transl., A.D. Lindsay, ed. 1925).

<sup>35</sup> ANTHONY GOTTLIEB, THE DREAM OF REASON: A HISTORY OF PHILOSOPHY FROM THE GREEKS TO THE RENNASANCE 164 (2000).

<sup>36</sup> *Id.* at 164.

<sup>37</sup> *Id.* at 159-160.

<sup>38</sup> THE REPUBLIC OF PLATO 318-320 (Francis McDonald Cornford, transl.)(1969).

<sup>39</sup> *Id.*

Less well known than his other major works, in *THE LAWS* Plato (428 – 347 B.C.)<sup>40</sup> created a dialogue between three speakers, each elderly: an unnamed Athenian, Clinias, a Cretan, and Megillus, a Spartan. He wrote in a time when public law, or legislation, was distinguished from private law, but within private law, no clear line existed between delict and crime. Plato believed that in the main man desired to do what was right, but that he needed guidance as to what “right” was, and encouragement to pursue it. Accordingly, in *THE LAWS* Plato expanded upon the simple recitation of legal or moral imperatives by giving to the different sections of his “specimen” laws discussion that included both “direction and encouragement” to the audience,<sup>41</sup> including Plato’s view of what constituted the worthier choices a man might make.

In *THE LAWS* Plato does not essay to write comprehensively of his view of an ideal corpus of law, and indeed there is no showing that aspired to such. Rather, as he surely intended it, as a treatise accessible to the quite literate Athenian population from which could be drawn representative examples of rules of conduct and the reasons therefore. For what not included, we can only suppose that the author intended that the organizing ethic revealed therein would encourage right-minded people to make the correct choices, guided by ethics if not law.<sup>42</sup>

To Plato’s mind, many of the wrongs to which man might be drawn did not even need the attention of the law. Incest, for example, was within a class of wrongs so base that acculturated norms alone should suffice to eliminate it.<sup>43</sup> Regarding obligations that

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<sup>40</sup> PLATO, *THE LAWS* (A.E. Taylor, transl.)(Everyman, 1966).

<sup>41</sup> *Id.* at xv.

<sup>42</sup> For the distinction between ethics, and acting from ethics, and law, *see* notes below and accompanying text.

<sup>43</sup> Ath: Well, then, you see how all such lusts are extinguished by a mere phrase.  
Meg.: Phrase? What phrase?

were, in contrast, suited to external obligations, Plato placed several rules that might represent tort-property or tort-contract hybrids under the rubric of Agriculture. Here the Athenian suggests a statute that would forbid the moving of a neighbor's landmark, be the neighbor friend or foe. He adds ominously that one violating this rule risks the wrath of Zeus, the "protector of the stranger to the other[.] . . ."<sup>44</sup>

Plato warns against "little repeated torts between neighbors" that might create ill will.<sup>45</sup> Persons will be held strictly liable to others for personal harm or invasion of property.<sup>46</sup> Throughout THE LAWS Plato's Athenian describes a regimen in which the ownership rights to land are protected as sedulously as they would come to be in English law a millennium later in its laws of trespass and nuisance. One working the soil of another "shall make the damage good to him, and shall moreover, by way of medicine for his churlish behavior, pay a further sum of double the amount of the damage to the sufferer."<sup>47</sup> For the creation of a nuisance such as the planting of trees in too close a proximity to the land of another, the actor must pay such a fine as is set by the magistrate.<sup>48</sup> For some wrongs to land, Plato's Athenian seems to introduce an element of *culpa*. Thus the man who "in making a bonfire . . . take[s] no precaution for the timber of his neighbor's land" must likewise pay the fine imposed.<sup>49</sup> With regard to the

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Ath: The saying that they are all unhallowed, abominations to God, deeds of black shame. The explanation must surely be that no one holds a different language about them; all of us, from our very cradles, are hearing the same report of them from all quarters[.] . . .

PLATO, THE LAWS, *id.* at 224.

<sup>44</sup> *Id.* at 230.

<sup>45</sup> *Id.* at 231.

<sup>46</sup> "[N]eighbor must take every care to do nothing exceptional to neighbor; must keep himself strictly from all such acts, and above all from encroachment on a neighbor's lands[.]" *Id.* at 231.

<sup>47</sup> PLATO, THE LAWS 231 (A.E. Taylor, transl.)(Everyman, 1966).

<sup>48</sup> *Id.* .

<sup>49</sup> *Id.* .

conversion of personal property, such as the “humouring” of the bees on one owner’s land so that they migrate to the other’s property, he must pay damages.<sup>50</sup>

Plato returns repeatedly to the issue of water in terms of its potential for damaging the land of another. He describes the duties of landowners both to others possessing land either higher in gradient or lower to their own. To his up gradient neighbor the landowner owed a duty not to impede the outflow of rainwater; to the down gradient neighbor a duty not to cause damage “by careless discharge of the efflux” from the higher property. In the event of a breach of these obligations, an affected neighbor might seek an order from a magistrate directing the appropriate party to commence compliance.<sup>51</sup>

In his TREATISE ON GOVERNMENT Aristotle recognizes that absent a circumstance in which “we suppose a set of people to live separate from each other . . . and that there were laws subsisting between each party, to prevent their injuring one another[,]” they still require, for those instances in which commerce requires that they aggregate in one place, “alliances subsisting between each party to mutually assist and prevent any injury.” It is noteworthy that Aristotle writes here of “alliances”, or agreements, and to “prevent[ing]” harm, as distinct from providing remedies for harm that has already occurred. This suggestion of the potential superiority of *ex ante* agreements permitting accords between neighbors before disputes may arise will be evident anew in Roman law codes and their several and copious interpretations.<sup>52</sup>

## 2. THE PROPER FORUM FOR AND CONDUCT OF “LAW GIVERS”

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<sup>50</sup> *Id.*

<sup>51</sup> PLATO, THE LAWS, *supra* note 40 at 232 (A.E. Taylor, transl.)(Everyman, 1966) Again, the Athenian suggests that liability is not strict, but instead applies only to “careless discharge”.

<sup>52</sup> See notes below and accompanying text.

As had Hesiod before him, Aristotle deliberated at length regarding the proper forum for and conduct of “law givers”. To Aristotle, great moral responsibility attaches those who would so organize a city that is prepared to live under the rule of law; “[W]hosoever endeavours to establish wholesome laws in a state, attends to the virtues and the vices of each individual who composes it; from whence it is evident, that the first care of him who would found a city . . . must be to have his citizens virtuous[.] . . . [L]aw is an agreement and a pledge, as the sophist Lycophron says, between the citizens of their intending to do justice to each other, though not sufficient to make all the citizens just and good[.]”<sup>53</sup>

Aristotle wrote of the application of unwritten law when he referenced the approach taken by the Ephors of Sparta “using their own judgement.”<sup>54</sup> Again, as Hesiod had ascribed to Muses his inspiration for many of his statements of law, so too does a figure in Aristotle’s account of early law, an unlikely law giver, Zaleucus, a shepard. Aristotle wrote: “[W]hen the Locians asked the oracle how they might find relief from the considerable turmoil they were experiencing, the oracle responded that they should have laws enacted for themselves, whereupon a certain Shepard named Zaleucus ventured to propose to the citizens many excellent laws, When they learned of these and asked him where he had found them, he replied that Athena had come to him in a dream.”<sup>55</sup> It appears that attribution of early law to the intervention of a god or a goddess was not unusual, and perhaps served to lend weight to the instructive power of any law thus derived. In analogous stories the Cretans assigned the origins of certain laws to the

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<sup>53</sup> ARISTOTLE: A TREATISE ON GOVERNMENT Bk. , Chapt. (William Ellis, A.M., transl.)(J.M. Dent. & Soncs, Ltd. 1928), available at

<sup>54</sup> ARISTOTLE, POLITICS BOOK III, 1.1270 B 30, at 578 (Ernest Barker, trans.)(Oxford:Clarendon 1946).

<sup>55</sup> F.E. Adcock, *Literary Tradition and Early Greek Code-Makers*, 2 C.A.M.B. HIST. J. 95 (1927), referenced in GAGARIN, *supra* note 20 at 57.

mythic figure Minos and others, while the Spartans believed that Lycurgas's laws came from the Delphic oracle.<sup>56</sup>

### 3. THE ESSENTIAL JUSTICE OF CERTAIN REMEDIES FOR PARTICULAR WRONGS

External law may coerce or induce man to act in accordance thereto. Ethics, in contrast, comprise "laws for which external legislation is impossible".<sup>57</sup> Ethics concerns man's act, or omission to act, and by the exercise of his free will or choice, not infurtherance of external legislation but rather pursuant to man's "will as its [ethics'] objects and aims. ... [pursuant to] the free choice of the individual."<sup>58</sup>

Returning what was owed, in effect giving up the actual or conceptual unjust enrichment associated with a wrongful taking, is of course part and parcel to the analysis of Aristotle, in NICHOMACHEAN ETHICS Book V, ch. 2, in which "The Thinker" is credited with laying the cornerstone of the corrective justice principles of today's common law,<sup>59</sup> although the logic has equivalent bearing upon economic considerations. Under the Aristotelian principle of *diorthotikos*, or "making straight," at the remedy phase the court will attempt to equalize things by means of the penalty, taking away from the gain of the wrongdoer. Whether the wrongdoer's gain is monetary, or measured in property, or the community's valuation of a personal physical injury consequent to the defendant's wrongful act, by imposing a remedy approximating the actor's wrongful

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<sup>56</sup> PLATO, THE LAWS, *supra* note 40 at 624A-625A.

<sup>57</sup> T.E. HOLLAND, JURISPRUDENCE 27 (11<sup>th</sup> ed)(1910).

<sup>58</sup> *Id.* (citations omitted).

<sup>59</sup> "[T]he law . . . treats the parties as equal, and asks only if one is the author and the other the victim of injustice or if the one inflicted and the other has sustained an injury. Injustice in this sense is unfair or unequal, and the endeavor of the judge is to equalize it." ARISTOTLE, NICHOMACHEAN ETHICS 154 (J. Welldon trans., 1987), discussed in David G. Owen, *The Moral Foundations of Punitive Damages*, 40 Ala. L. Rev. 705, 707-08 & n.6 (1989). See alternatively ARISTOTLE, NICHOMACHEAN ETHICS, Book II, in INTRODUCTION TO ARISTOTLE (Richard McKeon, ed.)(Modern Library 1947).

appropriation and “loss” to the sufferer, “the judge restores equality . . . .”<sup>60</sup> This justice should be meted out equivalently to all, irrespective of whether the sufferer is a good man or a bad one.<sup>61</sup> As Book V Chapter 4 is paraphrased by Joachim: “If, for example, the thief was a gentleman and the injured party a beggar - - a member of an inferior class in the state - - this difference of rank is nothing to the law. . . . All that the law is concerned with is that, of two parties before it, one has got an unfair advantage and the other has suffered an unfair disadvantage. There is, therefore, a wrong which needs redress - - an inequality which needs to be equalized.”<sup>62</sup>

Aristotle classified among the divers “involuntary” transactions that would invite rectification “clandestine” wrongs, including “theft, adultery, poisoning, . . . false witness[;]” and “violent” wrongs, including “assault, imprisonment, . . . robbery with violence, . . . abuse, [and] insult.”<sup>63</sup> Importantly, Aristotle does not promise distributive justice, in the sense that a man may remedy his antecedent unequal position *vis a vis* another.<sup>64</sup> Rather, corrective justice will only work to rectify the marginal inequality that the wrongdoing has imposed.<sup>65</sup>

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<sup>60</sup> “[T]he judge tries to equalize things by means of the penalty, taking away the gain of the assailant. For the term “gain” [kerdos] is applied generally to such cases - - even if it is not a term appropriate to certain cases , e.g., to the person who inflicts the wound - - and “loss” [zemia] to the sufferer; at all events, when the suffering has been estimated, the one is called loss and the other gain . . . . Therefore the just . . . consists in having an equal amount before and after the suffering.”

<sup>61</sup> 2 THE COMPLETE WORKS OF ARISTOTLE 786 (Jonathan Barnes ed., 1984).

<sup>62</sup> SAUL LEVMORE, FOUNDATIONS OF TORT LAW 60 (1993).

<sup>63</sup> ARISTOTLE, NICOMACHEAN ETHICS Bk. 5, Ch. 2 in INTRODUCTION TO ARISTOTLE 402 (Richard McKeon, ed.)(1947).

<sup>64</sup> To Aristotle:

Justice (contrary to our own view) implies that members of the community possess unequal standing. That which ensures justice, whether it is with regard to the distribution of the prizes of life or the adjudication of conflicts, or the regulation of mutual services is good since it is required for the continuance of the group. Normativity, then, is inseparable from actuality.

PRIMITIVE, ARCHAIC AND MODERN ECONOMIES: ESSAYS OF KARL POLANYI 96 (George Dalton, ed.)(1968).

<sup>65</sup> *Id.* at Ch. 3, p. 403:

Aristotle understanding corrective justice to enable restoration to the victim of the *status quo ante major*, insofar as a monetary award or an injunction can do so.<sup>66</sup>

Importantly, he proceeds to distinguish between excusable harm and harm for which rectification may appropriately be sought. For an involuntary harm, such as when “A takes B’s hand and therewith strikes C[,]” nor “within [A’s] power[,]” or for acts pursuant to “ignorance”, a more nuanced legal response is indicated.<sup>67</sup> Even for such involuntary acts as “violat[e] proportion or equality”, Aristotle suggests opaquely, some should be excused, while others should not be excused.<sup>68</sup>

In his hypothetical laws, Aristotle’s writings presage distinctions that will eventually form the basis for dividing absolute liability from innocent causing of harm. As to voluntary and harmful acts attributable to ignorance, Aristotle distinguishes between acts in which the ignorance is excusable and acts in which the ignorance is not.<sup>69</sup> The former, which we might today characterize as innocent, would not prompt remediation, while the latter would. Thus Aristotle describes an act from which injury results “contrary to reasonable expectation” as a “misadventure”, and forgivable at law.<sup>70</sup> To Aristotle, an unintentional act<sup>71</sup> that causes harm, but where such harm “is not contrary to reasonable expectation[,]” constitutes not a misadventure but a “mistake”. To Aristotle, “mistake” is a fault based designation. The example used is redolent of

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“[A]wards should be made “according to merit”; for all men agree that what is just in distribution must be according to merit in some sense, though they do not all specify the same sort of merit, but democrats identify it with the status of the freemen, supporters of oligarchy with wealth (or noble birth) and supporters of aristocracy with excellence.”

<sup>66</sup> “Therefore the just is intermediate between a sort of gain and a sort of loss, viz, those which are involuntary; it consists in having an equal amount before and after the transaction.” Ch. 4, *id.* at 407.

<sup>67</sup> ARISTOTLE, NICHOMACHEAN ETHICS CH. 8, *supra* note 63 at 414.

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> ARISTOTLE, NICHOMACHEAN ETHICS CH. 8, *supra* note 63 at 415.

<sup>71</sup> An act that “does not imply vice[.]” *Id.*

what would be termed “negligence” in today’s nomenclature: a man throwing an object “not with intent to wound but only to prick[.]” This man, although not acting with an intent to wound another in any significant way, would nonetheless be subject to an obligation in indemnity, for to Aristotle, when “a man makes a mistake[;]. . . the fault originates in him[.]”<sup>72</sup>

#### D. THE CODES OF SOLON AND OTHERS

With the end of the hereditary monarchy, political power in Greece passed to the nobility, who in turn sat in the Supreme Council of State on a hill known as Areopagus. Administration of the law was vested in magistrates, all of whom were drawn from the nobility. The law that was in fact administered was customary law, and indeed the Greek for law was *nomos*, or custom.<sup>73</sup> It was largely unwritten, and as its divination, articulation and application rested in the noble classes, the lower classes viewed it with and understandable mistrust.

It is probable that the Greeks began to inscribe their laws in the middle of the Seventh Century, B.C. In about 621 B.C., in response to popular turmoil, the nobility agreed to reduce customary law to writing, and produced the first Greek written legal code, the Code of Dracon. Draco was Greece’s first law scribe, at the time he enjoyed the position of *archon eponymous*. Draco’s law concerning homicide, variously 620 or 621 B.C. set exile as the penalty, and included other provisions such as pertain to the seeking of a pardon and the protection of the perpetrator from retaliation by the victim’s

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<sup>72</sup> *Id.*

<sup>73</sup> See generally Kathleen Freeman, *Legal Code and Procedure*, in J. C. SMITH, DAVID N. WEISSTUB, THE WESTERN IDEA OF LAW 296 (Butterworths 1983).

family.<sup>74</sup> It provided: “Even if a man unintentionally kills another, he is exiled. The kings are to adjudge responsible for the homicide either the killer or the planner[.] . . .If anyone kills the killer or is responsible for his death, as long as he stays away from the frontier markets, games and Amphictyonic sacrifices, he shall be liable to the same treatment as the one who kills and Athenian[.] . . . It is allowed to kill or arrest killers, if they are caught in the territory. . . . If a man defending himself straightaway kills someone forcibly and unjustly plundering or seizing him, the killer shall pay no penalty.”<sup>75</sup> A borrower in default could be sold into slavery if his social status was less than his lender.<sup>76</sup>

Zaleucus and Charondas undertook to set down in written form penalties for other delicts, surely a valuable endeavor to the extent that it would serve to lessen the then extant uncertainty of results at the penalty phase of a dispute. Charondas differentiated “minutely” the numerous types of assaults,<sup>77</sup> but such was the tenor of the time, as Aristotle relates the “lawgiving” endeavors of others as incidental and not collectively significant.[<sup>78</sup>] <sup>79</sup>

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<sup>74</sup> Demosthenes 23, GAGARAN, *supra* note 22 at 64. In his *POLITICS* Aristotle describes the proof associated with a judgment of homicide as involving the testimony of relatives who were witnesses to the killing: “There is a homicide law (*peri ta phonika nomos*) that if the plaintiff provides a certain number of his own relatives as witnesses to the killing, the defendant is guilty of homicide.” ARISTOTLE, *POLITICS* 1269A1-3 ( Ernest Barker, transl.)(Oxford:Clarendon 1946). *See also id.* at 1274B23-26.

<sup>75</sup> RONALD S. STROUD, *DRAKON’S LAW ON HOMICIDE* (Berkeley 19688), in MICHAEL GAGARIN, *EARLY GREEK LAW* 86 (U. Cal. 1986).

<sup>76</sup> May be found at <http://en.wikipedia.org/Draco>.

<sup>77</sup> GAGARIN, *supra* note 22 at 64-65. Prof. Gagan cites the parody in HERONDAS, *MIMES* 2.46ff, as well as Aristotle’s characterization of Charondas’s laws in *POLITICS* 1274 B 8. *Id.* at n. 56.

<sup>78</sup> ARISTOTLE, *POLITICS* 1274 B 19-20, *supra* note 54.

<sup>79</sup> “Pittacus was the author of some laws, but never drew up any form of government; one of which was this, that if a drunken man beat any person he should be punished more than if he did it when sober; for as people are more apt to be abusive when drunk than sober, he paid no consideration to the excuse which drunkenness might claim, but regarded only the common benefit. Andromadas Regmus was also a lawgiver to the Thracian talcidians. There are some laws of his concerning murders and heiresses extant, but these contain nothing that any one can say is new and his own. And thus much for different sorts of governments, as well those which really exist as those which different persons have proposed. ARISTOTLE: A TREATISE

In its employment of the penalty of death for a wide range of offenses, even for offenses as minor as petty theft, Draco's code, even as revised, was extraordinarily harsh by today's standards - whither today's expression of "Draconian" as an equivalent of "harsh". Even not so very long after its era, Aristotle wrote dismissively of the significance of Draco's codification, characterizing it merely as derivative and harsh.<sup>80</sup> In Draco's defense, though, his charge was not to reform the law, but rather to codify existing customary law, and that he did.<sup>81</sup>

Nevertheless, as Greek cultural mores evolved, an ever increasing number of Greeks concluded that Draco's Code in written form betrayed a harshness that invited, if not demanded reform, and the task of the first major revision fell to Solon, who was appointed to the task in 594 B.C.<sup>82</sup> He was given one year to reform the Athenian constitution, as well as its legal code, and its law courts.<sup>83</sup>

Under the laws of Solon, the penalty for rape was 100 drachmas.<sup>84</sup> The penalties for theft depended upon the value of the goods stolen.<sup>85</sup> Penalties were also imposed for libel,<sup>86</sup> and for a favorite topic of students of common law tort, the dog bite. For the lattermost, the penalty was the giving over of the dog, with the dog wearing a large

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ON GOVERNMENT Bk. Chapt. (William Ellis, A.M., transl.)(J.M. Dent. & Sons, Ltd. 1928), available at

<sup>80</sup> "As for Draco's laws, they were published when the government was already established, and they have nothing particular in them worth mentioning, except their severity on account of the enormity of their punishments." ARISTOTLE: A TREATISE ON GOVERNMENT Bk. Chapt. 1, *id.* at .

<sup>81</sup> ARISTOTLE: A TREATISE ON GOVERNMENT Bk. , Chapt. , *id.* at ..

<sup>82</sup> Solon could be described as dour. An aphorism attributed to him is this: "Let no man be called happy until his death. Till then, he is not happy, only lucky." Available at [http://www.QuoteFox.com/Solon\\_page\\_3](http://www.QuoteFox.com/Solon_page_3) (2005).

<sup>83</sup> Such was the respect afforded Solon's work that when the Romans in 454 B.C. turned to the task of their own first and great legal codification, the TWELVE TABLES, they sent commissioners to Athens to study the laws of Solon. *See generally* Kathleen Freeman, *Legal Code and Procedure*, in J. C. SMITH, DAVID N. WEISSTUB, *supra* note 73 at 297. The Roman TWELVE TABLES are discussed below at Parts III A, B.

<sup>84</sup> Fragment 26, from GAGARIN, *supra* note 20 at 65 (U. Cal. 1986).

<sup>85</sup> DEMOSTHENES 24.105; Fragment 23, at GAGARIN, *id.* at 65.

<sup>86</sup> Fragments 32-33, *id.* at 65.

wooden collar.<sup>87</sup> In one provision that would suggest revision of the established legal maxim *de minimus non curat lex*, Solon's laws contained a penalty for conversion of cow dung.<sup>88</sup>

Solon's law also contained regulations regarding matters that would today sound in nuisance, including rules for the minimum distances between homes, and the permissible interposition of walls, ditches, wells, beehives, and certain trees.<sup>89</sup> Demosthenes contains an account of one such dispute involving one neighbor's claim of damage arising from the placement of a wall on his neighbor's property.<sup>90</sup> Solon's revisions also introduced the jury court (*heliaca*), which came to be employed in most disputes save those involving bloodshed and arson. The juries reached remarkable numbers, some as large as 500 members, although the law provided that any number be uneven in order to preclude a tie. The jury would be the finder of fact in accordance with the applicable law, at which point, if the finding was one of guilt or responsibility, the law provided for the penalty. Jurors swore to hear both sides of a dispute impartially, but after that, the trials themselves could be extraordinary affairs in which litigants and jurors might end up in shouting matches, showing behavior more like today's town meeting than a modern trial.<sup>91</sup>

Thus from the time of Solon's revisions onward, the law applied in Greek courts was the Code of Solon, as it might be amended or clarified from time to time by decree of the Assembly of the People. In order to preclude casual alteration or repeal of the Code,

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<sup>87</sup> Fragment 64, *id.* at 65.

<sup>88</sup> Fragment 64, *id.* at 65.

<sup>89</sup> Fragment 60-62, *id.* at 65.

<sup>90</sup> DEMOSTHENES II. 55, in Ugo Enrico Paoli, *La loi de Solon sur les distances*, 27 REVUE HISTORIQUE DU DROIT FRANCAIS ET ETRANGER 505-517 (1949), reprinted in ALTRI STUDI DI DIRITTO GRECO E ROMANO 571-83 (Milan 1976).

<sup>91</sup> See generally Kathleen Freeman, *supra* note 73 at 297-98.

a specific and laborious procedure was followed for any proposed changes.<sup>92</sup> In the end, however, the laws of the Greek “democracy” could not under any circumstances fulfill the ideal of Kantian social contract theory. That social contract theory in particular contemplates “the idea of society as a system of cooperation between free and equal persons[.]”<sup>93</sup> And Greece, for its advances in the democratic ideal, never freed itself from the restrictions of slavery and status based upon land ownership and gender.

### III. ROMAN LAW

#### A. EARLY ROMAN LAW

It is received wisdom that together with Anglo-American common law, Roman law is one of the two foundations of the civil law now observed throughout much of the Western world.<sup>94</sup> The law today characterized as Roman Law had its sources in statutes, plebiscites,<sup>95</sup> constitutions, and praetorian orders, among other stimuli. However, as J. Declareuil points out: “The most ancient law was entirely customary.”<sup>96</sup> The pronounced and continuing effect of customary law was recognized in theistic and secular societies alike. In the earliest Roman Law codification, that of the Twelve Tables, we see the

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<sup>92</sup> Kathleen Freeman, *supra* note 73 at 298.

<sup>93</sup> Gregory C. Keating, Chapt. 1, *A Social Contract Conception of the Tort Law of Accidents*, in PHILOSOPHY AND THE LAW OF TORTS at 27. Keating continues, at *id.*:

[A] fundamental task of principles of justice on this account is to find terms of cooperation that express the freedom and equality of democratic citizens, recognizing that these citizens hold diverse and incommensurable conceptions of the good.

<sup>94</sup> See generally HANS JULIUS WOLFF, *ROMAN LAW* 3-5 (Norman: U. Oklahoma 1951).

<sup>95</sup> The plebiscite (*plebes scitum*) was comparable to what today, at the state wide level, are called “initiatives”. Originally it would be a decision by the plebs of approval or disapproval of a proposal of a tribune, and binding only the plebs; later it would represent one of a variety of statutory and more broadly applicable forms. J. DECLAREUIL, *ROME THE LAW GIVER* 19 (Greenwood, Westport, Ct. 1970).

<sup>96</sup> J. DECLAREUIL, *id.* at 16. “Law has always had much to do with customs and precedents, which derived their authority from various facts established by our ancestors since times immemorial.” WILLIAM S. H. JUNG, *OUTLINES OF MODERN CHINESE LAW* (1934). Jung continues: “To trace the laws of a nation with a history of over four thousand and six hundred years, or, in other words, to delineate those customs and precedents by which our daily dealings of our early ancestors were regulated, therefore, is without question a matter of extreme difficulty.” *Id.*

greatest incidence of rules that reflect the norms of an agricultural society. These rules must, of course, make provision for the protection of the individual and family from the wrongful interruption of others with their personal safety and the preservation of their property. Due, if preliminary, attention is also given to subjects that pertain to the preservation of individual rights against the potential predations of the wealthier, landed and more politically powerful nobility. Finally, early Roman Law sets forth a framework of proscriptions and penalties for the types of conflicts that would be predictable in the agricultural setting, which is to say, protection of crops and livestock.

While early Greek law evidenced the textures of philosophy and jurisprudence to which its famous philosophers contributed, Roman law was practical and elementary.<sup>97</sup> After much public pressure for a compilation and rationalization of the disparate sources of law as enforced by the consuls, in 451 B.C. a commission of 10 jurists (*Decemviri*) was appointed to consolidate the laws. Within a year they produced 10 “Tables”, and then, upon reappointment, wrote the additional two tables, constituting together the famous “Twelve Tables”. It is uncertain to what extent the Twelve Tables were a simple, if for the first time coordinated, exposition of customary law, or whether they reflected a reform reflecting the a need to reconcile customary law with new Republican constitutional authority. Nor is there any clear reflection within the Twelve Tables of any purposeful endeavor to adopt the progressive jurisprudence of Greece or any other of its neighbors.<sup>98</sup>

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<sup>97</sup> “The Roman genius was essentially practical; to the speculative and theoretical side of Jurisprudence it made no contribution; indeed, such was its poverty in this respect that it was constrained to import from Greece elementary notions in respect to the foundations of law.” WILLIAM A. HUNTER, INTRODUCTION TO ROMAN LAW 2 (F. H. Lawson, rev.)(Sweet & Maxwell 1955).

<sup>98</sup> Of the Decemvirs William A. Hunter writes: “They were dictated by the rigid and jealous spirit of the aristocracy, which had yielded with reluctance to the just demands of the people. But the substance of the Twelve Tables was adapted to the state of the city[.] . . .” WILLIAM A. HUNTER, *id.* at 4.

Under Roman law of this early era, criminal and delictual wrongs were most often correlative, but of course distinguishable. An array of delicts included some prohibitions which tracked religious or patriarchal values, and still others relying in whole or in part upon legend.<sup>99</sup> For the fluidity of the concept of delict, in Rome as was true as well in Greece, civil wrongs or *maleficia* were “acts involving what dominant opinion regarded as wrong, and the law punished them on this ground.”<sup>100</sup> R. W. Lee summarized the Roman Law of delict in words that resonate in today’s law of tort: “A few simple principles covered the whole ground, and adopted in modern codes, have been found sufficient to provide for the complexities of modern life. A man must see that he does not willfully invade another’s right, or, in breach of a duty, willfully or carelessly cause him pecuniary loss. If he does either of these things, he is answerable in damages.”<sup>101</sup>

## B. THE TWELVE TABLES

The Twelve Tables, dated at approximately 450 B.C., represent the Roman’s first recorded effort at a comprehensive recitation of existing customary and nascent statutory law. It was reduced originally to 12 wooden tablets, and as these, together with the original language were lost in episodic conflict with the Celts, even the most ancient of the surviving were doubtless modernized.<sup>102</sup>

The Italic community that generated the ambitious Twelve Tables was in no sense egalitarian. Political power and the ownership of land resided in the nobility (*patricii*),

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<sup>99</sup> J. DECLAREUIL, *supra* note 3 at 195.

<sup>100</sup> J. DECLAREUIL, *id.* at 194.

<sup>101</sup> R. W. LEE, AN INTRODUCTION FO ROMAN-DUTCH LAW 319 (3d ed. 1953), quoted in THE ROMAN LAW READER, *supra* note 92 at 146.

<sup>102</sup> See generally WOLFGANG KUNKEL, AN INTRODUCTION TO ROMAN LEGAL AND CONSTITUTIONAL HISTORY (J. M. Kelly, trans.) 23 *et seq.* (Oxford-Clarendon 1973).

from whose ranks were drawn the knights (*equites*) of the Roman army. Below these were the common people (*plebs*), who tended to such land of the nobility as was not attended to by the sons of the nobility or their slaves. Such land as was not so allotted would be occupied by *plebs*, who in return for this generosity were by law *cliens* of the nobility and obligated to take arms at the behest of their *patricii*. *Plebs* could not marry *patricii*, could not hold state office, and could not occupy the priesthood.<sup>103</sup>

The actual writing of the Twelve Tables was undertaken by an elite group of jurists, *patricians* of course, called *decemvirs*. They presented ten tables of laws, inscribed most probably on wood but perhaps on bronze. Within a short while it was concluded that the work fell short of the comprehensive treatment desired, and a second group of *decemvirs*, this one including plebian representation, was appointed. This second group prepared the final two tables.

In the Twelve Tables the legislators did not dedicate themselves to the description of civil government, as might the drafters of a constitution. Rather, they essayed “to codify the *ius civile*, i.e., those rules which were applicable to the rights and duties of the individual citizen, but to do so as completely as possible.”<sup>104</sup> For its plentiful strengths and limitations, the Twelve Tables gave a written unity Roman law that would last for hundreds of years. Cicero (106-43 B.C.), of whom more is said below, noted the continuing primacy and influential potency of the Twelve Tables as a resource among students of the law, lawyers and jurists.

In early Rome, slavery existed, but in no means at the robust level as would be manifest in a later epoch. As Kunkel relates: “The unfree serf ate the same bread as his

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<sup>103</sup> *Id.*

<sup>104</sup> *Id.* at 24-25.

master, and at the same table, and was protected against personal injury by a statutory compensation of half the amount prescribed for the case of a free man[.]”<sup>105</sup>

With only incidental variations, the Twelve Tables represented an absorption prior customary law. It was not coincidental that the consolidation of that customary law into written form corresponded inexactly with the Roman community’s ascension, in terms of size, political organization and legal structure, so as to permit it to publish law and provide mechanisms for its enforcement. The lack of coincidence is attributable to these two truths held generally to be necessary, but neither in themselves sufficient, predicates of law. First, to be considered law, be it private or public, the norms thus published must be rules of generally applicability as to the population cohorts to which they purport to be applicable. Second, the law must be accompanied by the means of its application and enforcement. As to this latter proposition, at the time of the TWELVE TABLES and at other junctures in the law of early Rome, the populace certainly welcomed the effect that codification would have on arbitrary and unpredictable actions by the judges. At the same time, they showed no great alacrity in abandoning the sum total of the tradition-based prerogatives, including the rights of blood vengeance and retaliation. This was particularly so in the early years in which the consolidation of families, kinship groups, freed men and slaves was yet to assume the size that would permit it to assume the responsibility of ensuring just resolution of disputes, or even, for that matter, defend its own borders.

THE LAWS OF THE TWELVE TABLES, Table II, *Concerning Judgments and Thefts*, is sufficiently concise as to invite setting it out in full:

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<sup>105</sup> *Id.* at 8, referencing TWELVE TABLES, VIII. 3.

Law IV. Where anyone commits a theft by night, and having been caught in the act is killed, he is legally killed.

Law V. If anyone commits a theft during the day, and is caught in the act, he shall be scourged, and given up as a slave to the person against whom the theft was committed. If he who committed the theft is a slave, he shall be beaten with rods and hurled from the Tarpeian Rock. If he is under the age of puberty, the praetor shall decide whether he shall be scourged and surrendered by way of reparation for the injury.

Law VI. When any persons commit a theft during the day and the light, whether they be freemen or slaves, of full age or minors, and attempt to defend themselves with weapons, or with any kind of implements; and the party against whom the violence is committed, raises the cry of thief, and calls upon other persons, if any are present, to come to his assistance; and this is done, and the thieves are killed in the defence of his person and property, it is legal and no liability attaches to the homicide.

Law VII. If a theft be detected by means of a dish and a girdle, it is the same as manifest theft, and shall be punished as such.

Law VIII. Whenever anyone accuses and convicts another of theft which is not manifest, and no stolen property is found, judgment shall be rendered to compel the thief to pay double the value of what was stolen.

Law IX. Where anyone secretly cuts down trees belonging to another, he shall pay 25 asses for each tree cut down.

Law X. Where anyone, in order to favour a thief, makes a compromise for the loss sustained, he cannot afterwards prosecute him for theft.

Law XI. Stolen property shall always be his to whom it formerly belonged; nor can the lawful owner ever be deprived of it by long possession, without regard to its duration; nor can it ever be acquired by another, no matter in what way this may take place.<sup>106</sup>

As was true of the Greeks,<sup>107</sup> at the time Roman legislators turned their attention to the TWELVE TABLES, there existed no complete distinction between civil and criminal transgressions. The TWELVE TABLES were intended principally to consolidate comprehensively, and in written form, the *ius civile*, thought traditionally as an endeavor at “safeguarding . . . the small man in particular against the arbitrary behavior of the patrician nobility in legal relations and the administration of justice.”<sup>108</sup> Specific measures follow largely the form of other ancient and modern codifications, i.e., a predicate act or omission is identified by a description beginning with the word that can be translated as “If”, then the act or the omission is described, and finally the legal consequences thereof.<sup>109</sup> After this, and despite the brevity of the sentences, lack of clarity pervades, with frequent ambiguity in the subject and the object of the chosen verb form.<sup>110</sup>

The rustic form of early Roman law contained no provisions for the compulsory attendance of the defendant, and accordingly, the TWELVE TABLES described a protocol that the plaintiff was obliged to follow. As translated: “If [plaintiff] summons [defendant] to law, and if [defendant] does not go, [plaintiff shall call up witnesses. Then

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<sup>106</sup> *The Laws of the TWELVE TABLES*, THE CIVIL LAW 58-65 (New York:AMS Press 1973), in J.C. SMITH, DAVID N. WEISSTUB, *supra* note 73 at 317-18.

<sup>107</sup> See PLATO, THE LAWS xiv, xv (A.E. Taylor, trans.)(Everyman 1966).

<sup>108</sup> KUNKEL, *supra* note 103 at 24-25.

<sup>109</sup> See generally M. Stuart Madden, Chapter 1, *Tort Law Through Time and Culture: Themes of Economic Efficiency*, in EXPLORING TORT LAW (M. Stuart Madden, ed.) *et seq.* (Cambridge 2005)(describing ).

<sup>110</sup> WOLFGANG KUNKEL *supra* note 103 at 25.

[plaintiff] shall seize [defendant] If [defendant] resists [plaintiff] shall lay hands on (seize) him. If sickness or age is a weakness, [plaintiff shall provide a beast to carry [defendant].”<sup>111</sup>

As Kunkel suggests, it is in many of the particular provisions of the TWELVE TABLES that the role of the code in Early Rome’s “cultural history” is revealed.<sup>112</sup> Recalling that at the time of its scrivening there were no clear markers delineating between what would be the realm of crime and the realm of delict, it appears that capital punishment was enforced by the state only in instances of treason, and also perhaps for particularly grave religious transgressions, the relation between the two being that each was considered an offense not against another individual but rather against the commonwealth.<sup>113</sup>

Even for intentional murder (*oarrucudas*), the punishment would be determined by the victims survivors (*agnates*). The family could seek blood vengeance, after a judicial finding of intent and malice. For unintentional homicide and for delicts more generally, payment of a prescribed number of cattle to the victim’s *agnate* might suffice. For example, the TWELVE TABLES describes an unintentional slaying, and its compensatory remedy, in this way: “[I]f the spear has rather flown from the hand than been thrown”, the killer would surrender to the victim’s family a ram. The ram might then be slaughtered in ritual vengeance, thus the term “scapegoat” attributed to Augustinian period jurist Labeo.<sup>114</sup>

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<sup>111</sup> *Id.* at 25 n. 2.

<sup>112</sup> *Id.* at 26-27.

<sup>113</sup> KUNKEL, *supra* note 103 at 27.

<sup>114</sup> *Id.* at 27.

Certain acts other than intentional homicide would warrant the victim or the victim's family putting the perpetrator to death, in each instance a revelation of the strong theme of legitimized vengeance found throughout the TWELVE TABLES. This countenanced vengeance can be seen as the very "self help" that the law of civil delict would require another millennium or more to dispatch. Interesting as well, in many instances the manner permitted for the execution of the punishment would bear a conceptual similarity to the nature of the offense. The intentional arsonist could be burned alive. One who stole crops at night could be hung at the location of the theft as a sacrifice to Ceres, goddess of the harvest. A false accuser could be thrown into an "abyss".<sup>115</sup>

The victim's prerogatives against certain transgressors revealed a liberality not shown even in instances of alleged intentional homicide. An individual encountering a thief "red handed" by night was permitted to kill him if the burglar was armed.<sup>116</sup> If the theft occurred during the day, slaying the perpetrator was approved if the victim first cried out to neighbors for help (*endplorare = implorare*) so as to permit corroboration as to the permissibility of killing the thief.<sup>117</sup> Alternatively, the victim could take the thief to the magistrate, who could then return him to the victim. The recourse then was as before, as the victim could kill the thief. Or, he could sell the thief as a slave, or demand ransom from the thief's family or others. For thieves not caught in the act, super-compensatory damages might be imposed in the form of moneys amounting to twice the value of what was stolen.<sup>118</sup>

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<sup>115</sup> *Id.* at 28

<sup>116</sup> TWELVE TABLES T., 8., 1, 2, 13; 9, 6, cited in J. DECLAREUIL, *supra* note 3 at 196 n. 2.

<sup>117</sup> KUNKEL, *supra* note 103 at 28.

<sup>118</sup> *Id.* at 28.

Pursuant to the TWELVE TABLES, accidental personal injury triggered specific remedies. For breaking the bone (*os factum*) of a free man, the remedy was retaliation in kind,<sup>119</sup> although the authority as to this differs, with another source indicating that the breaking of a bone of a freedman the defendant was required to pay 300 *as*.<sup>120</sup> The latter penalty seems more in keeping with the tendency of the TWELVE TABLES to influence the customary law in the direction away from the blood feud dimensions of customary law and in the direction of a system in which penalties would be assessed in money, livestock, or goods. For breaking the bone of a slave, the penalty was 150 *as*<sup>121</sup>, and for less severe injuries, 25 *as*.<sup>122</sup> The wrongful cutting down of a tree was likewise penalized by a payment of 25 *as*.<sup>123</sup>

Numerous fines were set at multiples of the proved harm. They included, without limitation, double the value of the wrong for usury, for a depositary who failed to repay the deposit, a seller of land who misrepresented the area of land, or a guardian responsible for misadministration. A threefold multiple of the plaintiff's loss would be due for the misadministration of a receivership.<sup>124</sup>

*Damages*      The severity of the penalties associated with certain delicts can be seen to relate directly to the gravity of the offense as it might be evaluated in an early agricultural society. As mentioned, the intentional arsonist could be dispatched by burning. Also considered capital offenses were the nocturnal theft of another's crops or permitting one's animals to graze on another's crops. If, however, one set fire to a

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<sup>119</sup> XII T., 8, 1, 2, 13; 9, 6, cited in J., *supra* note 95 at 196.

<sup>120</sup> TWELVE TABLES VIII 3, discussed in KUNKEL, *supra* note 103 at 28.

<sup>121</sup> TWELVE TABLES VIII 3, referenced in KUNKEL at *id.* .

<sup>122</sup> TWELVE TABLES VIII. 4, referenced in KUNKEL at *id.*

<sup>123</sup> CICERO, DE LEGIS 3, 11, cited in J. DECLAREUIL, *supra* note 3 at 197 n. 1.

<sup>124</sup> J. DECLAREUIL, *id.* at 197.

another's house by accident, he was responsible only in damages to be assessed at the level of the value of the home, or if he was too poor to pay, he would be "lightly chastised."<sup>125</sup> For what would later be termed either intentional torts or negligence-based torts, it has been urged that at this early stage of Roman Law neither, as to the former, the actor's frame of mind nor the level of care employed were of moment.<sup>126</sup>

While numerous delicts against property, if proven would garner the victim a pecuniary award in the amount of the value of the property, still others would permit recovery of two or even three times the actual loss suffered. As review of these instances demonstrates that these multiple awards were reserved for circumstances in which either the conduct of the accused was more blameworthy, or the loss to the victim could not be remedied with a simple compensatory award. For the wrongdoer discovered to have in his home the possessions of the accuser, the penalty was three times the value of the goods.<sup>127</sup>

## B. THE LEX AQUILIA AND CICERO

The TWELVE TABLES treatment of damage to property (*damnum injuria datum*) was superseded by the *Lex Aquilia* (286-195 B.C.), advanced by Tribune of the Plebians Aquilius (~286 B.C.).<sup>128</sup> The *Lex Aquilia*, a Plebiscitum, was stimulated most probably

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<sup>125</sup> H. F. JOLOWICZ, HISTORICAL INTRODUCTION TO ROMAN LAW \_\_\_\_, quoted in THE ROMAN LAW READER, *supra* note 92 at 148.

<sup>126</sup> "I do not know of any very satisfactory evidence that a man was generally held liable either in Rome or England for the accidental consequences of his own act." OLIVER WENDELL HOLMES, JR., THE COMMON LAW 4 (Little Brown 1881)(Dover Books edition 1991).

<sup>127</sup> H. P. JOLOWICZ, *supra* note 125 at 146.

<sup>128</sup> While some authorities state that there exists no certain date for this development, H. F. JOLOWICZ, HISTORICAL INTRODUCTION TO ROMAN LAW \_\_\_\_, quoted in THE ROMAN LAW READER, *supra* note 92 at 146, William A. Hunter dates this development at approximately 286 B.C. WILLIAM A. HUNTER, *supra* note 97 at 145.

by a popular movement and an ensuing plebiscite.<sup>129</sup> Its three chapters reflected an important step in synthesis of the evolving law for the securing of damages for private wrongs, and it replaced all prior law regarding injury to persons or things.<sup>130</sup> Reflective significantly of modifications, some legal and some equitable, to the TWELVE TABLES at the instance of a succession of Praetors, the *Lex Aquilia* preserved the general rule that one was strictly liable for one's actions. The most noteworthy exception pertained to murder, with the *Lex Aquilia* differentiating between the intentional and the unintentional taking of life.<sup>131</sup> Its structure and substance became the most typical means of proceeding in a matter of *damnum injuria datum*.<sup>132</sup>

In its general and specific sections together, the *Lex Aquilia* provided for remedies for wrongs ranging from simple damage (*damnum injuria datum*) to fraudulent defenses in legal proceedings (*infitiatio*).<sup>133</sup> It is also credited with the introduction of elements of fault (*culpa*), including absence of due care (today's negligence) to the law of delict. Should the actions of the wrongdoer (*corpore*) result directly or indirectly in harm to another thing, the action would be *directa actio Legis Aquiliae*.<sup>134</sup> If the injury was to a slave or to a quadruped (*quae pecu*, i.e., cattle, sheep, etc.), the wrongdoer could be obligated to pay as damages the highest value that the property had held over the preceding year.<sup>135</sup> The law included provisions intended to stimulate truth telling, for if a person were to be found responsible, and to have willfully denied the claim against him,

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<sup>129</sup> J. DECLAREUIL, *supra* note 3 at 199.

<sup>130</sup> Dig. 9, tit. 2, from \_\_\_\_\_

<sup>131</sup> THE ROMAN LAW READER 151 (F. H. Lawson, ed.)(Oceana 1969),

<sup>132</sup> WILLIAM SMITH, A DICTIONARY OF GREEK AND ROMAN ANTIQUITIES (JOHN MURRY, LONDON 1875), AVAILABLE AT

[HTTP://PENELOPE.UCHICAGO.EDU/THAYER/E/ROMAN/TEXTS/SECONDARY/SMIGRA/HOME.HTML](http://penelope.uchicago.edu/Thayer/E/Roman/Texts/Secondary/SMIGRA/home.html).

<sup>133</sup> J. Declareuil, *supra* note 3 at 199, citing D. 9, 2, 2-pr, 11-6, 27-5..

<sup>134</sup> WILLIAM SMITH, A DICTIONARY OF GREEK AND ROMAN ANTIQUITIES (John John Murry, London 1875), available at <http://penelope.uchicago.edu/Thayer/E/Roman/Texts/secondary/SMIGRA/home.html>

<sup>135</sup> Gaius iii. 211

his payment for the wrong could be doubled. If the injury was not lethal, the damages owed would be the highest value of the injured slave (or damaged property) within the month previous to the injury. An *actian factum* might arise if a person intentionally drove his neighbor's animal(s) into water, and they drowned.<sup>136</sup>

Under the *Lex Aquilia*, if property was damaged by direct contact, or by an agency directed by the wrongdoer, and if the value of the property was diminished thereby, the cause of action would be in *directa actio Legis Aquiliae*. If a slave or a quadruped was killed, the actor could be bound to pay the highest value of the slave or the animal during the preceding year.<sup>137</sup> The third chapter provided for the case of a slave or quadruped (*quae pecudum*) being damaged, or any thing else being damaged or destroyed. In this case he had to pay the highest value that the thing had within the thirty days preceding the unlawful act. If the damage was done to a thing (corpus), but not by a corpus, there was an *actio utilis Legis Aquiliae*, which is also an *actio in factum* on the case. Such a case would occur when, for instance, a man should purposely drive his neighbour's beast into a river and it should perish there.<sup>138</sup>

Later Roman law drew a distinction between injuries to the person and injuries to property. The former were termed, and the later *damnum injuria datum*. A wrong involving theft of property was termed *furtum*. When violence accompanied such a wrong, it was termed *rapina*, or *vi bona rapta*.<sup>139</sup> The protections afforded by the action in *injuria* addressed directly the interests protected by today's torts focusing on personal

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<sup>136</sup> Dig. 9 tit. 2 s7 § 7, 9.

<sup>137</sup> GAIUS ii I 211,

<sup>138</sup> DIG. 9 tit. 2 s 7 ss 3, 9.

<sup>139</sup> WILLIAM A. HUNTER, *supra* note 97 at 139-40.

physical injury: the right to be free of physical interference with one's own person. The wrong would be redressable whether it was intentional or merely negligent, and could include "a multifarious variety of wrongs", such as, without limitation, striking, whipping, kidnapping, or falsely imprisoning. It could also include wrongs that involve no physical contact, such as insult in the presence of others (*convicium facere*), defamation by spoken word, writing or deed,<sup>140</sup> or importunings to in chastity.<sup>141</sup>

Cicero (106-43 B.C.) wrote of the truth of an ethic that sounded simultaneously in terms of corrective justice and deterrence-efficiency. In his *ON MORAL DUTIES* wrote that even after "retribution and punishment" have been dealt to the transgressor, the person who has been dealt the wrong owes a duty to bring a close to any such misadventure by permitting a gesture such as repentance or apology.<sup>142</sup> From the extension to the wrongdoer of the opportunity to apologize or to repent could be reaped the immediate good of reducing the likelihood that he would "repea[t] the offense.", as well as the broader and eventual good of "deter[ing] others from injustice."<sup>143</sup>

As did Plato in *THE LAWS*, Cicero in his *DE LEGIBUS* included lengthy perorations that contain sample ethical or legal models. The work was probably completed in 45 B.C., following interruptions in Cicero's literary activity during his provincial governorship and the Civil War (49-48 B.C.). In *DE LEGIBUS* Cicero adopts the approach of Plato in *THE LAWS*, as Plato was the Athenian in *THE LAWS*, Cicero in *DE LEGIBUS* plays himself, with Quintus and Atticus as the two others. Cicero (106 B.C. – 43 B.C.)

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<sup>140</sup> *E.g.*, taking the property of a solvent man as though in the course securing compensation for a debt of an insolvent man. Compare *Nader v. General Motors Co.*, \_\_\_\_\_, for a modern example of deeds as defamation. In that case, the automobile manufacturer was found liable for, inter alia, defamation for its acts of having the consumer advocate followed by private detectives as though he was suspected of wrongdoing, and also of contriving to have Mr. Nader be witnessed or photographed in unsavory settings.

<sup>141</sup> HUNTER, *supra* note 97 at 140.

<sup>142</sup> *ON MORAL DUTIES* 16, in *BASIC WORKS OF CICERO* 16 (Moses Hadas, ed.) (1951)

<sup>143</sup> *Id.*

was pronouncedly bound to a vision of natural law, writing in his DE LEGIBUS: “Law is the highest reason, implanted by Nature, which commands what ought to be done, and forbids the opposite.”<sup>144</sup> With Law as the perfection of Nature, and since man’s “right reason” leads him to law, in Cicero’s “learned men”, nature, reason, virtue and justice coalesced to form Law that for reason of its perfection man shared with the gods.<sup>145</sup> Cicero was, of course, not naïve, and he recognized as well man’s capacity for “evil tendencies”.<sup>146</sup><sup>147</sup> Cicero commends Socrates for his criticism of those who segregate considerations of utility from Justice, for this separation, Cicero claimed, “is the source of all mischief.”<sup>148</sup>

At what level do justice and morality serve to deter persons from wrongdoing? As to the latter, Cicero suggests that the man tempted to wrongdoing is given pause not so much by an apprehension that he will be pursued by the Furies a recognition that he will be beset “with the anguish of remorse and the torture of a guilty conscience.”<sup>149</sup> Reemphasizing the superiority of ethics to law in the fashioning of just behavior, Cicero comments that the man who moderates his wrongful impulses solely for reasons external to himself, i.e., the apprehension of punishment by law, or “some consideration of utility and profit”, is “merely shrewd, not good.”<sup>150</sup> To Cicero, Justice and morality were not

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<sup>144</sup> CICERO, DE RE PUBLICA; DE LEGIBUS (Clinton Walker Keyes, transl.)(Harvard, 1952).

<sup>145</sup> *Id.* at 321, 323.

<sup>146</sup> “The similarity of the human race is clearly marked in its evil tendencies as well as in its goodness. For pleasure also attracts all men; and even though it is an enticement to vice, yet it has some likeness to what is naturally good.” *Id.* at 331.

<sup>148</sup> *Id.* at 333, 335.

<sup>149</sup> CICERO, DE RE PUBLICA; DE LEGIBUS, *id.* at 341.

<sup>150</sup> *Id.* at 343.

fixed by opinion but rather by Nature[;].<sup>151</sup> And good men would cleave to equity, fairness, generosity and the discharge of duty just as Justice herself and “all the other virtues are also to be cherished for their own sake.” True disinterested pursuit of good is the proper goal, writes Cicero, or duty, equity and generosity “sought for its own sake.” If man is motivated not by inner desire but rather by anticipated gain (or for that matter the prospect of eluding punishment) his work is not just but rather for hire.<sup>152</sup>

Writing of duties extending beyond the family, Cicero subscribed to a species of distributive justice that endorsed a concept that, insofar as possible, no one ought be left behind. In his words: “Whether we bestow or requite a favor, duty requires, if other things are equal, that we should help those who need our help most[.]”<sup>153</sup> Nonetheless, Cicero conceded, “[T]hat is not the way of the world.”<sup>154</sup>

As to persons beyond a benefactor’s core family or kinship group, to Cicero there existed a duty to the entire world as to such things “we receive with profit and give without loss.”<sup>155</sup> 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 that we must be willing to give likewise of the same in order to “contributre to the common weal.”<sup>156</sup>

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[I]s not merely Justice and Injustice which are distinguished by nature, but also ans without exception things which are honourable and dishonourable. . . .[V]irtue is reason completely developed; therefore everything honourable is likewise natural.”

*Id.* at 343.

<sup>152</sup> DE LEGIBUS XVIII, *id* at 351.

<sup>153</sup> ON MORAL DUTIES 16 , in BASIC WORKS OF CICERO 22 (Moses Hadas, ed.)(1951).

<sup>154</sup> *Id.*

<sup>155</sup> *Id.* at 23.

<sup>156</sup> *Id.*

The Lician Laws of 367 B.C. led to the creation of a role of administrators of the law, officials who were elected for terms of one year, and who bore the title of Praetor. Although the task of the Praetor was to administer, rather than to make the law, beginning in 242 B.C. the Praetor with urban jurisdiction, *Praetor Urbanis*, was permitted to enlarge upon or otherwise shape existing law or custom when fairness so dictated. Herein arose over time powers that would approximate those that at a later time would be termed the powers of equity. Such offense as might be given by vesting in the Praetor this authority was tempered with the knowledge that the risk of protracted abuse of office was lessened due to the fact that he was subject to annual election. Upon his assumption of office, each Praetor would issue a proclamation called an *Edictum Perpetuum*, which purported to define the laws and remedies he would apply, but the one-year term of an edictum perpetuum made the phrase oxymoronic. Moreover, the liberty afforded the Praetor was constricted even more by the *Lex Cornelia* (67 B.C.) that forbade a Praetor from violating his own *Edict*.<sup>157</sup> The *Lex Cornelia* also, due to the inflation experienced since the publication of the TWELVE TABLES, worked upward modifications in the sums assigned as monetary remedies.<sup>158</sup>

A considerable amount of the Praetor's influence over the development of equity was brought to a close with the *Edictum Perpetuum* (~129-138 A.D.), by Salvius Julianus at Hadrian's command, that served to freeze the praetor's interpretative flexibility by requiring the enunciation of the law he intended to follow at the outset of the one-year

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<sup>157</sup> WILLIAM A. HUNTER, INTRODUCTION TO ROMAN LAW (9<sup>th</sup> ed.) 11-13 (F. A. Lawson rev.) Sweet & Maxwell 1955). The date of the *Lex Cornelia* is elsewhere put at approximately 81 B.C. F.H. LAWSON, THE ROMAN LAW READER 151 (F.H. Lawson, ed.) (Oceana 1969).

<sup>158</sup> THE ROMAN LAW READER, at *id.* A story, perhaps apocryphal, gained currency, if you will, of a man who came to walk the streets of Rome handing out freely the 25 asses that were the original penalty for diverse offense, but which sum had become over time no more than pocket change.

praetorship, and proscribing any departure therefrom.<sup>159</sup> Of greater importance, at this time, four centuries before the reign of Justinian I, Hadrian assumed complete legislative power, with the effect of making all law, public and private alike, at the will of the Emperor.

### C. LATER ROMAN LAW-THE INSTITUTES AND INTERPRETATIONS

Numerous codifications or collections of the law preceded the 533 A.D. Code of Justinian. A collection of Imperial statutes was prepared by the jurist Papirius Justus in the latter part of the second century A.D. Under Diocletian there was prepared a *Codex Gregorianus* recorded constitutions to the approximate date of 295 A.D. There followed a *Codex Hermogenianus* that compiled constitutions up to approximately 365, and then a *Codex Theodosianus* under the auspices of Theodosius II that pertained to the Eastern Empire, and completed in 439 at the instance of Valentinian III for the Western Empire.<sup>160</sup>

The later Roman Law of delict derived from the TWELVE TABLES, and of course the customary law that preceded the TWELVE TABLES, as further designed at the warp and woof of jurists and praetors to produce as complete as possible structure of civil liability.<sup>161</sup> It is recognized now as a major development “from archaic formalism to rationalism[.]”<sup>162</sup>

Of the sources of later Roman law the Institutes of Justinian (483-562 A.D.) proclaim: “Our law comes either from written or unwritten sources, just as among the

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<sup>159</sup> See generally J. DECLAREUIL, *supra* note 3 at 21-22.

<sup>160</sup> See WILLIAM A. HUNTER, *supra* note 97 at 18; see also THE ROMAN LAW READER, *supra* note 92 at 10..

<sup>161</sup> *Id.* at 146.

<sup>162</sup> *Id.* .

Greeks; some laws are written, others unwritten. Written law comprises legislation , *legis* (enactments of the *comitia*), plebiscites, resolutions of the Senate, the will of the Emperor (in its various manifestations, the edicts of magistrates, and the answers of the learned.”<sup>163</sup> Today in civil code nations courts place repeated reliance upon the interpretations of the law by legal scholars, and this practice originated in Roman law, where involvement of jurists was pervasive and practically plenipotentiary. Participation of Jurists in identification of the appropriate interpretation law was a pressing need in the setting of voluminous legal sources in the near millennium since the TWELVE TABLES and competing interpretations thereof. In 426 A.D. Theodosius II enacted “The Law of Citations, which appointed the writings of five jurists, Papinian, Paulus, Gaius, Ulpian and Modestinus, as the principal heuristic devices for the interpretation of the law, and further declared that if the writings of these Jurisconsults would, if in agreement, be conclusive on any matter of interpretation. In the event of a tie, the conclusion of Papinian would be adopted. The act of Theodosius II of incorporating the learned work of this finite group of revered jurists as a necessary part of legal interpretation and jurisprudential application continued and elevated the role assigned the Decemvirs in the creation of the TWELVE TABLES, and was followed, predictably, by Justinian I in his publication of his later Code, Institutes, and Digests.

The Code of Justinian was one of a three-part presentation of Roman law. Published in 529 and the two years immediately following, the first part, the Code, was intended as a succinct manual for study by lawyers, jurists and students of law. The Institutes of Justinian comprised the second part, and were a reduction and modernization

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<sup>163</sup> THE INSTITUTES OF JUSTINIAN, BOOK 1, TITLE II (*Concerning Natural Law, the Law of Nations, and the Civil Law*) par. 3, in J. C. SMITH, DAVID N. WEISSTUB, *supra* note 73 at 353, from THE INSTITUTES OF JUSTINIAN 3-5 (J.A.C. Thomas, trans.)(Juta & Co. 1975).

into twenty volumes of the literally thousands of volumes interpreting, codifying and analyzing Roman law since the time of the TWELVE TABLES, quite a millennium before. The third part were the Digests, or Pandects, which were the works Rome's most celebrated jurists. Their work did not represent commentary on the compilation of Justinian, as some of the work of these jurists preceded the Code and the Institutes by hundreds of years. Yet as the work of revered jurists charged in their own time with interpretation of the evolving Roman Law, Justinian identified the Digests as a principal and enduring source to which contemporary jurists and lawyers ought turn in understanding and interpreting the Code of Justinian and the Institutes of Justinian. Together, the Code, the Institutes, and the Digests comprised the great *Corpus Juris* of 529 A.D., the great compilation of Roman Law credited with systematizing classic Roman law. It is in the *Corpus Juris* that scholars now identify that in Roman law "the goal of compensation of damage began to prevail over the goal of punishment and sanction."<sup>164</sup>

For this undertaking Justinian employed the assistance of Tribonian,<sup>165</sup> who thereupon enlisted the help of nine jurists to the task of editing the combined compilations, referenced above, of Gregorian, Hermogenian and Theodosian. This Code of Justinian was presented, as had been its predecessor a millennium before, in 12 books or tables. Then Tribonian and seventeen lawyers set about the task of extracting from, rationalizing and modernizing perhaps 2000 treatises, the work of the finest jurists in Roman law. They reduced this body of jurisprudence to approximately fifty books, that

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<sup>164</sup> Magnus, Ulrich, Compensation for Personal Injuries in a Comparative Perspective, 39 WASHBURN L.J. 348-49, (2000).

<sup>165</sup> For reason of his seemingly unsurpassed mastery of the law, culture and science of this era has been described as the Francis Bacon of his day.

would be called the Digests or *Pandects*. Most conspicuous among the contributions to the Digests were the works of Gaius, Ulpianus, Paulus and Marcianus.

The Institutes and the Digests of the Jurisconsults urged strongly a natural law orientation of Roman Law. “All peoples who are governed by law and customs use law which is in part particular to themselves, in part common to all men; the law which each people has established for itself is particular to that state and is styled civil law as being particularly of that state: by what natural reason has established among all men is observed equally by all nations and is designated *ius gentium* or the law of nations, being that which all nations obey. Hence the Roman people observe partly their own particular law, partly that which is common to all peoples.”<sup>166</sup> Evidencing a similarly full-throated natural law commitment to principles of universal duty applicable to all men, the Third Century jurist Ulpian, quoting Celsus, wrote: “Justice is a fixed and abiding disposition to give every man his rights. The precepts of the law are as follows: to live honorably, to injure no one, to give to every man his own. Jurisprudence is a knowledge of things human and divine, the science of the just and the unjust.”<sup>167</sup>

Committed to the identification of the delineation between “what is “just and what unjust”, The Institutes of Justinian and other sources of Roman law reflect 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.”<sup>168</sup> Violation of a “personal action” not

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<sup>166</sup> THE INSTITUTES OF JUSTINIAN, BOOK I, TITLE II (*Concerning Natural Law, the Law of Nations, and the Civil Law*) par. 1, in J. C. SMITH, DAVID N. WEISSTUB, *supra* note 73 at 352, from THE INSTITUTES OF JUSTINIAN 3-5 (J.A.C. Thomas, trans.)(Juta & Co. 1975)..

<sup>167</sup> ULPIAN, DIGEST I, 1, 10, quoted in GEORGE SABINE, A HISTORY OF POLITICAL THEORY 163-73 (Holt Rinehart & Winston 1937), in SMITH & WEISSTUB, *id.* at 349.

<sup>168</sup> THE INSTITUTES OF JUSTINIAN BOOK I, Preamble; par. 1; par. 3, in SMITH & WEISSTUB, *id.* at 352, from THE INSTITUTES OF JUSTINIAN 84, 85 (J.A.C. Thomas trans., 1975).

sounding in contract is in *delict*.<sup>169</sup> The Institutes include 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. In one notable example, pertaining to what would today be called the law of private nuisance or trespass, a particular 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."<sup>170</sup> 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.<sup>171</sup> To much the same effect, and specifically as to urban estates, is Book III, Title II par. 2 as interpreted by Gaius in his INSTITUTES OF ROMAN LAW,<sup>172</sup> to which Ulpianus, adds a prohibition on the obstruction of a neighbor's view.<sup>173</sup>

Just as today an emotional distress component to an award for personal physical injury may amplify the compensatory award received by the victim, so to in Roman law the transgressor might be liable to the victim for greater damages when the wrong took place in circumstances that would worsen the harm's same or degradation. Thus at the penalty phase, a penalty would be made greater if the *injuria* occurred in a public place.

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<sup>169</sup> GAIUS, THE INSTITUTES OF ROMAN LAW, Fourth Commentary par. 3 in SMITH & WEISSTUB, *id* at 353, from THE INSTITUTES OF ROMAN LAW BY GAIUS 442- 443 (E. Post Trans. 1925).(J.A.C. Thomas trans 1975).

<sup>170</sup> The INSTITUTES OF GAIUS continue: "He can also, by will, charge his heir not to build beyond a given height or not to obstruct the light of the neighbor's premises or to allow the latter to insert a beam into the wall or to accept raindroppings; as also to allow the neighbor a right of passage over his land or to draw water there." THE INSTITUTES OF JUSTINIAN BOOK III par. 4, in SMITH & WEISSTUB, *supra* note 73 at 358, from THE INSTITUTES OF JUSTINIAN 84, 85 (J.A.C. Thomas trans 1975).

<sup>171</sup> *Id.*

<sup>172</sup> Gaius, *On the Provincial Edict, Book VII*, THE DIGEST (or PANDECTS) BOOK VIII TITLE II par. 2., *id.* at 359.

<sup>173</sup> Ulpianus, *on Sabinus, Book XXIX, id.* at Title II par 3, *id.* at 359.

The same aggravation of penalty might accompany a battery in which a man is beaten with sticks, or scourged, or when parents are beaten by their children, or a patron struck by a freedman, or where the injury is to a particularly valuable part of the body, such as the eye.<sup>174</sup>

Slaves *qua* slaves had no redress in *injuria*. Indeed, masters were permitted to flog their own slaves. Conceptually, the slave was not a being in any entire sense, but instead a unit of labor that could lose value if mistreated. However, if another were to injure a master's slaves, the action in *injuria* was deemed to devolve to the master, as an action in insult, irrespective of whether the actor intended any insult. This would be so even when no severe injury was involved. Should the slave's injury be severe, the Praetor could grant to the master an action in *injuria*.<sup>175</sup> The imputation of an injury suffered by a slave to the master has been described as a progenitor to the later law of agency. The reasoning given is that under Roman Law the slave had no legal standing, and in a juridical sense was absorbed into his master's family, and represented before the law by his master. In later eras of freed men or freed servants, it would be a substantial but measured step to visualize the free servant as enjoying a relation to the master (employer) similar to that of the ancient slave to his master. The final step to this analysis is the identification circumstances, be they broad or narrow, in which the actions of the servant are treated in a legal sense as the actions of the master. In Holmes' words: "This is the progress of ideas as shown us by history; and this is what is meant by saying that the characteristic feature which justifies agency as a title of the law is the absorption *pro hac vice* of the agent's legal individuality in that of his principal."

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<sup>174</sup> HUNTER, *supra* note 97 at 140-41.

<sup>175</sup> HUNTER, *id* at 141.

If a wrongful injury was inflicted upon a child (persons under *potestas*), the remedy in *injuria* would lay in the father (*paterfamilias*), who could bring an action both on his behalf and on behalf of his child.<sup>176</sup> From what appears, this approach partakes at least in half measure of that taken for injuries to slaves, with the damage to the father being essentially on in insult and/or lost services.

*Theft* Originally, Roman Law treated theft as delictual, or a civil wrong, with accompanying penalties, as referenced below. Only later would theft be catalogued as criminal. Thus for the purposes of the present description, theft can be compared to the various later common law delicts of conversion, trover *di bonis asportatis*, etc.

*Wrongs to Moveable Property* Roman law regarding injury to property was sufficiently supple to recognize variations of injury. The actor could interfere with property by two means: (1) deprive the owner of possession by (a) stealth (*furtum*), or (b) by violence (*vi bona rapta*). The wrongdoer might also interfere with the occupier's rights without dispossessing him of the property by damaging the property or otherwise impairing its usefulness (*damnum injuria datum*).<sup>177</sup>

A man suspecting that his property had been asported to another's house was permitted to search for it, but only upon seeking entry dressed only in a loincloth (*licium*), and carrying a plate. The origins of the requirement of a loin cloth are thought to predate the separation of the Indo-Germanic, and most probably have a common sense rationale of minimizing the potential that the accuser would contrive to hide goods

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<sup>176</sup> *Id.*

<sup>177</sup> *Id.*

beneath his clothes and later claim that they had been found in the accused's home. No similar explanation of the requirement of the plate is apparent.<sup>178</sup>

Other provisions reflective of the slaveholding era are not of central significance to this treatment but nevertheless worthy of mention as an early example of a commitment that the substance of the law be favored over its formal requisites if such an approach was necessary to the imposition of justice. One delict that occurred with sufficient frequency as to prompt its inclusion in the Institutes was the third-party's seduction of another's slave to steal from its master for the benefit of the third party. In order to catch the perpetrator, the law permitted the master to carry out what would today be termed a "sting" operation, in which the slave would take some goods to the wrongdoer to permit the completion of the wrong. While some jurists were uncertain if the action for theft by stealth (*actio furti*) or action for corruption of a slave (*actio servi corrupti*) could be brought, as the owner had consented to the movement of the goods, and the slave had not in fact succumbed to corruption, Justinian disagreed that "such subtlety" should preclude the bringing of both actions.<sup>179</sup>

## 2. *Personal Actions*

Gaius, in his Fourth Commentary to his INSTITUTES OF ROMAN LAW, differentiated personal actions from real actions. A "personal action" was "an action which seeks to enforce an obligation imposed on the defendant by his contract or delict", with delict, for the purposes of the Commentary confined to contracts, transfers of property, or promises of performance. It is in his description of "real" actions that we

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<sup>178</sup> H. F. JOLOWICZ, HISTORICAL INTRODUCTION TO ROMAN LAW, in THE ROMAN LAW READER, *supra* note 158 at 147.

<sup>179</sup> HUNTER, *supra* note at 142.

find the description of modern delict, with a strong emphasis on the torts that today fall into the categories of nuisance and trespass. A “real” action was “an action by which one claims as one’s own in the *intentio* some corporeal thing or some particular right in the thing, as a right of use or usufruct of a thing belonging to a neighbor, or the right of a horse way, of carriageway through his land, of raising one’s house above a certain height, or having the prospect of one’s windows unobstructed; or, when the opposite party (that is the owner) brings the negative action, asserting that there is no such right in the thing.”<sup>180</sup>

## 2. *Defense of Person and Property*

A man was not free to defend his property with the same freedom as obtained in defending his person. An occupant of property could resist a burglar with non-lethal force. However, in what seems to be an equivalent of a modern (if not universal) rule, one discovering a burglar could not kill him unless he was unable to escape from peril without endangering himself.<sup>181</sup>

## IV Conclusion

As is true of tort law today is equivalently true of Graeco-Roman law of delict, tort law has always represented a society’s revealed truth as to its better self, and further to so doing, has identified the behaviors it wishes to encourage and the behaviors it

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<sup>180</sup> GAIUS, THE INSTITUTES OF ROMAN LAW, Fourth Commentary par. 3 in SMITH & WEISSTUB, *supra* note at 353, from THE INSTITUTES OF ROMAN LAW BY GAIUS 442- 443 (E. Post Transl. 1925)(J.A.C. Thomas transl. 1975).

<sup>181</sup> HUNTER, *supra* note at 140.

wishes to discourage. the conclusion is inescapable that no organizing principle will be adequate to explain the entirety of the law of delict, and this is true of tort law today as it is of Graeco-Roman Law. As expressed by Gerald W. Postema, “[T]ort practice appears to be too heterogenous to submit easily to the strictures of any single valued explanatory theory. Some part of the tort balloon seems to pop out, regardless of the shape of the explanatory box we construct.”<sup>182</sup>

This article has focused upon Western law, and more specifically upon the markers, some clear and some vague, within the experience of the ancient Greeks and the ancient Romans that informed our modern law of civil remedies for harm. More so with the Greek experience than with the Roman, the progress has not been invariably smooth. But in a Hegelian sense, progress it has nonetheless been. From the practices countenanced by the ancients, which focused upon kinship rights, retribution and vengeance, and which countenanced self help as the primary remedy for wrongs, by the time of the *Corpus Juris Civilis* Western law had made a permanent commitment to peaceable resolution of disputes, often before juries, and the adoption of rectificatory justice in place of criminal or quasi-criminal proceedings for all but the most aggravated offenses.

In terms of civil justice generally, the Greeks and the Romans identified effectuated protections in a sprawling array of delicts that would inform all of later Western law. For personal physical injury, a nonexclusive recitation would include intentional and unintentional battery, maiming, wrongful death, and defenses, if limited, therefore: accident and mistake among them. For damage to personal property, causes of action were permitted for harms ranging from the killing or injury of animals to the

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<sup>182</sup> *Introduction, PHILOSOPHY AND THE LAW OF TORTS 15* (Gerald W. Postema, ed.)(Cambridge, 2001).

conversion of personal items. Fraud or deceit were penalized to the extent that such actions might induce an unfair sale of property or an unjust legal defense, among other potential distortions of justice. Personal dignitary wrongs from defamation to turning a citizen away from a public bath were prohibited, while there existed seemingly no cultural expectation that a “love balm” cause of action would be recognized. Limited powers of equity permitted the Praetor, even if by obvious contrivance, avoid imposition or denial of legal remedies that offended the community sense of fairness. And the entirety of ancient Greek and ancient Roman law moved definably towards the remedies of compensatory justice over violent retribution.

Contemplating the respective contributions to modern Western law of the Greeks and the Romans of the eras under discussion, some have suggested that elegance and erudition of the Greeks represent juridical contributions that surpass those of the Romans. Those so proposing point to the lasting philosophical contributions of the Hellenist period, the philosophers’ employment of dialectical and negative pregnant reasoning, and their appreciation that ethics should stand on an equivalence with law. The Greeks developed and conveyed ethics, the norms that might or might not eventually find their way into law, but which even if remaining simple ethics, obligated the adherent to examine individual questions of conscience and morality. Their great thinkers advanced philosophy and the engines of dialectical reasoning that power it. It would be Grecian ethics, philosophy and reasoning together that permitted the receptivity to re-analysis and to ongoing change that has preserved the intellectual importance of the ancient Hellenist period. What did the Romans bring to the table, the *quare* concludes, other than organization and systematization?

For the Greeks, at least from a philosophical and not necessarily a statutory perspective, the objective of the law giver was to give direction to people, which is to say, to identify the “right” objectives of desire and the most worthy objectives of man and society. In contrast, for the Romans, from the time of the TWELVE TABLES through and including that of Justinian, and even at the intellectual level of their *Jurisconsuls*, the premium was placed not upon theistic canon, the science of law, or intellectual education, but rather upon the written recitation of and organized body of law, suitable to its time.

By the close of the reign of Justinian I these advancements, among others, could be counted: (1) the adoption of money damages as the dominant remedy in resolving civil disputes; (2) the identification of instance in which strict liability for the consequences of one’s actions might not apply, such as in the instance of action not voluntarily taken or taken without *culpa*; (3) the codification of numerous beneficial interests in land or its enjoyment, and the normalization of means for protecting them, including introduction of the preference for *ex anteresolution* of prospective disputes between neighboring landowners; (4) transparency in decision making, by dint of requiring successive praetors to pronounce the law they would apply and to forgo application of any other; and (5), notwithstanding the noted limitation on the power of the praetor, recognition that in instances where the application of a legal remedy, or the absence of one, would work a manifest unfairness, the implicit vesting in the praetor not to defy the law but rather to find a means why the law should be inapplicable.<sup>183</sup>

Particularly taking into account their tradition-bound endeavors at codification, and that most of their leading philosopher’s plied their ideas beyond the centers of

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<sup>183</sup> WILLIAM A. HUNTER, *supra* note 97 at 6, 7.

political or judicial power, the Greek legal legacy was not so visionary as some might suppose, or at least have hoped. Nor for that matter were the Roman contributions so symbolic of stasis as some have claimed. Neither the Grecian nor the Roman contributions would, standing alone, provide the foundational support for later Western law that together they represent, and comparing the Greek contribution with that of the Roman is really nothing more than an intellectual diversion. In truth the two civilizations, and their respective comparisons, are *sui generis*, and no more suited to comparison than apples and oranges. It is unquestionably true that the ancient Romans never elevated issues of ethic, philosophy or self-challenging jurisprudence that might have been hoped for in the one thousand years between the TWELVE TABLES and the publication of the *Corpus Juris Civilis*. The Romans did produce, however, what the Greeks could never have, and it was this: A one thousand-year written, closely examined and regularly revisited experiment in a rule of law by civil and criminal code. In many ways picking up where the custom-bound endeavors of Greece's Draco and Solon left off, the Romans solidified the *terra firma* of Western law.