



Raymond Westbrook

Ex Oriente Lex

*Near Eastern Influences on
Ancient Greek and Roman Law*

RAYMOND WESTBROOK

Edited by
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CONTENT!

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Codification and Canonization

31. The concept of half the true value (by *aestimatio*) is found in classical sources, but in an entirely different context, where it makes sense: where a house sold has unbeknownst to the parties been partially destroyed by fire (*D.* 18.1.57 pr.).

32. As did Rabbinic law, which (notwithstanding the doctrines discussed here) effectively jettisoned all the debt-relief measures of biblical law. Thus Hillel (first century B.C.E.) invented a device called the *prosbol* to enable creditors to circumvent the seventh-year cancellation of debts mandated by Deut. 15:1–11 (*Sheb.* 10.2).

33. Note the play between the full price meaning full value and meaning the whole of the agreed price—the same ambiguity that informs the Near Eastern terminology.

Abstract

First millennium codes from the Mediterranean basin, such as the Twelve Tables and the Pentateuchal codes, were the product of an ancient proto-scientific tradition from Mesopotamia that produced treatises on the law in the form of lists of casuistic examples. Like their cuneiform forerunners, they were originally read as descriptive and not prescriptive sources of law, because the concept of the legislative text as an autonomous source of law had not yet been developed. However, the intellectual revolution that produced analytical jurisprudence and jurists also led to a change in their character. They were “canonized” by having attributed to them the status of legislation and of autonomy. They could thus be read as if they were a comprehensive and prescriptive body of rules.

Introduction

A law code has two requisites: firstly that it be a law and secondly that it be a code. The first means that the text must be a normative source of law which a court is bound to obey, not merely a source of information about the law, however much respect the court may have for its sagacity. The second requirement means that it must be an exclusive source of the law, at least in the area which it purports to regulate (e.g. civil code, criminal code). Even if some exception is made in practice, the theoretical concept remains necessary to interpretation of the code. Its text is deemed to be a comprehensive statement of the relevant law, so that anything omitted from the text is omitted from the law—a sort of legal *horror vacui*.

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Early "Law Codes"

The earliest known legal systems are those of the ancient Near East, the documentary record of which stretches from the thirty-first to the third century B.C.E. Scattered through this record, and indeed extending beyond it, is a distinctive genre of texts known to modern scholars as law codes. There are seven extant examples in cuneiform script, and several more from the periphery of cuneiform culture, such as the biblical codes, the Laws of Gortyn, the Laws of Drakon, and the Twelve Tables.¹ Did these documents meet the above criteria? Let us begin with the best-known example, Codex Hammurabi.

In the epilogue to his code, king Hammurabi appears to claim both the properties of law and code for its provisions. He states:

Any man wronged who has a case, may he . . . have read to him the inscription of my stele, may he hear my words sublime and may my stele reveal the case to him. May he see his judgment and his mind be eased. . . . (xlvi 3-19)

And a little further on:

In the future, may any king who arises in the land keep the just words that I have written on my stele. May he not change the judgments of the land that I judged, the decisions of the land that I decided. . . . (59-72)

We should be careful, however, not to import our own cultural and juridical conceptions into the text. Let us begin with the idea of exhaustiveness that the first of the above passages appears to claim.

Exhaustive Codes?

The provisions of Codex Hammurabi are formulated as a series of casuistic sentences. This form, characteristic of all the law codes, marks it as belonging to a wider literary genre, namely, that of Mesopotamian "science." By the third millennium B.C.E., the Mesopotamians had developed a technique for organizing knowledge by compiling lists of like examples: of flora, fauna, professions, grammatical forms, etc. A more sophisticated type of list consisted of cases: medical symptoms and their diagnosis, omens and their significance, legal problems and their solution.² They were expressed in a hypothetical form that for the Mesopotamians was the hallmark of their scientific method: for example, "if X does Y, his punishment shall be Z."

Mesopotamian science must have been a considerable improvement on whatever system of thought had preceded it, for it came to dominate, along with other aspects of Mesopotamian civilization, the whole of the ancient Near East (with the partial exception of Egypt). The genre of casuistic law codes was one aspect of this domination, and one in which it spread even further, into the Mediterranean basin. A brief examination of the contents of the Mediterranean law codes, as opposed to native accounts of their origins, immediately reveals their dependence in form and content on jurisprudential traditions that can be traced back to Sumer of the third millennium B.C.E.³

Compared with classical or modern methods of organizing knowledge, however, the Mesopotamian approach was primitive, a proto-science. In particular, it lacked the ability to formulate general principles or abstract categories. Hence it was unable to reason vertically; it could only proceed horizontally by cumulating examples. Accordingly, neither Codex Hammurabi nor its fellow codes could ever amount to a comprehensive statement of the law; their lists of casuistic examples could not hope to be exhaustive, except at the point of infinity.

How then, could Hammurabi purport to provide every possible answer to the perplexed litigant? He felt perfectly justified in his claim, because his scientific standards were very different from our own. Certain methods were employed by Mesopotamian science to compensate for its own limitations, so that, in native eyes at least, its lists met the requirements of comprehensiveness. The examples were consciously grouped by topic, as we know from a native edition of Codex Hammurabi, which gives sub-headings to groups of paragraphs, such as "Rules of House, Field, and Orchard," "Rules of Soldier and Fisherman" (types of feudal tenant).⁴ Note that the headings themselves are not strictly analytical, but list examples. Within topics, the choice and arrangement of examples was designed to place markers at suggestive points—sometimes at the very center of the topic but most often at its periphery—so as to indicate (if not to delineate) its boundaries.⁵

A good example of this technique is to be found in the opening paragraphs of Codex Hammurabi itself:

If a man accuses a man of murder and does not prove it, his accuser shall be killed.

If a man accuses a man of witchcraft and does not prove it, the one accused of witchcraft shall go to the river and leap the river. If the river overcomes him, his accuser shall take his house; if the river purifies that man

and he is saved, the one who accused him of witchcraft shall be killed and the one who leapt the river shall take the house of his accuser.

If a man in a lawsuit proffered false testimony and did not prove what he said, if that case is a capital case, that man shall be killed.

If he proffered testimony on grain or silver, he shall bear the penalty of that case.

If a judge judges a case, renders a verdict, and has a sealed document drafted, and subsequently changes his verdict, they shall prove that judge to have changed his verdict and he shall pay 12-fold the claim in that case. . . .

The topic is clearly procedure in litigation. The five paragraphs cover the topic by the simple technique of chronological sequence: initial claim, trial, judgment. At each stage examples are given which illustrate misconduct, some common, others not so. Although only a small sample of possible wrongdoing and of types of claim is given, the parameters of the topic are set and the principles by which other cases within its ambit will be decided are at least adumbrated, if not expressed.

There is thus a considerable gap between the subjective perceptions of the ancient authors as to the exhaustive nature of their work and our evaluation according to modern criteria. It is in the light of this gap that the second passage from Hammurabi's epilogue, referring to his code as a text to be obeyed by future kings, should be considered.

Normative Legislation

There has been much debate as to whether the ancient Near Eastern law codes were normative legislation at all.⁶ It has been noted that they are never cited in the manner of modern laws, but that argument has been dismissed as an argument from silence.⁷ A second argument arises from the "scientific" character of the texts. A scientific work is a work of reference: it may be consulted, but it does not stipulate, as does a law. Again, it may be countered that although the ancient law codes were the product of science, they became legislation by virtue of their publication by a king. I wish to raise a third, more radical, argument against the legislative character of the ancient codes. It relates not to the way they were *written* but to the way that they, and all other legal documents, were *read*. In my view, Mesopotamian jurisprudence did not read legal texts in the same way as we do. They did not treat them as autonomous sources.

Legal Interpretation and Textual Autonomy

A vital element in the status of modern legislation is that the words of the text are the ultimate point of reference for its meaning. They can be elucidated with the assistance of *travaux préparatoires* or other evidence of the will of the lawgiver, but the lawgiver could never simply declare, for example, that the text did not properly reproduce his intention and should be disregarded. The reason is that the text is not mere evidence of the order of the lawgiver; once promulgated, it becomes the lawgiver itself, the messenger as well as the message. Consequently, specially trained experts are needed to "read" its provisions correctly and understand its words, to introduce that much-maligned practice of *legalistic* interpretation.

In the ancient Near East, lawyers did not yet exist as a learned profession.⁸ This curious absence may be explained in part by the fact that the conceptual basis for their discipline was still lacking. Those same inadequacies of Mesopotamian science that shaped the composition of their law codes also circumscribed their reading of legal texts. In particular, one inadequacy not yet mentioned, namely, the inability to *define* concepts, was of vital significance. One of the key instruments of *legal* interpretation of texts—definition—was not available to them. More significant, however, was the status of legal texts themselves within the constitutional structure of ancient states: they had not yet attained sufficient autonomy to require a special discipline for their interpretation.

Let us begin with those documents about the status of which we can be relatively certain. It is well established that private legal documents such as contracts and testaments were of evidentiary value only: they were the protocol of an oral transaction.⁹ Even the most sophisticated of contractual documents, international treaties, were no more than records of an oral oath ceremony, and their drafting was a triumph of the scribe's, not the lawyer's, art.

The same may even have been true of records of unquestionably legislative acts. There is plenty of evidence in letters and contracts of rulers making orders and of courts obeying them. But those orders, even when committed to writing, did not stray far from their author, either in scope or duration. Decrees of kings did not set up general rules of permanent validity affecting the general population, that is, rules of the type found in the law codes. The reason for this is that they could not establish for themselves an existence that would outlive the king's own will. Ultimately, cases would be referred back to the king, not to the decree. Thus the most sophisticated

example of ancient Near Eastern legislation, the royal debt-release decree, which was solemnly proclaimed, affected the whole population, and was recorded in a lengthy text, was retrospective. It demonstrated the king's ability to impose his will on past acts. Subject to the restraints of justice, there was no guarantee that an order of the king relating to the future would not be replaced by a contrary order relating to the past, so undoing all that had been done by the first. In these circumstances, the written text could not be more than evidence of the king's order; it never became independent of that order.

Between these two types of legal source lie the "law codes." Their structure made no pretense of being anything but an academic treatise, the context of their publication, in those texts that provide one, was an *apologia*, and nothing in letters or contracts refers to their being obeyed.¹⁰ It is unlikely, therefore, that their text would have had an independent status.

As was the case with comprehensiveness, the limits of Mesopotamian conceptualization provide the cultural context for understanding Hammurabi's claims. Hammurabi expected future kings to follow the words on his stele because they were evidence of his wise judgments, which resolved every case that could possibly exist, not because the stele was law independent of Hammurabi. On the contrary, the same curses that were heaped upon wicked future kings for erasing the words of the stele applied to a king who merely erased the *name* of Hammurabi and substituted his own.¹¹

If this understanding is correct, the reason for the striking absence of all reference in the ancient Near Eastern sources to citation of the law codes in law courts is not the existence of some oral practice which has not happened to surface in the extant written sources (a perfectly feasible possibility), but a fundamental lack of the necessary conceptual basis: legalism.

The total absence of legalism, being a negative proposition, is impossible to prove and, whatever its heuristic value, may be too extreme. It is possible that, as with other areas of theoretical reasoning, the Mesopotamians had some inkling of a text's potential for semantic manipulation, but failed to develop it.¹² A search of the cuneiform sources—not merely the legal ones—for evidence of legalistic reasoning brings to light some straws in the wind. From the early second millennium B.C.E., there are a few references in Babylonian contracts and in Assyrian letters and court verdicts to actions to be taken "in accordance with the words of the stele." The city council of Assur in particular uses this formula to refer to what appear to be orders previously made by it.¹³ Nonetheless, the words themselves are never given, and are never the subject of dispute. It is impossible to determine from the bare formula whether the written text was anything more than a means of disseminating information.

The copious literature relating to omens might be expected to have provided a focus for legalistic reasoning. The omen lists bear a close formal resemblance to the law codes, they apply the same scientific method, and they are analogous to judgments in the sense that they are predictions by divine rulers as to future events within their control. Furthermore, since gods are eternal, an omen will remain valid forever, that is, the same ominous sign will always have the same significance. Thus it has the potential for becoming independent of the god whose will it represents. In the seventh century, Assyrian kings consulted experts who in turn consulted canonical lists in order to establish the ominous significance of astronomical or other phenomena. Nonetheless, the closest that the experts came to interpreting the lists as independent sources was to suggest that omens predicting defeat in battle applied to an enemy land rather than the Assyrian king. Even here they showed a lack of confidence, advising the king to take apotropaic measures, as if the god could not be relied upon to follow the diviner's interpretation.¹⁴

There is, however, one definite reference to the power of the written word. King Esarhaddon wished to rebuild Babylon, destroyed by his father, Sennacherib. He tells us: "He (the god Marduk) wrote the time of its lying waste as 70 years, but quickly merciful Marduk's heart calmed down and he turned it upside down and ordered its rebuilding within 11 years."¹⁵ Although represented as the god changing his mind, it appears to be an allusion to the Assyrian king turning the tablet round so that the same signs read 10+1 instead of 60+10. If so, the text was regarded as an immutable expression of the god's order, and could therefore be reinterpreted, albeit in a crude and mechanical fashion.

New Developments

The Assyrian system of the seventh century B.C.E. represents the ultimate refinement of Mesopotamian science. Although in its final stages it drew close to the creation of analytical categories, it failed to attain them, and thus failed to provide the basis for analytical jurisprudence.¹⁶ From the Mediterranean littoral, on the other hand, new ideas were emerging that gave exciting possibilities for the development of law.

Firstly, legislation became detached from the legislator. In the book of Deuteronomy (generally dated to the seventh century), the ultimate prerogative of the king, to decree a cancellation of debts, is made automatic and cyclical (15:1–11). The tradition that Solon, after proclaiming such a decree, precluded himself from doing so again by abolishing debt-slavery, belongs

to the same trend.¹⁷ The process of detachment was perfected in the Greek cities, where it went hand in hand with the development of new forms of government. It has been argued that the change in terminology from *thesmos* (the decree of an individual ruler) to *nomos*, which by the fourth century meant written statute, marks the change to a democratic attitude.¹⁸ By then it had become standard practice in Athenian courts for judges and juries to swear an oath to decide according to the *nomoi*, referring to the written texts invoked before them by forensic orators (Demosthenes, *Against Timocrates* 149–151). What gave the *nomoi* their status was not their publication by or association with a ruler, but their validation by passage through a legitimate political process.

In this way, the text of legislation came to be regarded as having a life of its own, independent of the human agent who had produced it. Accordingly, Socrates could imagine the personified laws (*nomoi*) asking him, “Are you not intending by what you are trying to do (that is, escape from custody) to destroy us, the laws . . . ?” (*Crito* 50a–b). The book of Daniel (written in the second century B.C.E.) dramatically projects this new attitude back into the Near East with its description of king Darius’ decree, which, “according to the law of the Medes and Persians,” once written down might not be changed, even by the king himself (*Dan.* 6:9).

The second, interrelated, development was that Greek philosophy provided the means whereby truly comprehensive laws might be formulated. New methods of analytical reasoning such as division into categories (*diairesis* and *merismos*) and definition (*logos tēs ousias*) enabled laws to be formulated in a vertical manner, with subsidiary rules being derived from general principles, and categorization ensuring that those principles covered the whole of a given field of law.

Canonization

If the promise of such new methods was not immediately fulfilled, it was because they did not fall upon a vacuum. The societies of the Mediterranean basin not only had a long and settled tradition as regards their substantive law, they also had an equally venerable tradition as regards its theoretical formulation. It looked to a fund of casuistic wisdom, compiled by the methods of Mesopotamian science. Local versions drew in varying measure upon a repertoire of traditional legal problems developed originally by Mesopotamian jurisprudence, for instance the goring ox, the adulteress caught *in flagranti*, the thief breaking in by night, the talionic response to physical injuries.¹⁹ In some cases parts of this casuistic fund of traditional

wisdom existed in written form. The latter, none other than the ancient law “codes,” enjoyed great prestige and in some instances may have been regarded as comprehensive, by the less exacting standards of Mesopotamian science. Traditional law, especially if concretized in a law code, could not be swept aside; it could only be reformed and reformulated piecemeal.

The task fell not to philosophers, but to an entirely new learned profession—the jurists. By applying the methods of Greek philosophy, they were able to read old sources “legalistically” and thus turn them into comprehensive legislation. Their approach was therefore to “canonize” existing texts, that is, to read them as if they were law codes created on the basis of the new legal science. For this purpose, the old code would be given the status of *normative legislation* and a suitable historical pedigree, namely, promulgation at a critical juncture in the early history of the nation (not at the very beginning, but at the politically appropriate beginning).

Two parallel examples are the Pentateuch and the Twelve Tables. In the first case, several codes, or more probably fragments of codes or of an oral canon, were inserted into an historical narrative which located its promulgation at a convocation in the desert prior to Israel’s occupation of the promised land, by no less than God himself.²⁰ Rabbinic jurists went further by deeming it the basis of all Jewish law (while admitting the existence of an oral code alongside it). In the second case, the Twelve Tables were referred to by classical jurists simply as *lex*, “the statute,” and (while admitting the existence of an oral tradition) were regarded as the “*fons omnis publici privatique iuris*” (“the origin of all public and private law,” Livy 3.34). The code was said to have been promulgated at a suitably critical moment in the early Republic (not during the monarchy, of course) for a suitably worthy social cause. Its form and content, it is to be noted, give no hint of any of this; they mark the code as a typical product of Mesopotamian science, in the same peripheral tradition as the biblical codes and Codex Eshnunna.

Being regarded as comprehensive legislation, the casuistic paragraphs of the old codes were interpreted as if they had been drafted by a philosopher. Cicero, who spans the two worlds of philosopher and jurist, unwittingly provides us with an insight into the jurists’ attitude when he tries to explain how Greek philosophical discourse may be used for legal argumentation. The examples that he adduces to illustrate *genus* and *forma* (=species), *divisio* (= *diairesis*), *partitio* (= *merismos*), and *definitio* are not from some current juristic treatise or recent legislation, where their influence might be expected to be at its most compelling, but from that (already in Cicero’s day) venerable antiquity, the Twelve Tables.²¹

Too little has been preserved of the text of the Twelve Tables for it to furnish a reliable control of the reverse process, namely, extrapolation from casuistic examples to general categories. The parallel Jewish sources, on the other hand, preserve the full text of both the original "code" and its reinterpretation at the hands of the jurists. For example, the so-called "Covenant Code" in Exod. 21–22 contains four different cases of wrongful damage scattered through its provisions: a goring ox, an ox or ass that falls into a pit, cattle that trespass on a neighbor's field, and a fire that spreads to a neighbor's field. In the hands of the Rabbinic jurists these were transformed into a code of the law of wrongful damage:

The four heads of damage are: the ox and the pit and the devourer and the fire. *The* ox is not like the devourer, and the devourer is not like the ox, nor are both these, which are living, like the fire, which is not living. Nor are all these, whose nature is to go forth and cause damage, like the pit, whose nature is not to go forth and cause damage. What is the same in them is that their nature is to cause damage and that you are responsible for guarding them, and when they cause damage, the one who caused it is liable to pay compensation with the best of his land. (*Mishna, Baba Kamma* 1,1)

Individual cases thus became *genera*, under which other traditional cases could be classified as if they were subsidiary rules. In the light of this example, one should perhaps be cautious in assuming that rigid bi-polar distinctions of classical Roman law, such as that between *furtum manifestum* and *furtum nec manifestum*, existed in the same form in the Twelve Tables, and thus be wary of reconstructions based on that assumption.²² If the fragmentary reference in the Twelve Tables to theft *quod nec manifestum erit*²³ was no more than an isolated allusion to a special set of circumstances, then the classical assumption that it was already then an exclusive category to which two-fold damages always applied might also be questionable.²⁴

Once a casuistic rule is regarded as theoretically comprehensive, so that what is omitted is deemed to be excluded, the door is opened to extremely creative readings of the text, which were, indeed, an inevitable consequence of canonization. For the orgy of legalism that characterizes the writings of both the Rabbinical and Roman jurists may be traced to a method that on the one hand reveres the text as the most just lawgiver of all, and on the other strives to make an inadequate text cover (in theory) every possible contingency. Thus, for example, the casuistic rule in the Twelve Tables: "If a father sells a son three times, the son is free of the father" was interpreted by the classical jurists as follows:

Now a son passes out of parental authority by three mancipation, but all other children, male or female, leave it by a single mancipation. For the law of the Twelve Tables speaks of three mancipation only in the case of a son. . . . (Gaius *Inst.* I. 132)

The jurists, faced with the practical problems of their own day, adopted a teleological rather than an historical interpretation of the canonized text. The alternative—to rewrite the text itself on the basis of the same principles that were applied to its interpretation—was not attempted. Nonetheless, the intellectual investment arising from canonization may be regarded as an important stepping-stone toward Justinian's *Digest* and subsequent codifications. It allowed the early jurists an opportunity to control the practical consequences of adopting general principles, by confining them within a framework of pragmatically tested casuistic rules.

Conclusions

We have attempted to trace the history of a legal tradition from Mesopotamia of the third millennium to the Roman Empire of the early centuries of the common era. It is a tale of both continuity and caesura. In the course of the odyssey, awareness of the system of thought with which the tradition originated—Mesopotamian legal science—was lost, as indeed was the whole civilization, lying forgotten for nearly two thousand years.

The process of canonization enabled a few products of that system of thought to survive, from societies on the periphery of its sphere of influence. While canonization served working legal systems well, at the same time it threw a veil over the original meaning of the texts, which were henceforth seen exclusively through the perspective of a radically different conceptual structure. The very success of canonization in this regard demonstrates that codification may be as much a function of reading texts as of their composition.

Notes

1. The cuneiform codes were: Codex Ur-Namma (Sumerian, c. 2100 B.C.E.); Codex Lipit-Ishtar (Sumerian, c. 1930); Codex Eshnunna (Akkadian, c. 1770); Codex Hammurabi (Akkadian, c. 1750); Middle Assyrian Laws (Akkadian, fourteenth century); Hittite Laws (Hittite, various copies from seventeenth to twelfth century); Neo-Babylonian Laws (Akkadian, seventh century). The Pentateuch was regarded by Rabbinical tradition as containing 613 laws, comprising both religious prescriptions and temporal rules. Modern scholars refer to the two main clusters of rules in the narrative as the Covenant Code (Exod. 21.22–23.33,

esp. chapters 21–22, where laws on temporal matters are concentrated) and the Deuteronomic Code (temporal laws concentrated mostly in chapter 15 and chapters 21–25). The Deuteronomic Code is generally dated to the seventh century B.C.E. and the Covenant Code two or three centuries earlier.

2. See Bottéro 1982.
3. See, e.g., Westbrook 1988a.
4. Ed. Finkelstein 1967.
5. Cf. Eichler 1987.
6. For a recent summary of the arguments, see Renger 1994.
7. Renger 1994: 35.
8. The correspondence of scholars with Assyrian kings of the seventh century B.C.E. names five scholarly disciplines: *fupsarru* “astrologer/scribe,” *baru* “haruspex/diviner,” *BSipu* “exorcist/magician,” *asti* “physician,” and *kalu* “lamentation chanter” (Parpola 1993: xiii–xiv).
9. Already pointed out by San Nicolò 1931: 162–163.
10. On the law codes as royal apologia, see Finkelstein 1961: 103–104.
11. “If that man pays no heed to my words which I wrote on my stele, disregards my curses, does not fear the curses of the gods, and annuls the judgments that I judged, replaces my words, removes my engraved image, erases my inscribed name and writes in his name . . .” (col. xlix 18–35).
12. See Neugebauer 1969: 29–52.
13. For references, see Veenhof 1995.
14. E.g., Parpola 1983: 14–18: “If Jupiter becomes visible in the path of the Anu stars: the crown prince will rebel against his father and seize the throne. The path of the Anu stars (means) Elam; it pertains to Elam. Nevertheless, they should (strengthen) the guard and perform the relevant apotropaic ritual.” Some hint of legalistic interpretation might also lie in the question and answer concerning another omen: “Does (the omen) ‘(If something) passes between the legs of a man’ apply to something that came out from underneath a chariot? It does apply.”
15. Borger 1956: 15 no. 10.
16. A Neo-Assyrian learned commentary on extispicy, *Multabiltu*, finally expresses the rules of association between physical conditions of the entrails and their application to human life. It consists of three columns which read: “If length/fulfillment/(casuistic example); If protrusion/fame/(example); If thickness/strength/(example) . . .” See Jeyes 1980: 23–24.
17. Plutarch, *Solon* 15.3.
18. Ostwald 1969: 158–160; MacDowell 1978: 44.
19. See Westbrook 1988a: 91–118.
20. Cf. the legend reported by Aristotle that Locrian law was first codified by Zaleucus, who received the laws from Athena (Frag. 548 Rose).
21. *Topica*, esp. 2,9–10; 3,13–14; 4,26–28. The formal application of the Greek classifications by Roman jurists has been studied by Nörr 1972: 1–25. Cf. Méléze-Modrzejewski 1993.

22. E.g., the putative law “*si furtum manifestum est, ni pacit, verberato tran-sque dato . . .*” based on no reported source and offered with all due reserve by the editors in *Roman Statutes* (Crawford 1996: 578, I, 19).

23. VIII 16 (FIRA)=I, 21 in *Roman Statutes*.

24. The danger of anachronism applies *a fortiori* to reconstructions of broad statements of principle, such as that proposed by Watson for this fragment (1991: 309–312).

The Early History of Law

A Theoretical Essay

Abstract

This article surveys early modern histories of the development of law to show that these accounts were at first shaped by teleology and later by evolutionary theory. The late-nineteenth-century discovery of the cuneiform documents of the ancient Near East did not immediately challenge the evolutionary approach, but over time it became clear that these documents, rather than representing a primitive form of law, were the results of a developed system that was widely diffused throughout the Mediterranean basin. This system was characterized by the absence of definition, citation of authority, and jurists. It persisted until the seventh century B.C.E., when early forms of Greek philosophical thought began to have an impact. This new thinking gradually transformed concepts and applications of law until by the fourth century B.C.E. a clearly new form of law emerged that displayed all the features of a modern legal system.

I

The question of how law began first received serious consideration not from historians but from philosophers of the European Enlightenment in the seventeenth and eighteenth centuries. It formed an important part of their inquiry into the original state of nature and how it developed into civil society. As might be expected, their arguments are elegant and persuasive, but from a modern perspective they are problematic, for two reasons.

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First, their reasoning is not historical but teleological. The real purpose of their supposedly historical inquiries was to reform modern society, not to make an objective scientific study for its own sake. Thus for Rousseau the original state of nature was peaceful, with individuals living in harmony and having no need for law. It was the imposition of government that led to violence and tyranny. Rousseau's "historical" perspective was in fact an argument for the need for a social contract as the basis of government, in order to return to the pristine harmony of early society.

By contrast, Hobbes had earlier reconstructed the life of early man as "solitary, poor, nasty, brutish and short." Matters only improved with the imposition of law. This Hobbesian history was in essence a plea for the absolute power of the sovereign, which alone offered security from the violence that existed in a state of nature.

The second problem with the philosophers' reconstruction was their evidence.

They relied on what was available at the time, which was of two types. The first was gleanings from classical literature, namely, the accounts of the patriarchs in the book of Genesis, certain notices in Homer on primitive peoples, such as the Cyclopes, and occasional speculations to be found in the work of Greek and Roman philosophers and historiographers.

Furthermore, the chronology that they applied to these ancient sources was biblical. Accordingly, Genesis and Homer represented the earliest history of society. Giambattista Vico in his "New Science" of 1744 set out a chronological table that reckoned the age of the world at the Flood at 1656 years and at the time of Abraham at around 2000 years.

The second type of evidence that the philosophers applied came from published observations on contemporary savages in newly discovered territories (the Americas, Australia, and Africa). The connection between the two types of evidence was based on a historical determinism derived from the new discipline of ethnography. Under this doctrine, all societies began with unrelated individuals or families (e.g., Cyclopes) and had to pass through three or four stages of development: e.g., hunting, pastoralism, agriculture, and commerce, according to the Scottish jurist Lord Kames. Savages fitted into stage 1 (hunting) and Abraham into stage 2 (pastoralism).

II

In the nineteenth century, philosophy gave way to a new focus of intellectual endeavor: the scientific investigation of origins, as exemplified by Darwin's *Origin of Species* (1859). This new interest in origins spread to the origins of

law. Three landmark works appeared at roughly the same time in mid-century: Sir Henry Maine's *Ancient Law* (1861), Johann Jakob Bachofen's *Das Mutterrecht* (1861), and Numa Denis Fustel de Coulanges' *La cité antique* (1864). The most prominent of these three scholars was Maine, whose work was tremendously influential, being cited even by Marx and Engels (albeit not always positively). It remains a classic of legal history until today.

Maine's thesis was that the original unit of society was the patriarchal family (not the individual) and that as families coalesced into larger units (villages or clans) following a deterministic ethnography, the law also developed in a series of stages. The first three stages were:

1. arbitrary decisions of the patriarch or the king, who was a patriarch writ large;
2. customary law guarded by aristocracies, who inevitably abused their monopoly of knowledge;
3. law codes, resulting from popular agitation and the invention of writing.

In these early stages, the law had certain standard characteristics, in particular, formalism; the priority of procedure over substance and of status over contract, communal property, and private revenge (as opposed to criminal law). "Progressive" societies overcame these limitations by legal tools such as legal fictions, equity, and, ultimately, legislation.

Maine's theory was evolutionary, that is, it saw the law as developing slowly and organically along a well-defined path, pre-determined by the social and economic development of society, analogous to the Darwinian view of the ascent of man. The same is true of his contemporaries. They argued over details, for instance whether patriarchy or matriarchy came first, but they all used the same approach. It was an approach that suffered from two limitations:

1. These nineteenth-century historians had essentially the same evidence on early law available to them as did the philosophers of the previous century, except perhaps for more ethnographic reports. In Maine's case, it was even narrower. He purported to write a history of Indo-European law and therefore ignored the evidence of the Bible, although in practice he drew wider conclusions and his work has always been taken to have universal validity. Maine basically elevated certain incidents related in Livy's *Early History of Rome* to universal principles of legal history.
2. Although no longer teleological, the historians' approach failed to break out of the paradigm that had been created by the philoso-

phers. On the contrary, they took the eighteenth-century model and applied it, reinforcing it with new sciences, such as geology and anthropology. They continued and developed what was effectively an evolutionary determinism. For example, a popular concept was that of "fossils": early written evidence and contemporary primitive rituals that contain relics of earlier practice.

By the 1890s there was broad agreement on certain features of legal evolution, which became conventional wisdom, including, for example:

1. Society evolved from family to clan to kingdom.
2. Property evolved from communal ownership to private ownership.
3. Injury and death were dealt with initially by revenge, which was then replaced by payment and finally by punishment.
4. Liability was strict (*Erfolgshaftung*), with the mental element only gradually being introduced.
5. Early law was suffused with religion and gradually became secularized.

III

By the late nineteenth century, decipherment of hieroglyphics and of cuneiform script had recovered the lost civilizations of the ancient Near East, until then only known through garbled fragments of information in Hebrew and Greek sources. At the same time, advances in science had expanded the chronology of pre-history by tens of thousands of years.

The new data included legal sources. In 1877 the first cuneiform legal documents were published and the trickle soon became a flood. The greatest impact was the publication in 1901 of the Law Code of King Hammurabi of Babylon (CH), which a French archaeological team had discovered the year before and brought back in triumph to the Louvre (where it still stands). Here was a law code that predated the laws of Moses by a thousand years (on the chronology as then reckoned) and the Roman Twelve Tables by 1500 years. Legal historians flocked enthusiastically to the new source; some learned Akkadian and the cuneiform script. In 1903 David Heinrich von Müller published an edition of CH, the Twelve Tables and Moses' Code in parallel columns. Much ink was spilled on speculating as to the connection between the three.

What was the effect of these astonishing new sources on legal historians? Did it lead to a new paradigm? Not at all. Like the historians of the mid-nineteenth century, who had adopted the paradigm of the philosophers,

historians of the twentieth century sought to impose existing conventional wisdom on the new material.

The great pioneer of cuneiform law, Paul Koschaker, in a study of Babylonian marriage law (1917) argued that marriage was by purchase, unconsciously (or consciously?) echoing Aristotle's assertion that primitive Hellenes had once upon a time purchased their wives from one another (*Politics* 2.111). He also insisted on the *patriarchal* nature of the Babylonian family as explaining many features of Babylonian law. Geoffrey Rolles Driver and Sir John Miles, in their classic commentary on CH (1952), set out "the development of the Semitic theory of punishment." I quote it here in full, because it is the quintessence of an evolutionary theory:

The family is the primitive unit of which the paterfamilias is the chief, but it does not long live in isolation; groups are formed for security, and matters affecting the group are decided by the king or chief. . . . If one member of the family injures another, the matter is settled by the head of the family who does what he thinks right to requite the wrong. . . . If, however, one member of a family injures a member of another . . . a feud arises between the two families. . . . Here the group itself is concerned . . . for the blood-feud is civil war. The community must then lay down rules and the first is that, when the blood of the murderer has been shed, the murder has been requited and peace between the two families shall be restored. Here the germ of one of the principal limitations on the indiscriminate vengeance of the blood-feud appears, the principle of "tit for tat" or talion. This principle is applied not only to slaying but to all corporal injuries, and the doctrine that the punishment must fit the crime begins its history. The other limitation on the blood-feud is the recognition of "composition," whereby the offending party buys off the consequences of his act. In the first instance composition is purely voluntary, a private agreement between the two families, which is perhaps the earliest type of contract. Subsequently, composition for certain offences became compulsory. . . .

This beautifully elegant exposition is a masterpiece of *a priori* reasoning. It could have been lifted straight out of Maine's history of Indo-European law. What about the evidence? Sources are hung upon the development model like cladding on a scaffold. In CH, talion is prescribed for aristocrats and fixed payments for commoners. Therefore, according to Driver and Miles, CH has partially reached the stage of composition, but only for the lower classes. Using the same method, other scholars created a different history of development. For example, Arthur Sigismund Diamond had argued that composition must have preceded talion, because primitive society

saw life purely in economic terms. The discovery of laws predating CH that prescribed fixed payments for injury seemed to confirm his theory. Unfortunately, the Hittite Laws, which were later than CH, also had fixed payments. This difficulty was easily overcome by assuming a different rate of progress towards civilization among the different societies, in the manner of Maine's distinction between progressive and backward societies. The reasoning formed a perfect circle: societies that are more primitive have fixed payments; evidence that they are more primitive is the existence in their laws of fixed payments.

The many societies that were attested by new discoveries from the ancient Near East could thus be contrasted by assigning them different rungs on the evolutionary ladder and all fitted neatly into place. Within a society, progress could be marked by contrasting different laws from different periods, and if this did not work, by dissecting the same law. Seeming contradictions within a law could be resolved by assuming interpolation of new words or phrases into an old text to accommodate developments in legal doctrine. Of course, the editing had to be clumsy, or the signs of interpolation would not be visible.

Evolutionary determinism has the benefit of explaining similarities between laws in different systems without the need for any connection between them; systems at the same stage of development are bound to have similar laws. This was adopted with enthusiasm by scholars wishing to promote the particularity of the legal system in which they specialized. After an initial wave of pan-Babylonianism, a reaction set in. Throughout the twentieth century, Greek, Roman, and biblical historians hastened to deny any connection between the cuneiform systems and their own law. Particularism could be found even within the cuneiform systems, with Babylonianists denying connections with Assyrian law, for example.

Here at least, the rising tide of evidence has slowly but surely swamped particularist objections. Fifty years ago scholars could still be found who claimed that the virtually identical text of law about the goring ox in Exodus and in Codex Eshnunna (a law code from a kingdom to the north of Babylonia slightly pre-dating the reign of Hammurabi) was pure coincidence. Now the derivation of biblical law from cuneiform models is unquestioned, although the nature of the relationship is still a matter of debate. In the Greek and more slowly in the Roman sphere, ancient Near Eastern influence on local law, still rejected with vehemence some twenty years ago, is being admitted as part of a general pattern of interconnection ranging through myth, theology, and material culture. Ethnography, however, under the modern guise of anthropology, still thrives as a source of evolutionary determinism

and even of particularism. There are biblicists on the one hand and classicists on the other who still consider early Hebrew law or early Greek law (from as early as the tenth to seventh centuries B.C.E.) to have more in common with the practices of twentieth-century stone-age tribes than with each other.

IV

At the beginning of the twenty-first century we have reached a point where we can reject the model of early law based on an intellectual tradition going back to eighteenth-century philosophy. Instead, we need to create a new paradigm based on the mass of evidence that has accumulated over the last 150 years.

Surveying that evidence in the manner of an archaeologist's initial survey, we see that the earliest law that we can recover comes from the Near East. The sources from that region predate by far sources from other early civilizations such as India and China. They fall into roughly three categories:

1. By far the largest group is documents in cuneiform script, mostly written on clay tablets. They form a good ninety percent of our sources, albeit solely due to the accident of preservation. Clay is not perishable; other media such as papyrus and parchment are. Most cuneiform tablets come from Mesopotamia, with a small quantity from Syria and Anatolia.
2. A smattering of sources comes from Egypt, in the various Egyptian scripts, and a few documents in Aramaic are found in Egypt and Syria. Some early legal inscriptions have been discovered in Greece, mostly from Crete (such as the Gortyn Code).
3. Finally, there are the sources known previously, that have survived by tradition rather than being recovered by excavation. The main examples are the Hebrew Bible, the Twelve Tables, and other fragments culled from later Greek and Roman literary sources.

The earliest decipherable legal documents in cuneiform date from the twenty-seventh century B.C.E. and they continue until the fourth century B.C.E.. Egyptian Demotic documents begin in the seventh century B.C.E. but only become numerous from about the fourth century B.C.E. The Hebrew Bible, Aramaic documents, and early Greek and Roman material date between the ninth and the fourth centuries B.C.E. With the conquest of the Near East by Alexander in the fourth B.C.E., Greek gradually replaced the other languages and scripts, although Demotic survives into the first century C.E.

We can thus conveniently describe the earliest phase of recorded law as dating roughly from the twenty-seventh to the fourth centuries B.C.E., after which the Hellenistic period ushers in a new phase. As we shall see, it is possible to describe the end of early law in more detail and endow it with more significance.

Turning our attention to the types of sources available, we can discern five broad categories:

1. Records of contractual agreements make up the bulk of the legal documents of practice, and of these the two largest types by far are land sales and loans.
2. A small number of texts are records of litigation. They are not law reports in the modern sense: they contain no legal argument, merely a summary of the facts and the result, and sometimes elements of the evidence.
3. An even smaller number of texts record legislation, in the form of royal decrees, instructions, and the like.
4. Making up a small but significant genre of their own are the so-called "law codes." CH is the most complete and prominent example, but in total seven such codes exist in cuneiform, one in Greek and one in Latin.
5. The Hebrew Bible contains examples of all the above, including three law codes. They have been transformed by being embedded in a different literary form. The historian can extract legal information from the different literary genres in the Bible and the same applies to miscellaneous sources such as myths, letters, and lexical lists.

A survey of this immense material—the legal documents of practice run into the tens of thousands—reveals three quite startling features.

The earliest decipherable legal documents (from Sumer in southern Mesopotamia) reveal a legal system that is already mature. They contain contracts relating to the sale of land that presuppose a settled agricultural, indeed urban, society with governmental institutions, a bureaucracy, law courts, and long-established legal procedures.

The latest legal documents (from Babylonia under the Persian empire) are still based on the very same legal principles. The principles underlying the law of sale or marriage or even evidence have not fundamentally changed.

This continuity is geographical as well as chronological. Many of the legal principles and rules present in Mesopotamia are reproduced throughout the Near East with varying degrees of similarity over almost three millennia of documentation. Israel and Hatti, for example, present strikingly

close affinities, while Egypt seems to be a little more remote, although it is difficult to judge due to the paucity of documentation from Egypt. Even more startling is the fact that some of those principles and rules are reproduced in what we know of law from pre-Hellenistic Greece and Rome.

Our immediate conclusions are that the law in the earliest known phase of legal history, focused on the ancient Near East, was essentially static over the course of several millennia and transcended individual legal systems, covering the whole region and beyond. This is not to say that laws did not change or that individual legal systems were not autonomous, but there was a core legal tradition common to all that did not develop significantly over this period.

This conclusion seems counter-intuitive. By its very nature, law must change to meet changing circumstances. New cases will create new law. The model, however, is our own modern society, where the restless pace of technological development and social change forces the law into a constant frantic rush to keep up. Massive resources are poured into the effort, in the form of specialized experts and branches of government dedicated to churning out fresh legislation, interpreting and implementing its provisions. The reasons behind our present situation are suggestive of the reasons for the very different conditions in early antiquity.

The world of the ancient Near East was more static than our own, but not entirely so. Cities, states, and empires rose and fell. Population movements led to radical changes in the ethnic composition of the area and brought in new cultures as much as in later periods. International trade and diplomacy facilitated the exchange of ideas. The social background is therefore important, but not the sole factor.

Justice comes from the heart, law from the head. Every child has an innate sense of justice, summed up in those familiar words "but it's not fair!"—likewise our most distant ancestors. Law, by contrast, is an intellectual construct. Although a society cannot exist without law, the latter is an artificial product of the mind. For individual judgments to become more than ad hoc justice, they must be formulated as rules that are reasonably predictable in their results and mutually consistent. All the more so with legislation and treatises. Consequently, a legal system cannot be more advanced than the system of thought and reasoning generated by its host society.

If we look again at the overall picture given by these early sources from the ancient Near East, three more remarkable features strike us—remarkable, that is, by their absence.

First, nowhere to be found, in the legal literature or elsewhere, are the basic components of modern legal reasoning, namely, division into theo-

retical categories and definition of abstract concepts. Nowhere do we find anything remotely like the statement, fundamental to our thinking, that, for example, there are three types of property: real, personal, and intellectual. Technical legal terms like inheritance, adoption, pledge, and hire abound, but nowhere are they defined. The most intellectualized form of source, the law codes, which were the equivalent of academic treatises on the law, are formulated as lists of individual cases, such as:

If a man rents an ox or a donkey and a lion kills it in the open country, it is the owner's loss.

In this respect, they form part of what is known as Mesopotamian science, which attempted to understand the world through lists: of trees, plants, animals, and precious stones, of medical symptoms and their diagnosis, and of omens and their meaning, for instance:

If a woman gives birth and the right ear (of the child) is small, the house of the man will be scattered.

Second, another basic feature of modern law is missing: citation of authority, whether statute or precedent. The nearest the sources come are a few vague references to a rule being "according to the words of the stele." They undoubtedly refer to a statute inscribed on a monument, but it is a reference, not a citation. It is possible that we do not have the right type of source, that citation took place during legal argument in the courts but has not been recorded. But there is no hint of any such notion in letters or other literature, whereas when we reach the Hellenistic period the opposite is true. The sources indulge in an orgy of citation: in Greek courts and by Roman and Rabbinic jurists. For the earlier period, we gain the impression that the law was expressed in decrees, law codes, or precedents; for none of them was the exact wording of the text of any significance, even when it existed in written form.

Third, among the long lists of professions—doctor, soothsayer, priest—there is one missing: the lawyer. Or, to be more exact, the jurist: the expert in the interpretation of the law.

Accordingly, the legal systems of the ancient Near East differed intellectually from modern systems and from the systems of the Hellenistic period in how they formulated the law and how they read it. The reason is the Greek intellectual revolution. Mesopotamian science controlled the law, and Mesopotamian science lacked the tools that Aristotelian logic was to provide and which we use to this day. In consequence, the law was condemned to remain static. Once the law could be formulated in exclusive

categories, and its technical terms defined, the text of legal instruments such as statutes and contracts took on a new role: they became autonomous, to be interpreted without regard to the circumstances of their creation or their creator. Interpretation became an art, if not a science, and required a new type of specialist: the jurist.

The flood of legislation and the restless juridical innovation that characterizes modern Western systems has its origins in the philosophical revolution of the eighteenth-century Enlightenment, which gave legal systems new intellectual tools, so eagerly grasped by philosopher-jurists such as Jeremy Bentham in England and Friedrich Carl von Savigny in Germany. That revolution, however, relied on the Greek philosophical revolution of two millennia earlier and on the new intellectual tools that it gave the Greek orators and Roman jurists. They used those tools to create law as we recognize it today.

The revolution in early law that I am describing did not happen overnight. The static picture that I have painted begins to crumble from about the seventh century B.C.E. in the Mediterranean basin (roughly around the time of the Presocratic philosophers). For example, the book of Deuteronomy, which dates to the seventh century and the Assyrian occupation of Israel, takes traditional ancient Near Eastern material, much of it from Assyria, and begins to transform it in innovative ways. Traditional debt-release decrees, an instrument in use for millennia, are turned into cyclical legislation of a type not seen before: the sabbatical and jubilee years. In the sixth century, the Gortyn Code still has the form of an ancient Near Eastern law code but has paragraphs that definitely indicate that it was legislative in effect. It even contains a definition of a legal term. Citation appears in the Greek orators of the fifth and fourth century and in the later books of the Bible, but jurists do not appear until the third century in Rome.

To illustrate how this "revolutionary" view of legal history affects development of the law, I will return to an earlier example that was emblematic of the evolutionary school: homicide. The evidence of the sources shows a traditional system established already in the third millennium and very widespread: in Mesopotamia, among the Hittites in Anatolia, in the Hebrew Bible, and in the Homeric epics. The principle is that the relatives of a homicide victim have a dual right: to execute the killer by way of revenge or to accept payment by way of composition. The two rights were contemporaneous, not consecutive, in time. Revenge was private, but it was not a lawless vendetta. It was a judicial remedy awarded by the courts where they deemed the circumstances appropriate. Moreover, the court could

calibrate the dual right according to the seriousness of the offense, determined by criteria such as the mental state of the killer (premeditated or not) or the status of the victim (head of household or son). The court could raise or lower the degree of revenge or insist that the right-holders accept composition and fix the level thereof.

As an aside I should explain that commentators who thought only revenge or only composition was exclusive to a legal system because a law code or a paragraph therein mentioned only one of them failed to appreciate the casuistic nature of the sources, which do not state principles, only the rule applicable to a narrow set of circumstances. Where a paragraph in a law code set a fixed payment, the underlying alternative of revenge would have been self-evident to any contemporary reader, although not mentioned explicitly.

At the same time, the ancient systems did not lack purely public offenses. Offenses that were deemed to pollute society, such as blasphemy or incest, were likely to bring down divine wrath upon the whole society. The authorities therefore acted to arrest and execute the culprit, just as in a modern prosecution of crime. Homicide did cause some local pollution, but it did not fall within this category of polluting crimes that endangered society as a whole.

Somewhere between the seventh and fifth centuries B.C.E. a radical change appears in legal systems of the Mediterranean basin. The Priestly source in the Bible polemicizes against accepting composition for homicide; the victim's family must exact revenge. Its rationale is that murder pollutes the Promised Land, like blasphemy. Thus the Priestly source appears to be engaged in an attempt to shift murder, hitherto understood as a purely private matter between the culprit and the victim's family, into the category of public offenses such as blasphemy, apostasy, and incest, and thereby turn the private right of revenge into a public duty. It even places a strained interpretation on the customary phrase "life for life" in order to achieve this result, the first known instance of juristic interpretation of a text (Lev. 24:17-21).

The same tendency is apparent over the same period in ancient Greece. Homeric law in the eighth century still accepts composition as a legitimate alternative to revenge. By the fifth century, Athenian homicide law is still based on revenge by the victim's family, but that revenge has changed from a right to a duty. One of the reasons given is that it is necessary to free the whole state from pollution caused by homicide. In both systems, the groundwork has been laid for treating murder as a public crime.

To summarize, the early history of law can be divided into three periods. Taking them in reverse chronological order, the latest is the *classical* period dating from the fourth century B.C.E. It is based on Greek philosophy and exhibits the reasoning and general characteristics that are familiar to us in modern legal systems.

The preceding period, which we may call the *archaic* period, begins for us in the early third millennium with the first known legal sources, but must already have existed long before then. It is based on Mesopotamian science and its legal reasoning seems alien to us, not least because of the intellectual tools that it lacks. Between this and the classical period there is a transitional phase from about the seventh to the fifth century B.C.E. when radical new ideas from the Mediterranean are penetrating and transforming the ancient tradition. At its outset, Mesopotamian science must have been equally revolutionary in its effects, but we can only speculate about the circumstances of its creation or of its application to law.

The invention of writing in the late fourth millennium is an obvious point of reference, but in my view is unlikely to have been a direct cause. Throughout the archaic period the practice of law was essentially oral, both in transactions and in litigation. Writing was adjuvant: an occasional convenience but by no means a necessity. Writing could at most have been an indirect cause, in that it was a technology of power, which aided new modes of social control and organization arising from urbanization. On the other hand, the turning-point may have been the advent of urbanization itself in the mid-fifth millennium, predating the advent of writing, when major organizational changes would already have been needed. Or it may have been even earlier, at the agricultural revolution at the beginning of the eighth millennium, when ownership of land became necessary. It is impossible to know and unwise to speculate, but it does give us some perspective on the evolutionary theories of ancient law.

It should be clear by now that the supposed features of primitive law proposed by evolutionary theories, if they ever occurred, are irrelevant to the archaic period. The literary sources on which they rely relate mostly to the early first millennium, when a settled, static tradition based on highly organized urban societies had already existed for at least two thousand years and possibly much, much longer. Rules which supposedly represented the first faltering steps of a nascent legal system can be shown to be derived from that long-standing and widespread tradition.

If primitive law did evolve in the manner posited by eighteenth-century philosophers and repeated by historians of the following centuries, it can only have been in the first period of early law, which we may term the *prehistoric* period and which, for all we know, went back to the Neanderthals. Unfortunately, since we have no written sources from that period, we cannot know the nature of law at its origins nor how it evolved. We can only conjecture. But I am a historian and leave conjecture to the philosophers.

Note

Charles Alexander Robinson, Jr., Memorial Lecture, Brown University, Monday January 23, 2009. I thank the editors for accepting the manuscript in the shape of the lecture. Essential literature: Bachofen 1861; Darwin 1859; Diamond 1971; Driver and Miles 1956; Fustel de Coulanges 1982 (1864); Hobbes 1651; Kames 1758; Kohler 1897; Koschaker 1917; Kuper 2005; Maine 1861; Morgan 1864; von Müller 1903; Rousseau 1762; Stein 1980; Vico 1744; Westbrook 2003b.