The Varieties of Ancient Legal History Today

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Abstract

The article surveys, contextualizes and explicates the arguments of the eight papers featured in the forum on “The New Ancient Legal History” in 3:1 Critical Analysis of Law (2016).

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These are heady days for ancient legal history. In Greek, Roman, Chinese, Hindu, Islamic, and Jewish law, new theoretical approaches, newly published primary materials, and new scholarly resources are transforming fields of inquiry. The papers included in this section are intended as a celebration of the creativity now sweeping the field. The coverage is exemplary rather than comprehensive: the essays serve to illustrate the excellence and interest of the work now being produced, not to define or demonstrate its scope. In what follows, I therefore advance no holistic claims in relation to ancient legal history as a field of inquiry, either in respect of method or the critical potential of its results. Instead, I offer an account of the achievement of each article and seek to articulate themes engaged by them severally, in the hope that doing so will enhance their accessibility to readers from outside the disciplines in which each originates.

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1 The citations below are intended both as illustrative rather than exhaustive, and as supplementary to the information conveyed elsewhere in this introduction and by the articles in this issue.

2 For bibliography, see A New Working Bibliography of Ancient Greek Law (7th-4th centuries BC) (Mark Sundahl et al. eds., 2011). The same editors produce a website that keeps the bibliography up to date. NOMOI: A Bibliographical Web Site for the Study of Ancient Greek Law (http://www.sfu.ca/nomoi/).

3 The Oxford Handbook of Roman Law and Society (Paul du Plessis et al. eds., 2016); Handbuch des Römischen Privatrechts (Ulrike Babusiaux et al. eds., in progress); see for now Handbuch des Römischen Privatrechts (http://www.rwi.uzh.ch/lehreforschung/alphabetisch/babusiaux/HRP2.html).


7 The Cambridge Comparative History of Ancient Law (Caroline Humfress et al. eds., in progress).
In “When Law Goes off the Rails,” Ari Bryen takes up the autonomy of the law as a problem of social authority. The gradual emergence in first century BCE Rome of a notion of law and legal scholarship as an autonomous social field was once the subject of a very sophisticated inquiry by Bruce Frier, but the problem has not attracted much attention since then. Frier focused on the late Roman republic, when powers of jurisdiction and law-making authority were granted to annual magistrates by popular assemblies. Bryen, by contrast, writes about Roman law in the age of imperial monarchy. Although the jurists of that age (ca. 31 BCE-235 CE) sought to present themselves as autonomous and their discourse as rational—and generations have read them in this spirit—Bryen focuses on instances when they appear to acknowledge and ward off other forms of social authority that impinge upon the reading and making of law. To make sense of this move, he imports a distinction from the study of rabbinic literature, between halakhic and aggadic moments, which is to say, between passages concerned with the propositional content of legal norms and the investigation of aspects of legal language and argumentation, narrowly construed, and other moments, bracketed as non-law, that include anecdotes, narrative, and commentary. In the end he focuses on two instances: popular stories about the mechanistic punctiliousness of jurists being bested by a clever outsider, and seeming contests over normative salience of the exceptional. The particular instance in the latter inquiry is one of remarkable fecundity. Should one generally make allowance for the birth of quintuplets? As Bryen observes, some jurists resolved the question by appeal to Greek natural history, in other words, through invocation of a recognized authority outside and beyond the reach of contemporary politics. It was a question for science, and the jurists who subscribed to this view arrogated to themselves the capacity to adjudicate what the domain and relevance of science was. The alternative was that the scope of facts for which the law must account would be determined by imperial action, e.g., by the emperor’s granting an audience and then a stipend to mothers of multiple births. The contest over interpretive authority described by Bryen has an important correlate in local, metropolitan and imperial arguments over the limits of analogical argument: should courts merely apply statute law as written, reserving power to make law to the emperor (as Justinian, for example, insisted), or should the power to determine the scope of analogical extension lie with courts and especially experts?

Natalie Dohrmann takes up very similar questions in her reading of early rabbinic literature, “Means and End(ing)s: Nomos Versus Narrative in Early Rabbinic Exegesis.” She commences from a set of interlocking observations about the social position of the

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8 Bruce W. Frier, The Rise of the Roman Jurists: Studies in Cicero’s Pro Caecina (1985); see also Andrew Wallace-Hadrill, Mutatio morum: The Idea of a Cultural Revolution, in The Roman Cultural Revolution 3 (Thomas N. Habinek & Alessandro Schiesaro eds., 1997). Related arguments, situated more wholly within the ideology of the civil law tradition, regarding the status of law as science or as rational, may be found in Fritz Schulz, History of Roman Legal Science 38-86, 124-140 (1946); Aldo Schiavone, The Invention of Law in the West (Jeremy Carden & Antony Shugaar trans., 2012).

9 Clifford Ando, Exemplum, Analogy and Precedent in Roman Law, in Between Exemplarity and Singularity: Literature, Philosophy, Law 111 (Michèle Lowrie & Susanne Lüdemann eds., 2015).
rabbis and the form of the literatures that they produced. Important interlocutors for Dohrmann are not simply legal historians writing about legal literatures, but also scholars of later Latin literature, who understand its context of production as a culture obsessed with prestige texts that are imagined simultaneously as of one's culture and yet impossibly distant.10 The intellectual and religious project of the rabbis was nothing less than the re-fashioning of Judaism, with law, purity and domestic ritual rather than public sacrifice at its center. To this end, the resources of earlier Judaic cultural production and historical memory had to be mined for norms, and resources had to be crafted to make those speak to contemporary practice, the particularity of their contexts of production notwithstanding. This had a number of consequences of salience: certain texts within the tradition had to be privileged as sources of law (all others were dispreferred and ignored); and modes of reading and argumentation had to be developed so that the very finite resources of a bounded text could be made to cover situations unimagined at the moments of production of its constituent units. As Dohrmann puts it, “Divine text, once closed, is in perilously short supply.” In consequence, the textual representation of a putatively oral rabbinic discourse had to persuade its audience(s) that its argumentation was sufficient to both present and future time, and that the rabbis were exclusively qualified to carry the project forward.11 The result is a literary form in which alternative views are explicitly weighed, the better to assert a hegemonic claim to final authority; outsiders occasionally are addressed via apostrophe, and made to see the error of their ways; and textual exegesis and analogical argumentation are deployed in such a way that the scriptural text is taken as a unity, any part of which might be made to speak to any other. The rabbis thus developed a mode of reading that refused the narrative logic of its own objects of study, and a legal literature that resisted “historical linearity.” In this way, the rabbis endowed Judaism as law with a distinctive temporality: “messianism and eschatology [being] inescapably narrative,” rabbinic law and legal argument took forms that spoke to present and future in this saeculum.

In “Law, Empire, and the Making of Roman Estates in the Provinces During the Late Republic,” Lisa Eberle engages with themes charted by both Ari Bryen and Maxim Korolkov, and also lays out substantial theoretical and historical claims of her own. Her topic is the acquisition of control by Romans over land in spaces defined by both local and Roman authorities as alien in respect to Rome. The alienness of the land meant that, in theory, local law regarding title, transfer and acquisition obtained. Furthermore, Greek cities generally restricted rights of ownership in land to citizens. Given that in premodern economies agricultural production was a massively important percentage of all economies,

10 On legal literature, beyond Bryen’s essay in this issue, see Clifford Ando, Roman Social Imaginaries 66-67 (2015). On Latin literary culture, beyond the essay by Formisano cited by Dohrmann, see Catherine M. Chin, Grammar and Christianity in the Late Roman World (2008). Bracketing its polemics, much can also be gleaned from Alan Cameron, The Last Pagans of Rome 399-626 (2011).

control of land effectively delivered control over the most important means of production. Eberle’s topic is thus one of very considerable importance to the history of both law and political economics in the ancient world, one that has received scant attention to date, a shortcoming all the more surprising in light of the rich literature in other fields. In the densely populated and advanced cultures of the eastern Mediterranean on which Eberle focuses, the existence of developed legal and administrative cultures and the Romans’ own reluctance to embrace alien persons, things and actions within Roman law meant that contestation over possession and ownership of provincial land emerged as a major site for argument over choice of law. What is more, the period on which she focuses is precisely that in which Roman doctrines in respect of choice of law and international private law first emerge to view, and Eberle quite reasonably suggests that this occurred in response to petitions for dispute resolution addressed to Roman magistrates to exercise jurisdiction as courts of the second instance in provincial contexts. On her argument, then, neither military action nor statal fiscal institutions, but economic and legal initiatives taken by private members of the imperial diaspora were the leading edge of legal development in these domains. Along the way, Eberle illustrates a considerable divergence of interest between the metropolitan governing class and entrepreneurs in the provinces, and so argues against any simplifying language that posits “the state or the empire as an autonomous entity pursuing a narrow and disembodied set of state or imperial interests.”

Maxim Korolkov takes up a theme central to contemporary premodern legal history, namely, the relationship between discourses of law, legal institutions and assertions of sovereignty over persons and territory. He does so in part in dialogue with Norman Yoffee’s theorization of ancient states as weak, and a fascinating literature on this theme is now developing, with the splendid work of Seth Richardson playing a leading role. “Calculating Crime and Punishment: Unofficial Law Enforcement, Quantification, and Legitimacy in Early Imperial China” studies legal texts written on bamboo strips excavated archaeologically from the tombs of Qin and Han era officials. A great many of these are normative or instructional, or else formularies: that is to say, they do not so much offer records of particulars but attest the desire of the central state to know and control local conduct through the imposition of scripts or metanarratives. Korolkov reads these documents in light of James C. Scott’s Seeing Like a State, with all due respect for the gap that Scott himself posits between the ambitions and efficacy of modern states and those of premodern technology regimes. That is to say, Korolov understands the Qin reforms

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12 See, e.g., Peter Karsten, Between Law and Custom: “High” and “Low” Legal Cultures in the Lands of the British Diaspora: The United States, Canada, Australia and New Zealand, 1600-1900, 23-266 (2002); Stuart Banner, How the Indians Lost Their Land: Law and Power on the Frontier (2005); Stuart Banner, Possessing the Pacific: Land, Settlers, and Indigenous People from Australia to Alaska (2007).


14 James C. Scott, Seeing Like a State: How Certain Schemes to Improve the Human Condition Have Failed (1998). One might also study Korolkov’s material in light of Scott’s notion of transcripts, James C. Scott, Domination and the Arts of Resistance: Hidden Transcripts (1990), or Thomas Sizgorich’s use of Hayden
to the imperial state as aspirational: despite infrastructural weakness that ultimately prevented deep and uniform penetration of civil society throughout the space it claimed to rule, the formularies and regulations regarding personal status and criminal conduct, including the moves toward quantification over against discursive or lexical assessment, should be understood as seeking to make the world legible. They were deployed so as to subject the chaos and diversity of the world to state control by rendering particulars not simply knowable but susceptible to aggregation. “The discrepancy between the aspiration to pervasive control, on the one hand, and the infrastructural weakness of state power, on the other, was expressed in the rulers’ permanent anxiety about the performance of their agents in provinces and offered a fertile ground for the ideology and practice of quantification that supplanted hardly attainable actual control with the discourse of a regimented, quantifiable society.” In a further effort to overcome its inherent weakness and also to align the subjectivity of civilians with the self-declared legitimating principles of the state, the Qin and early Han empires offered very considerable rewards seeking to coopt non-officials into policing each other and state officials on behalf of the central power.

The legal system of classical Athens was, by contrast with Rome, without any notion of autonomous law, nor, indeed, did it have any internal theoretical resources regarding historicism, doctrinal development, or statutory interpretation. What is more, as Susan Lape demonstrates in “The State of Blame: Politics, Competition, and the Courts in Democratic Athens,” public law norms were crafted so as to allow policy and personality disputes among the political elite to be transferred from the assembly to the courts. This was a feature of political dysfunction at Rome, too, where the criminal prosecution of one’s enemies became a common means of damaging the political career of one’s opponents in the violent and destructive high-stakes of intra-elite competition in the decades before the violence turned civil and Roman democracy was ended forever.15 To explicate the situation at Athens, Lape establishes a dialogue between ancient, principally Aristotelian theories of emotion and contemporary theories of social emotions. In this way, she is able to explain the rhetorical and procedural maneuvers by which the disputants in her narrative transformed a complex political scene and foreign policy debate into a zero-sum contest for honor and survival. Beyond the translation of their dispute from the potentially multilateral and multivocal assembly into the adversarial context of the court, there lay the politics of phthonos, hostile envy, and the compulsion it motivated to destroy in other domains those possessing social honors that one wishes for oneself.

In Rena Lauer’s paper, “Jewish Law and Litigation in the Secular Courts of the Late Medieval Mediterranean,” we enter directly into consideration of problems at the

15 Important studies include Erich S. Gruen, The Last Generation of the Roman Republic 260-357 (1974); Michael C. Alexander, Trials in the Late Roman Republic, 149 BC to 50 BC (1990).
margins of explicit consideration in Roman and rabbinic jurisprudence, namely, that Roman and Jewish law and legal institutions both existed in pluralist worlds, alongside other sources and bodies of norms, as well as other law-applying institutions. Pluralisms come in many forms, of course. Bryen and Dohrmann paint portraits of the Roman jurists and rabbis of late antiquity as anxious about other sources of social power impinging on their authority within their domain, and a mechanism employed by both to shore up that authority was the exclusion, via both silence and literary form, of alternative voices. (It might be useful to note, regarding the politics of such exclusions, that in the Roman case, the fact that Roman law was codified three hundred years after Roman citizenship and notionally, therefore, Roman law was universalized to all residents of the empire, rendered all prior literature on international private law moot.) In Lauer’s world, by contrast, minority Jewish communities around Europe and the Mediterranean often existed in far more fraught situations: the communities were great in number but they were often perilously small, and their claims to legal and ritual autonomy were far more precarious than had been the case in the high Roman empire or, indeed, Sassanian Iran. There was a strand of Medieval Jewish legal culture that advertised its adherence to a rabbinic norm of forswearal of non-Jewish courts, and Lauer observes that historians, taking the rabbis at their word, long allowed Jewish practice to go uninterrogated: the Jews were creatures of the law, and one could simply assume that rabbinic/halakhic norms were actualized in daily life. However, as Lauer notes, more recent archival research has revealed the Ashkenaz to have been particularly committed to the use of rabbinic courts. Elsewhere, not only did Jews have recourse to local and imperial institutions of dispute resolution, but leaders of Jewish communities played important roles as advocates or transmitters of norms. Focusing on the records of the colonial court of the second instance in Venetian Crete, especially its capital, Candia, Lauer investigates the dynamics that brought Jews to gentile courts and, in particular, the problems that arose from the commitment of those courts to apply Jewish norms in matters of personal law. This commitment raised difficulties, visible in many such contexts, of knowledge and transmission of law. To a point, as Lauer reveals, courts allowed litigants to dispute the content of norms as well as facts—the content of indigenous law was thus established adversarially, on an ad hoc basis—but they also relied upon archival knowledge of norms as previously enforced.

Marta Madero’s paper, “The Servitude of the Flesh from the Twelfth to the Fourteenth Century,” exposes Anglophone readers to the work of an exceptional practitioner of medieval legal scholarship in the French tradition and provides an English précis of

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16 Some literature relevant to this problem is cited in Clifford Ando, Pluralism and Empire: From Rome to Robert Cover, 1 CAL 1 (2014).
19 Cf. Ando, supra note 9.
arguments in a volume she has just published on the same theme.\footnote{Marta Madero, La Loi de la Chair: Le Droit au Corps du Conjoint dans l’Oeuvre des Canonistes (XI\textsuperscript{e}-XVe siècle) (2015). An earlier work is also available in English: Tabula Picta: Painting and Writing in Medieval Law (Minique Dascha Inciarte & David Valayre trans., 2010).} Where American scholarship on medieval law of marriage in recent decades has focused on records of litigation,\footnote{R.H. Helmholz, Marriage Litigation in Medieval England (1974); Charles Donahue, Jr., Law, Marriage, and Society in the Later Middle Ages: Arguments About Marriage in Five Courts (2007).} Madero offers a doctrinal study focused on the long history of reception, recuperation and modification of Roman and canon law concepts and arguments. Historiographically, Madero engages a literature that has tended to understand the history of canon law of marriage as evolving (or degenerating) from an earlier, consensual view, based on affective attachment, to a legalitarian one, in which there is a mutual exchange of power over bodies in pursuit of procreation. Methodologically, she takes up a principle of reading medieval legal texts advanced by Yan Thomas, to the effect that core concepts in medieval argumentation are often best viewed in moments of consolidation and delimitation at the margins of those concepts.\footnote{Yan Thomas, L’extrême et l’ordinaire: Remarques sur le cas médiéval de la communauté disparue (first published 2007), in Les opérations du droit 207 (2011).} The meaning and extent of a wife’s power over her husband’s body may thus be clarified by studying, e.g., a case where a husband joins a monastic order or flees to a monastery to avoid capital punishment without his wife’s permission, thus depriving her of property over which her rights were paramount. Finally, at a substantive level, Madero urges that the language of property as employed in medieval arguments about marriage—of possession, ownership, servitudes, and, in premodern civil law terminology, of moveable and self-moving property such as animals and slaves—is emphatically not metaphorical, but literal. Only this, she affirms, can explain the complex arguments built on their basis; and only by understanding this can we chart and understand the social institutions that this body of law sought to regulate.

The interaction between imperial and local norms is also at issue in William Sullivan’s study of “Consent in Roman Choice of Law.” Sullivan opens by observing a paradox regarding the history of international private law, that Roman legal texts played a foundational role in the formative period of international private law and yet modern theorists have been reluctant to credit claims that a robust system of international private law existed in Roman antiquity. To be sure, Roman theory described the empire as tessellated into jurisdictions, in each of which a different code of democratically authorized law was understood to obtain. What is more, for ideological reasons, the Romans described these systems of law as organized in parallel rather than in hierarchical terms. That said, Rome was an empire, and the reflections of Roman jurists on conflicts of law, and all evidence from practice, concern systems of law within the empire. Sullivan rightly sidesteps this issue and urges that the varied dissonances between modern theory and ancient practice do not so much distort as illuminate. He then urges that much Roman theory, as well as Roman rules of jurisdiction, subscribes to a principle of personality: persons are subject to
the law of the community in which they hold citizenship, and furthermore, they are so
bound because, as citizens, they have consented to the legitimacy of the procedures and
institutions by which law is made. Sullivan then considers three types of problems en-
countered by citizenship as a principle of choice of law: parties to litigation may hold
discrepant citizenships; it might be difficult to determine, or achieve consensus regarding,
the content of local law; and enforcing local law might involve a Roman court of the sec-
ond instance in what it considers a miscarriage of substantive justice. With the turn to
knowledge of law, Sullivan raises the problem we have encountered in Rena Lauer’s study
of Venetian Candia. The turn there to archival knowledge of norms previously enforced
was in fact a method advocated to Roman judges by the jurist Ulpian: when a litigant cites
the “custom” (consuetudo) of the region or province, a judge should seek to ascertain both
its content and its status as a norm by inquiring whether it has ever been upheld in an ear-
ier proceeding.23

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23 Dig. 1.3.34; see Clifford Ando, Legal Pluralism in Practice, in The Oxford Handbook of Roman Law and
Society, supra note 3.