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THE CULTURAL EVOLUTION OF TORT LAW

M. Stuart Madden[†]

ABSTRACT: *The Institutes of Justinian and other Graeco-Roman recitations of tort-type delicts and remedies are recognized as root stock of modern western tort law, common law, or civil code-based alike. Long before these sources, however, both ancient and primitive cultures adopted norms and customs which defined permissible individual and group conduct, and which provided for remedies ranging from money damages to banishment. Among the surveyed examples of ancient cultural responses to tort-type delicts were numerous instances in which both the civil wrong identified and the remedy provided for can be harmonized readily with modern tort law, whether it is practiced in common law or civil code nations or throughout the world. A broad range of such examples can be found not only in the nations or regions in which such norms obtained, but also in their specific subject areas: public nuisance, manslaughter, assault, trespass, conversion, negligence, strict liability, deceit, defamation, and even invasion of privacy. Indeed, a review of ancient tort-type law dispels any Euro-centric claim that western Europeans led in the conception and nurturance of tort principles at any point in history.*

I. INTRODUCTION

Countless years before the coalescence of human groupings into civil societies, kinship groups, and later tribes and cultures, people needed norms by which individual conduct could be ordered. The primary stimulus for such norms was group survival, and the ancillary motivations were the achievement of civil peace and the protection of one's person and property from wrongful harm. The means by which normative behavioral impositions operated took countless shapes, but the avenues taken could be classified, in roughly chronological order, as spiritualism, folk tales, folk law, mythology, religion, and customary law.¹

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

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

At the core of tort norms, and later tort law, has always been a group desire that disputes be resolved without retaliation and escalation. This rationale receives an early expression from the Greek observer Demosthenes, in the speech *Against Konon*, as it might pertain to remedies for battery and abuse:

[In] cases of battery; these, I am told, exist in order that no one, when losing, should defend himself with a stone or anything of that sort, but he should await the legal case. . . . The most trivial offence, I suppose, that of abuse, has been provided for to [ensure] . . . that homicide should not be committed, . . . but [that] there should be a legal case for each of these, and they should not be decided by the individual’s anger or whim.²

Islamic law too is clear cut in its differentiation between excusable self-defense and culpable retaliation.³

At the same time, it would be disingenuous to deny that dissimilarities between ancient and modern approaches to civil justice are not likewise apparent at almost every turn to this inquiry. Some primitive remedies for conversion might offer not only restitution to the wronged party but also the opportunity to exact a fine, to be collected by the complainant himself, a double recovery by today’s standards.⁴ Other pairings of right and remedy might at first seem suggestive of the modern action in public nuisance, but, upon closer evaluation, be seen to depart from that rule in the designation of who may bring the claim. And a very large number of disputes are resolved not by fact-finding, application of governing norms, and an adjudicatory

2. DOUGLAS M. MACDOWELL, *THE LAW IN CLASSICAL ATHENS* 123 (Cornell 1978) (quoting Demosthenes, *Against Konon* 54.17–19).

3. See *infra* text accompanying notes 39–42.

4. See, e.g., Shih-Yü Yü Li, *Tibetan Folk-Law*, J. ROY. ASIATIC SOC. G.B. & IRELAND PARTS 3, 4, pp. 127–48 (1950), reprinted in 1 ALISON DUNDES RENTELN & ALAN DUNDES, *FOLK LAW* 513–26 (1995).

declaration, but rather by mediation and conciliation, which although a goal in numerous modern state and federal precincts in the United States, cannot be described as a general rule.

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

Describing with confidence the range of remedies for such wrongs, much less their varied justifications, is a more difficult task. Or at least it seems so due to the diverse ways tort objectives are described—often in terminology that seems not so much a dispassionate description than an argument for a polemical position. The more interesting groupings of tort objectives can be found in a source one would not at first think of: Friedrich Nietzsche. In his *Genealogy of Morals*, Nietzsche identifies a core cluster of the objectives of punishment.⁵ Winnowed of punishments suited to criminal actions, one is left with more classically civil, or only quasi-criminal, responses, i.e., the types of remedies associated with torts. To Nietzsche, these include:

2. Punishment consisting of the payment of damages to the injured party, including affect compensation.⁶ 3. Punishment as the isolation of a disequilibrating agent, in order to keep the disturbance from spreading further.⁷ . . . 8. Punishment as a means of creating memory, either for the one who suffers it—so-called “improvement”—or for the witnesses. 9. Punishment as the payment of a fee, exacted by the authority which protects the evil-doer from the excesses of vengeance. 10. Punishment as a compromise with the tradition of vendetta⁸

A question central to this article can be framed in this way: When it comes to tort law, can it be said that “It has always been thus?” The question may be answered with an acceptable degree of accuracy in the affirmative. As Henry Sumner Maine observed:

5. FRIEDRICH NIETZSCHE, *THE BIRTH OF TRAGEDY AND THE GENEALOGY OF MORALS* 213 (Francis Golfing, trans., Anchor Books 1956).

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

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

8. NIETZSCHE, *supra* note 5, at 213.

Now the penal Law of ancient communities is not the law of Crimes; it is the law of Wrongs, or, to use the English technical word, of Torts. The person injured proceeds against the wrongdoer by an ordinary civil action, and recovers compensation in the shape of money-damages if he succeeds. . . . [All such Torts] gave rise to an Obligation or *vinculum juris*, and were all requited by a payment of money.⁹

It is noteworthy that primitive and ancient law contain numerous examples in which the society has seemingly concluded that simple corrective justice is insufficient to reach the joint objectives of redressing the harm done and of deterring the actor and others from the same or similar conduct. For example, throughout the *Rules of Punishment for Tibetans*, published by the Manchu Imperial Court in 1733, the burden imposed by the restitutionary interest of the rule, i.e., the return of the animal, and elsewhere the property, etc., is seemingly ancillary to, the punishment dimension of the rule.¹⁰ It might be surmised that over time a culture's collective wisdom was that simple restorative justice had an insufficient gravitas as a deterrent if unaccompanied by a fine payable to the wronged party.¹¹ In cases of incorrigibility, though, the penalty might be shunning or even banning from the community.¹²

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

Customary law, sometimes called the "living law," has reflected norms to which a particular society has assigned epochal and steadfast adherence;

9. HENRY SUMNER MAINE, ANCIENT LAW 358 (Charles M. Haas ed., Beacon Press 1963) (1861) (emphasis in original). To Maine's account it is worthwhile to add that in addition to or as an alternative to money damages, and as will be described below, both primitive and ancient communities might require other remedies. Replacement of any goods or animals damaged or injured is one example.

10. In this sense, the diverse fines provided for in Tibetan folk law operated as punishment bearing similarities to today's punitive damages. See, e.g., Rules 20–21, *Rules of Punishment for Tibetans*; Yü Li, *supra* note 4, at 525.

11. *Id.*

12. Few societies today maintain gulags to which persons may be banished, although with the passing of opportunities to send persons to entirely different continents such as Australia, prisons and jails serve similarly. Excommunication in the Catholic Church harkens to such themes. In the early church, excommunication carried with it the revocation of other ordinary rights in civil society. This deterrent cannot be seen to have worked terribly well, as in the year 1337 it is estimated that half of Christendom was under sentence of excommunication. 1 ERNST TROELTSCH, THE SOCIAL TEACHING OF THE CHRISTIAN CHURCHES 234 n.100a (Olive Wyon trans., Harper & Brothers 1960) (1911).

rules that a culture has followed so unflaggingly and consistently as to permit the application of no inconsistent rule. To Sir John Salmond, customary law embraces “any rule of action which is actually observed by men—any rule which is the expression of some actual uniformity of voluntary action,” irrespective of whether it is obligatory and enforceable or exists by reason of de facto observance.¹³

What of ancient codes, such as the Babylonian *Code of Hammurabi*? Ordinarily, early codes reflected efforts to gather, rationalize, and organize already extant customary law. For all that is apparent, Hammurabi himself intended that his law reconcile wrongs and bring justice to those aggrieved.¹⁴ His unmistakable goal was the economic stability and enhancement of the people.¹⁵ By way of further example, the *Rules of Punishment for Tibetans* have been interpreted as “an attempt to standardize . . . folk-law by removing authority from the local chieftains and monasteries.”¹⁶ It is therefore not surprising that the antecedents of customary law have often included folk law, folk custom, and folk tales. In the many examples of primitive and ancient law to follow, it is seen that the norms of conduct, be they characterized as folk law, custom, or otherwise, were enforced not by any leadership of the community but rather by the whole.

Sometimes in literate societies, and invariably in preliterate ones, folk laws and customs, as well as folk tales, were dispersed and preserved orally. A culture’s oral tradition has been described as a tradition that “represents the complete information deemed essential, retained and codified by a society, primarily in oral form, in order to facilitate its memorization and ensure its dissemination to present and future generations.”¹⁷

Of great significance too was the cultural watershed of symboling, including writing. Man’s capacity for symbolic communication accelerated the development and communication of norms. The characteristic of all such norms was that they confined the realm of permissible behaviors.¹⁸ This higher level capacity of man to communicate in enduring form was more than a boon; with increasing populations and social complexities attendant thereto, it was an absolute essential to survival.¹⁹ Without

13. JOHN SALMOND, JURISPRUDENCE 30–31 (8th ed., Sweet & Maxwell, Ltd. 1930).

14. See generally RUSS VERSTEEG, EARLY MESOPOTAMIAN LAW (2000).

15. *Id.*

16. Yü Li, *supra* note 4, at 520.

17. A. Raphael Ndiaye, *Oral Tradition: From Collection to Digitization* 1 (65th International Federation of Library Associations & Institutions Conference) (1999).

18. CLIFFORD GEERTZ, THE INTERPRETATION OF CULTURES 67–68 (1973).

19. Of course, the human mentality did not come into being and thereupon structure culture around human needs. Rather, the development of an “encephalated nervous system . . .

symboling, the communication of norms could only survive in a state of enduring retardation, confined to the lumbering and limited means of oral communication. And without norms human life would fall into chaos. As put by Langer, “[Man] can adapt himself somehow to anything his imagination can cope with; but he cannot deal with Chaos.”²⁰ Increasingly, therefore, without symboling the generational and geographic transmittal of norms would lag behind societies’ expanding needs.

Thus, early man needed norms and proscriptions to permit his very survival. Even before the advent of kingdoms, there was a premium on keeping the “king’s peace,” even in large human groupings, which could be described as units of the earliest proto civilizations. These norms and proscriptions have been described loosely as “natural law,” and form the foundation of all modern law. Hobbes placed the source of natural law as “reason,” writing in *Leviathan*: “Reason suggesteth convenient Articles of Peace, upon which men may be drawn to agreement. These Articles are they which otherwise are called the Lawes of Nature.”²¹ T.E. Holland describes the rights conferred by natural law as these: “I. To personal safety and freedom[;] II. To society and control of one’s family and dependents[;] III. To reputation[;] IV. To advantages open to the community generally; such as the free exercise of one’s calling[;] V. To possession and ownership [; and] VI. To immunity from damage by fraud.”²²

The discussion to follow in the next section of this article will validate Hobbes’ recitation in that it will show that the norms and customs to which man turned his attention from the earliest times bear a similarity—regular if not perfect—to the natural law described by Hobbes and other later theorists.

II. PARTICULAR APPLICATIONS OF ANCIENT TORT LAW

A. *Nuisance and Disturbing the Peace*

Throughout primitive and ancient law are examples of strictures suggesting that the social group placed a greater premium on restoring order and good will than it did on determining that one disputant was right and

[and the] . . . capacity to create and use symbols” did not merely permit man to develop culture, it “demand[ed] that he do so if [man was] to function at all.” *Id.*

20. *Id.* at 99 (quoting SUSANNE K. LANGER, *PHILOSOPHY IN A NEW KEY* 287 (1942)).

21. THOMAS ERSKINE HOLLAND, *THE ELEMENTS OF JURISPRUDENCE* 34 (10th ed. 1910) (quoting THOMAS HOBBS, *LEVIATHAN* 63 (Univ. Press 1904) (1651)).

22. *Id.* at 169.

the other was wrong. In Australian aboriginal customary law, for example, the objective or resolution of a dispute would more often be the quieting of temper and the restoration of a placid community than it would be any strict identification of which party was at fault.²³

Tibetan folk law demonstrates numerous examples of remedies for what today might be termed “public nuisance.” In the *Rules of Punishment for Tibetans*, Rule No. 26, titled “Making Fire to Burn Wild Animals out of Their Lairs,” vests in the individual who discovers the infraction the remedy of fining the hunter “1 ‘nine.’”²⁴ Reposing the remedy in the person discovering the delict might at first seem like an example of the “special injury” rule in public nuisance, in that an individual may bring the claim. Yet in this “Fire Rule,” there is no articulated need that the reporting individual/claimant have suffered any injury at all.²⁵ Perhaps the rule simply stands as an example of a public nuisance proceeding that can be brought not only by public officials but also by individuals, with the inclusion of individuals seen as a prudential device to increase deterrence by increasing detection.

Penalty provisions referencing one or more “nines” or one or more “animals” were enforceable with reference to Rule No. 39, which detailed how these terms correlated with livestock:

One ‘nine’ means a combination of nine animals such as 2 horses, 2 *dso*, 2 three-year-old cows, 1 two-year-old cow. ‘Five animals’ means 1 *dso*, 1 cow, 1 three-year-old cow, and 2 two-year cows. The person who comes to demand these fines is entitled to receive as his fee 1 three-year-old cow from the guilty. In places where horses are not plentiful *dso* may be offered in their stead.²⁶

Further to the theme of norms directed principally at maintaining peace and quiet, among the Pygmies living in the Ituri Forest of the former Congo, there has long been a saying that “a noisy camp is a hungry camp.”²⁷ This proposition is so because the Pygmies are hunters, and as is self-evident, unnecessary noise drives the game deeper into the forest.²⁸ As it might be

23. Kenneth Maddock, *Aboriginal Customary Law*, in *ABORIGINES AND THE LAW* 212, 232 (Peter Hanks & Bryan Keon-Cohen eds., 1984). Maddock references the effect of “community opinion about the merits of a case as helping to decide the outcome through its influence on both the disputants and their potential supporters . . .” *Id.* (citing L. R. HIATT, *KINSHIP AND CONFLICT: A STUDY IN AN ABORIGINAL COMMUNITY OF NORTHERN ARNHEM LAND* 146–47 (1965)).

24. Yü Li, *supra* note 4, at 526.

25. *Id.*

26. *Id.* at 529.

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

28. *Id.*

today, and yet for different reasons, noise that is unreasonable in its volume, timing, or location may be treated as a nuisance. Anthropologist Colin Turnbull records an incident in which the father of an attractive village girl chased away a suitor and persisted in his tirade by taking a position in the middle of the village, calling for others to support him. That failing, the father took to rattling the roofs of the surrounding huts.²⁹ An elder interceded in a calm voice: "You are making too much noise—you are killing the forest, you are killing the hunt. It is for us older men to sleep at night and not to worry about the youngsters. They know what to do and what not to do."³⁰ Evidently displeased, the father nevertheless accepted the resolution.³¹

Under Roman Law, the *Institutes of Justinian* included rules that reveal numerous restrictions against the imposition of one's will over the rights of a neighbor. Specifically as to urban estates is Book II, Title III, para. 1, in which there is a prohibition on the obstruction of a neighbor's view.³² In another notable example, pertaining to what would today be called the law of private nuisance or trespass, a 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, Title III, para. 4, the *Institutes* provide that one wishing to create such a right of usage should do so by pacts and stipulations.³³ A testator of land may impose any such agreements reached upon his heirs, including limitations upon building height, obstruction of light, introduction of a beam into a common wall, the construction of a catch for a cistern, an easement of passage, or a right of way to water.³⁴ These last examples reflect a clear preference for *ex ante* bargaining over economically wasteful *ex post* dispute resolution. The provision permitting the testator to bind his heirs to any such agreement is additionally efficient in a manner akin to the approach that was taken later and famously by Justice Bergen in the cement plant nuisance case of *Boomer v. Atlantic Cement Co.*,³⁵ who ensured that the award of damages would be indeed a one-time resolution of the dispute by requiring that the disposition of the claim be entered and recorded as a permanent servitude on the land.

29. *Id.* at 119.

30. *Id.*

31. *Id.*

32. THE INSTITUTES OF JUSTINIAN bk. 2, tit. 3, para. 1 (JAC Thomas trans. North Holland Publishing Co. 1975).

33. *Id.* at bk. 2, tit. 3, para. 4.

34. *Id.*

35. 257 N.E.2d 870 (N.Y. 1970).

As to private nuisance in ancient Mesopotamia, the codified customary law provided specifically for redress should one's irrigation waters overflow onto another's property or crops. Particularly harsh legal consequences might be visited upon the landowner who failed to contain his irrigation canals, as flooding of the water might "result not only in leaving crops and cattle dry and parched in one part, but also widespread floods in another part of a district."³⁶ In a simple case only involving damaged grain, replacement of a like amount might give sufficient remedy.³⁷ But an unmistakable message of potentially severe penalties would be clear to those knowing that should the careless farmer be unable to replace the grain, the neighbors might be permitted to sell his property and sell him into slavery to achieve justice.³⁸

B. Manslaughter or Wrongful Death

At Sura 4, the Koran prohibits, unsurprisingly, the intentional killing of a believer.³⁹ In traditional Islamic law, the unintended killing of another would warrant payment of a full *diyet*, or blood-money, set at 3.8 grams of silver.⁴⁰ Should a believer be killed by "mischance," i.e., accident, the responsible party "shall be bound to free a believer from slavery; and the blood-money shall be paid to the family of the slain, unless they convert it into alms."⁴¹ Killing in self-defense would be unpunished. Lawrence Rosen gives an example of the limitations on the defense with the example of one Zeyd, who attacked Amr. Reviewed by the *mufti*, it was noted that Amr could have rescued himself by calling for help, thus denying him the privilege of self-defense.⁴²

There are numerous Eastern examples of the treatment of unintentional killing as an offense redressable in money or other damages. In ancient India, if a person were accidentally killed by an animal-drawn vehicle, the driver would be subjected to the same monetary liability as would be

36. VERSTEEG, *supra* note 14, at 136 (quoting G.R. DRIVER & JOHN C. MILLS, *THE BABYLONIAN LAWS* 152 (1952)).

37. *Id.* (citing *Laws of Hammurabi* § 53).

38. *Id.* (citing *Laws of Hammurabi* § 53); see also Raymond Westbrook, *Slave and Master in Ancient Near Eastern Law*, 70 CHI.-KENT L. REV. 1631, 1644 (1995).

39. THE KORAN, 4:93 (J.M. Rodwell trans., Everyman 1994).

40. HAIM GERBER, *STATE, SOCIETY, AND LAW IN ISLAM* 33 (1994).

41. THE KORAN, *supra* note 39, at 4:93.

42. GERBER, *supra* note 40, at 52 (citing Lawrence Rosen, *Responsibility and Compensatory Justice in Arab Law and Culture*, in SEMIOTICS, SELF, AND SOCIETY 101-19 (Benjamin Lee & Greg Urban eds., 1989)).

imposed upon a thief of a chattel of equivalent value.⁴³ In China, for injuries resulting in death, traditional law distinguished between intentional killing and accidental killing. *T'ang Code* Article 339 provided that “[a]ll cases of accidentally (*kuo shih*) killing or injuring someone follow the manner in which the death occurs and treat as redeemable.”⁴⁴ By “redeemable” it is meant that the offense may be expiated by the payment of money to the victim’s family.⁴⁵ The analogous provision in the *Ch’ing Code* describes accidental killing (*wu sha*) in the context of hunting for game (*hsi sha*).⁴⁶ It states that for an accidental killing the punishment should be the same as for a killing in a fight, except that “redemption is permitted.”⁴⁷ The *Ch’ing Code* gives examples of an accidental death such as: “where one is shooting wild animals or for some reason is throwing bricks or tiles”; climbing and one’s fall causes others to fall; navigating a boat by sail, riding a horse that becomes frightened, driving a cart downhill, or lifting an object when “[one] lacks the strength to sustain it and someone else is harmed.”⁴⁸ In each such instance, when “there has been no intention to harm,” the Code provides that “the sentence is to conform to the punishment for killing or injuring in a fight,” except that redemption is permitted, with “the money to be given to the family of the person killed or injured as a contribution to funeral or medical expenses.”⁴⁹

C. Assault and Battery

It is a historical verity that intentional battery is an offense that creates a high risk of retaliation, or self-help, or “blood feud” between kinship groups. Yet some native Indian groups even while making allowance for such violent responses, provided simultaneously for the peaceable intercession of village council.⁵⁰ In the Asian context, numerous Indian groups, in contrast, demonstrate, without exceptions, “a general disapproval of ‘retaliation as a means of obtaining justice.’”⁵¹

43. THE LAW CODE OF MANU 145 (Patrick Olivelle trans., Oxford University Press 2004) [hereinafter CODE OF MANU].

44. GEOFFREY MACCORMACK, THE SPIRIT OF TRADITIONAL CHINESE LAW 38 (1996).

45. *Id.* at 39.

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.*

50. Upendra Baxi, *People’s Law in India – The Hindu Society*, in ASIAN INDIGENOUS LAW: IN INTERACTION WITH RECEIVED LAW 251 (Masaji Chiba ed., 1986) [hereinafter ASIAN INDIGENOUS LAW] (addressing indigenous law governing the Konyak Nagas of India).

51. *Id.* at 253 (reciting the Law of Gond in India).

Putting aside its punishment of death for one who strikes his mother or father,⁵² under the Torah one who inflicts a direct nonmortal blow to another will not be liable if the victim is able to get up and about, “even with a stick,” providing an interesting early invocation of the principle *de minimis non curat lex*.⁵³ If, however, the injury is sufficiently serious that the victim is temporarily incapacitated, the aggressor “must compensate him . . . for his enforced inactivity, and care for him until he is completely cured.”⁵⁴ This approach contemplates not only recovery for what is today termed economic loss (compensation for “enforced inactivity”), but also rehabilitation expenses.

In Islamic law, compensatory justice for injurious battery might provide for damages according to a schedule keyed to the severity of the harm, rather as does modern workers compensation. Liability might be according to *diyet*, or blood-money.⁵⁵

Full blood-money due for the unintentional death of the victim was set at 10,000 *dirham*, or 3.8 grams of silver.⁵⁶ Serious injury to the hand, the leg, or the eye was compensable with half blood-money.⁵⁷ Loss of a tooth might warrant 1/20 blood-money.⁵⁸

The Koran is not pacifistic by any means, and does not feign to offer by its rules remedies to persons that may avoid injury by resort to self-help, or by means of retaliation. While the Koran explains that God does not countenance attacking others first, Muslims may “fight for the cause of God against those who fight against you[.]”⁵⁹ Is it then paradoxical that it may be true that, as some scholars claim, “the function of law in Islam is merely to get people back on a negotiating track”?⁶⁰ This perception pertains instead to a goal that the state attend to affairs of government, not religion. Islam, in turn, attends to religion, and not to the state, and that it is in these subject matters that the “negotiating” ideal obtains.⁶¹ Within the tribal

52. “Anyone who strikes his father or mother must die. Anyone who abducts a man—whether he has sold him or is found in possession of him—must die. Anyone who curses father or mother must die.” Exod. 21:15–17 (The Jerusalem Bible).

53. *Id.* at 21:19.

54. *Id.* at 21:18–19.

55. GERBER, *supra* note 40, at 33.

56. *Id.*

57. *Id.* at 35.

58. *Id.*

59. THE KORAN, *supra* note 39, at 2:186.

60. LAWRENCE ROSEN, THE ANTHROPOLOGY OF JUSTICE 61 (1989), *quoted in* GERBER, *supra* note 40, at 59. “In the classical Islamic theory of the state . . . [T]he state was seen not as the instrument for the application of law, nor were the courts . . . envisioned as vehicles for economic redistribution or the construction of a particular political order.” *Id.*

61. *Id.*

customary law of the Awlad Ali of Egypt, for battery resulting in injury, *diyah* or blood-money, would be paid to the family of the victim, together with *kebara*, calculated in money and animals.⁶²

Under the *Rules of Punishment for Tibetans*, battery could incur variable fines depending upon the severity of injury. A fine of three “nines” would be levied for a fight resulting in an injury to the eye, hand, or foot. If the injury was such as could be cured, the fine was one “nine,” as was true also for a fight causing broken teeth, or an abortion.⁶³ When hair would be torn off, the fine was five animals.⁶⁴

In ancient Indian law, the “low born” were treated very differentially than were the Brahmins. For injurious assaults against one of a superior caste, punishment ranged from amputation of the limb used by the assailant to banishment or exile, or for spitting on one’s superior, the cutting off of the assailant’s lips.⁶⁵ Other aggression causing injury and pain to another (or to an animal) called for the king to “impose a punishment proportionate to the severity of the pain.”⁶⁶

Lastly, pursuant to Greek law, striking another gave rise to a private cause of action in battery (*dike aikeias*).⁶⁷ If liability was found, it was ordinarily against the one striking the first blow.⁶⁸ The penalty was an amount payable in money damages as assessed by a jury.⁶⁹

D. Trespass to Land and Chattels

In the authoritative and ancient work *Manu*, entitled alternatively *The Law Code of Manu* or *Manava Dharmasastra*, the text references ancient Indian law governing the trespass of animals.⁷⁰ For such fields surrounding a settlement as are left open, any farm animal damage to crops should not be punished.⁷¹ To receive any protection for one’s fields, a person “should erect there a fence over which a camel cannot look and cover every hole through which a dog or pig could poke its head.”⁷² For damage caused by

62. ASIAN INDIGENOUS LAW, *supra* note 50, at 65.

63. Yü Li, *supra* note 4, at 526 (citing Rule 28, *Rules of Punishment for Tibetans*).

64. *Id.*

65. CODE OF MANU, *supra* note 43, at 144.

66. *Id.*

67. MACDOWELL, *supra* note 2, at 123 (citing Demosthenes, 47.45–7, 47.64; Isokrates, 20.19).

68. *Id.*

69. *Id.*

70. CODE OF MANU, *supra* note 43, at 141.

71. *Id.*

72. *Id.*

herded livestock to such fenced land, a fine of 100 panas should be imposed—and if the livestock are unherded, they should be impounded.⁷³ For livestock damage to other fields, “one and a half [p]anas should be assessed for each animal,” and the owner of the land should be compensated for any crop loss.⁷⁴

Prior to the *Laws of Hammurabi*, the *Laws of King Ur-Nammu* and the *Laws of Lipit-Ishtar* were published.⁷⁵ Read together as principal sources of the law of ancient Babylonia, there is seen an emphasis on the protection of person, property, and commerce from forced divestiture of a right or a prerogative.⁷⁶ Regarding navigation, a collision between two boats on a body of water having a perceptible upstream and downstream would trigger a presumption of fault on the part of the upstream captain, on the logic—faulty or not—that the upstream captain had a greater opportunity to reduce avoidable accidents than did his counterpart, as the former would be traveling at a slower speed.⁷⁷

Anglo-American common law trespass includes numerous instances in which a landowner is held liable in trespass if a structure or an activity on the first individual's property causes damages, by diversion of water or otherwise, to the land of another. The account *Against Kallikles* is found in Athenian law, recorded by Demosthenes, in which it appears that Kallikles and a neighbor both lived on a hillside.⁷⁸ Kallikles's neighbor constructed a wall to protect his land from water runoff from rainfall, which served this purpose, but also diverted water onto his Kallikles's property.⁷⁹ Kallikles brought a suit because his property was damaged due to his neighbor's wall.⁸⁰ By Demosthenes' account, if found guilty for this trespass, Kallikles would be fined in damages (*dike blabes*) a sum of 1000 drachmas.⁸¹

In ancient Athens, an action for destruction of, or damage to, chattels was defined in a way as to merge the modern notions of trespass to chattels and conversion. An action for “damage” could be brought for any “physical

73. *Id.*

74. *Id.*

75. See VERSTEEG, *supra* note 14, at 18.

76. *Id.* at 22–26.

77. *Id.* at 130 (referencing G. R. DRIVER AND JOHN C. MILES, *THE BABYLONIAN LAWS* 431–32 (1952)). The author questions the reliability of this, as to the author's limited knowledge, in an encounter with an upstream boat, the downstream boat is the boat fighting the current. Irrespective, the point made is the same. *Id.*

78. MACDOWELL, *supra* note 2, at 136–37 (citing H. J. Wolff, *The Dikh Blabhs in Demosthenes*, O.R., LV. 64 *Am. J. Philology* 316 (1943)).

79. *Id.*

80. *Id.*

81. *Id.* at 136–37.

damage to a piece of property, such as to destroy it or make it useless or less valuable than before, but without taking it away”⁸²

Tibetan folk law includes methods of economic recovery, recovery in kind, and punitive consequences that bespeak strong deterrence objectives.⁸³ Should one’s trespassing cattle damage another’s field, the owner of the field may seize the cattle pending payment for the damage.⁸⁴ Should the land at issue not be a field but instead a pasture utilized by nomads for the grazing of their animals, Tibetan folk law proscribes the trespassing of one nomadic tribe’s cattle on the pasture of another tribe. Again, the trespassing cattle may be seized pending payment for the harm done. Should the grazing be done in the course of a caravan’s passage through the territory of another tribe, a pristinely market-based transaction is expected. The traveling tribe offers to the local tribal chieftain a gift of “grass money,” to compensate for the grass the herd is expected to graze.⁸⁵

The *Rules of Punishment for Tibetans* contains provisions for the conversion of another’s animals.⁸⁶ Rule No. 30, “Injury to Other People’s Animals,” states that should the animal of another be killed, the perpetrator is fined one “nine,” and also must pay the full value of the animal to the owner.⁸⁷ If a horse is shot and killed, two horses must be given in compensation. If the horse is only injured, a fine of a two-year-old cow is levied.⁸⁸

In ancient India, should a cart or coach kill a large animal (such as a cow or an elephant), its owner (if the driver was unskilled) would be fined half the amount that would be applicable if the offense had been theft.⁸⁹ For the similar death of a small farm animal, the fine would be 200 panas; for a “beautiful animal” or a bird, the fine would be 50 panas, and for a donkey, a sheep or a goat, 5 māsas.⁹⁰

E. Conversion or Theft

During the Egyptian Sixth Dynasty, from approximately 2460 to 2200 B.C., the law bled together the notions of theft as a criminal action as

82. *Id.* at 149 (quoting Demosthenes, *Against Kallikles* 21:50).

83. *See generally* Yü Li, *supra* note 4.

84. *Id.* at 516.

85. *Id.* at 516–17.

86. *Id.* at 527.

87. *Id.*

88. *Id.*

89. CODE OF MANU, *supra* note 43, at 145.

90. *Id.*

opposed to conversion, to be prosecuted by a civil complainant.⁹¹ During the reign of Pepi I, c. 2325, a prosecutor named Weni was appointed, and he presided over these and other matters.⁹² His recitations of the suits brought before him gives evidence of the law employed and the remedies exacted.⁹³ Weni recounts being sent by the king “to prevent [the army] from taking bread or sandals from a wayfarer, to prevent any one of them from taking a loin-cloth from any village, [and] to prevent any one of them from taking any goat from any people.”⁹⁴ Upon a finding of responsibility, the remedy exacted would typically be that of requiring the thief to return any stolen goods to the victim, and also payment to the victim of money damages in the amount of two to three times the value of the property stolen.⁹⁵

For the wrong of conversion, ancient Greece followed an approach consistent with that of so-called “civilized” societies and pre-literate societies alike throughout the world. That approach was a two-pronged response to conversion of chattels.⁹⁶ First, the wrongdoer must give up the wrongfully gained property. Second, the perpetrator should be punished.⁹⁷ Following successful prosecution of a claim for theft (*dike klopēs*), the punishment might be the payment of a fine gauged at twice the value of the property.⁹⁸ In egregious instances, an additional penalty of time in public stocks might be imposed.⁹⁹

For some theft, the remedy would be restitution in some fixed amount, or in a multiple of the value of what was stolen.¹⁰⁰ The same would be required of any knowing receiver of any such stolen goods.¹⁰¹ In comparison, among Indian indigenous groups, cash fines might be levied for petty thefts.¹⁰²

91. See RUSS VERSTEEG, *LAW IN ANCIENT EGYPT* 151–52 (2002) [hereinafter *LAW IN ANCIENT EGYPT*]. This absence of a distinction between which rules might be criminal, and enforced by the state, and which would be civil, leaving the wronged individual to pursue a claim for damages, continued through Roman law and beyond. See generally M. Stuart Madden, *Graeco-Roman Antecedents of Modern Tort Law*, BRANDEIS L.J. (forthcoming 2006).

92. *LAW IN ANCIENT EGYPT*, *supra* note 91, at 85, 161.

93. *Id.* at 161.

94. *Id.* (quoting SIR ALAN GARDINER, *EGYPT OF THE PHARAOHS* 96 (1961)).

95. *Id.* at 162 (citing ANDREA MCDOWELL, *JURISDICTION IN THE WORKMEN’S COMMUNITY OF DEIR EL-MEDINA* 230 (1990)).

96. MCDOWELL, *supra* note 2, at 147–48.

97. *Id.*

98. *Id.* at 148 (citing Demosthenes, *Against Timocrates* 24.105. 24.114; Lysias, *Against Philocrates* 29.11).

99. *Id.*

100. Raymond Westbrook, *The Character of Ancient Near Eastern Law*, in *A HISTORY OF ANCIENT NEAR EASTERN LAW* 1, 81 (Raymond Westbrook ed., 2003).

101. *Id.*; MCDOWELL, *supra* note 2, at 148.

102. *ASIAN INDIGENOUS LAW*, *supra* note 50, at 216–39.

As with Native Americans, among certain African tribes theft is rare.¹⁰³ One anthropologist assigned one reason to be that the tribal members have few individual possessions.¹⁰⁴ However, other delicts resembling theft might be treated with great seriousness. Among the Pygmies living in the Ituri Forest, mentioned earlier, of the former Congo, the men hunted as groups, with some acting as beaters to drive game in a certain direction, and the others setting nets at agreed-upon locations.¹⁰⁵ As Colin Turnbull describes it, "In a small and tightly knit hunting band, survival can be achieved only by the closest co-operation and by an elaborate system of reciprocal obligations which insures that everyone has some share in the day's catch. Some days one gets more than others, but nobody ever goes without."¹⁰⁶ In one incident that Turnbull recorded, a member of the hunting party set up his nets in a place that garnered for him a comparative advantage over the others. Brought to task, the hunter returned to camp and "ordered his wife to hand over the spoils."¹⁰⁷ Interestingly, the wrongdoer's amenability to accept this result might have been affected by his recognition that he could not, as a practical matter, defy it.¹⁰⁸ He likely recognized that he was not in a position to break away from his group, as "his band of four or five families was too small to make an efficient hunting unit."¹⁰⁹ More generally, for theft among the Pygmies, the punishment for the frustrated nocturnal theft of food from a neighbor's pot, might include public whipping or shunning.¹¹⁰

All bodies of folk law reveal norms against conversion. For Tibetans, pursuant to the *Rules for Punishment of Tibetans*, a theft of domestic animals such as "dogs [or] pigs" could result in a fine, recoverable by the wronged party, of five animals.¹¹¹ Theft of other domestic animals, such as fowl, was treated variously, with conversion of fowls punishable by a fine of a three-year-old cow.¹¹² Additionally, in each instance the stolen animal had to be returned.¹¹³ This latter requirement converts the restitutionary objective of the rule into a hybrid rule that is at once restitutionary and punitive.

103. TURNBULL, *supra* note 27, at 120.

104. *Id.*

105. *See id.* at 97–101.

106. *Id.* at 107.

107. *Id.*

108. *Id.*

109. *Id.*

110. *See id.* at 120–21.

111. Yü Li, *supra* note 4, at 525.

112. *Id.*

113. *Id.*

For theft of personalty ("gold, silver, sable, otter-skin, hides, money, cloth, food, etc."),¹¹⁴ the malefactor was required to return property "of equal value." In addition, fines would be imposed, keyed to the value of the stolen goods, e.g., three "nines" for the theft of a two-and-one-half-year-old cow; one "nine" for a sheep; and a three-year-old cow for the theft of an animal of lesser value than a sheep.¹¹⁵

Conversion or theft is prohibited of Muslims. As expressed in Sura 7, "Give . . . the full in measures and weights; take from no man his chattels, and commit no disorder on the earth after it has been made so good."¹¹⁶ Muslims on pilgrimage are instructed to kill no game in the lands through which they journey. If such game is purposefully killed, the person responsible shall compensate for it "in domestic animals of equal value (as determined by two persons in the group), or feed the poor, or fast "that he may taste the ill consequences of his deed."¹¹⁷ Although hunting is prohibited for pilgrims,¹¹⁸ it is lawful for them "to fish in the sea."¹¹⁹ The same approach, with variations, is found in the customary law of other populations. Among the agricultural community of the Konyak Nagas of India, conversion might be punished by fines, but the stricter penalty of banishment might be reserved for chronic offenders.¹²⁰

Folk stories, too, have long carried social norms from generation to generation. Joel Chandler Harris, in his writing of the Uncle Remus stories, comments upon how story and fable transport the listener from the common reality of known things into the emotive state of feeling—wherein lay the enduring power of oral history and fable.¹²¹

One example might be that of an Indian folk tale, in which even the theft of a mason's services creates an opportunity for some sanctimonious advice

114. *Id.*

115. *Id.*

116. THE KORAN, *supra* note 39, at 7:83.

117. *Id.* at 5:96.

118. *Id.*; *see also id.* at 5:97.

119. *Id.* at 5:97.

120. ASIAN INDIGENOUS LAW, *supra* note 50, at 251.

121. In the course of one story in which Uncle Remus finds himself, in the course of telling a story, obliged to feint and weave in response to a boy's inquiry, Harris writes:

Indeed, one of the queerest results of the old man's manner of telling his stories — the charm of which cannot be reproduced in cold type — was that all the animals, and all of the various characters that figured therein, were taken out of the reality which we know, and transported bodily into that realm of reality which we feel: the reality that lies far beyond the commonplace, everyday facts that constitute not the least of our worries.

JOEL CHANDLER HARRIS, UNCLE REMUS RETURNS 62–63 (1918).

on victim responsibility.¹²² The story, entitled *The Burglar's Gift*, describes a mason who found himself so in need of work that he agreed to build a cellar for a man of suspicious character; indeed, "he was reported to be a thief and burglar."¹²³ The mason completed the work and was invited to the burglar's home to receive "his humble reward."¹²⁴ Arriving the following morning, the mason was distressed to see that he was the only guest, and his alarm only grew greater as the burglar's tone grew hostile and he began to beat the mason.¹²⁵

"I shall return to you every pice [sic] taken in wages," said [the mason,] "and the greatest reward for me is to let me go." But the appeal fell on deaf ears and the host relished every lash he gave to the mason. The latter invoked all the holy angels, the Holy Book and God to rid himself of the present misfortune. At last the burglar seemed to have got tired and stopped.¹²⁶

The beating suspended, the mason gathered himself to go home, only to have the burglar bid him to sit down.¹²⁷ After a fine meal, the burglar presented the mason "a malmal (turban) and a five rupee note by way of reward."¹²⁸ While confused at "this paradoxical behaviour of the burglar," the mason accepted these gifts and asked again to go.¹²⁹ "I shall be most happy to bid you good-bye after I place a valuable and an everlasting gift at your feet," said the burglar . . . The burglar continued, "You did not ask me why I belaboured you so heartlessly?"¹³⁰ To both of these declarations, the mason did not respond.¹³¹

"Look," said the burglar, "what I gave you as tokens of my appreciation will last a short while and disappear. What I want to give you now will last for ever and is sure to pass from one generation to another, and why I gave you a beating thus was to imprint the lesson indelibly on your mind and body so that you never lose sight of the great truth. The lesson I want you to learn is that you need not fear thieves and burglars as long as your doors and windows are well bolted and hasped. On the basis of my

122. S. L. SADHU, FOLK TALES FROM KASHMIR, *The Burglar's Gift*, Chap. 10, <http://www.koausa.org/Folk/Sadhu/> (last visited Oct. 14, 2005).

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.*

130. *Id.*

131. *Id.*

professional experience my advice to you is that you should always keep your windows and doors properly hasped and bolted at night to be free of the fear of thieves. You will please excuse me for the beating but the lesson had to be rubbed in thoroughly.”¹³²

F. Negligence

Some scholars assert that the concept of “the reasonable man” has been common to all ancient cultures.¹³³ The historical record seems to provide support for this. For example, under ancient Mesopotamian law, a wrongdoer that negligently caused personal injury might be responsible for the person’s medical expenses, with provision too that the duration of the remedy take into account for the time the victim was invalidated.¹³⁴ This rule, it is seen, is quite similar to that contained in the *Code of the Covenant* referenced above.¹³⁵

Further evidence in early Mesopotamian law of the negligence concept of duty is found in the identification of a neighbor’s duty as it might pertain to discourage neighbors from permitting their unoccupied land to elevate a risk of trespass or burglary to the nearby property. The *Law of Lipit-Ishtar* provided that should a robbery occur, the inattentive neighbor, who had notice that his unattended property provided access to the complainant’s property by potential robbers, would be liable for any harm to the complainant’s home or property.¹³⁶

The *Rules of Punishment for Tibetans* No. 26, referenced earlier regarding its public nuisance implications,¹³⁷ also provided that witnesses (those “in sight”) of a “fire[] caused by carelessness” would be “entitled to fine the guilty [five] animals.”¹³⁸ If the carelessly started fire killed an individual, the fine was one “nine.”¹³⁹ Those carelessly handling firearms “without justifiable causes,” and irrespective of injury, could be fined

132. *Id.*

133. GERBER, *supra* note 40, at 34. The author therein references the administration of Islamic law of the Byzantine Empire, a codification of ancient customary law, which contains reference to a dispute arising from a claim of a coachman who was alleged to have beaten his horses so severely that they bolted and injured a child. From the record it appears that the coachman was permitted to interpose the defense that he had acted reasonably, and the disputants were permitted to present evidence that he had not. *Id.*

134. Westbrook, *supra* note 100, at 82 (discussing the *Laws of Hammurabi* § 202, the *Hittite Law* § 10, and Exod. 21:18–19).

135. Exod., *supra* note 52, at 21:18–19.

136. VERSTEEG, *supra* note 14, at 135 (discussing Lipit-Ishtar para. 11).

137. Yü Li, *supra* note 4, at 526.

138. *Id.*

139. *Id.* For definitions of “nines,” see *supra* note 26 and accompanying text.

"[two] nines for *Ch'ienhu*, [one] nine for *Paihu*, [seven] animals for centurions, [five] animals for lesser centurions, and [three] animals for lesser elders and commoners."¹⁴⁰

The logic of the "failure to cover a ditch" cases that are a mainstay of modern torts casebooks is reflected in *Code of the Covenant* provisions declaring that should one leave a ditch uncovered and an ox or a donkey fall into it, he must pay the owner (although he would be permitted to keep the dead animal as his own!).¹⁴¹

Again with reference to harms done due to an actor's breach of a duty of reasonable care, in the law of ancient India, there were rules for accidents caused by animal-drawn vehicles.¹⁴² If the driver was unskilled and the accident was "due to the driver's incompetence," the owner of the vehicle "should be fined 200"; and "all the riders should be fined 100."¹⁴³ If the driver was skilled, he would sustain the fine.¹⁴⁴

G. Strict Liability

A commonly-cited provision of the *Laws of Hammurabi* treats the imposition of strict liability when one's animal injures another in this manner: "If an ox gores an ox and causes its death, the owners of both oxen shall divide the value of the live ox and the carcass of the dead ox."¹⁴⁵ Mosaic law provides similarly, and even more forcefully if the incident results in the death of a person: "If an ox gore[s] a man or a woman that they die, then the ox shall be surely stoned and his flesh shall not be eaten."¹⁴⁶ The proscription on eating the animal, which is permitted when an ox gores another ox, has been described as a recognition that "the animal has killed a superior in the cosmic order, namely a human being."¹⁴⁷ The entire remedy reveals the premium placed on (1) the cathartic importance of some civil remedies (not to mention modern criminal penalties), in this case the stoning of the animal; and (2) the importance invested in nature's order, i.e., forbidding eating the animal, surely an orderly and "dignified" end for such beasts, in that it offended such order.

140. *Id.*

141. Exod., *supra* note 52, at 21:33-34.

142. CODE OF MANU, *supra* note 43, at 144-45.

143. *Id.*

144. *Id.*

145. Westbrook, *supra* note 100, at 17.

146. SALMOND, *supra* note 13, at 431 (quoting Exod., *supra* note 52, at 21:28).

147. Westbrook, *supra* note 100, at 77.

The *Code of the Covenant* addresses the issue somewhat more particularly. There is no strict liability if the ox has not gored before. The penalty will be that the ox be stoned, and its flesh uneaten. If, on the other hand, the ox “has been in the habit of goring before,” and its owner is aware of this, if the ox kills “a man or woman, the ox must be stoned and its owner put to death.”¹⁴⁸ In a seeming endeavor to ameliorate such harsh consequences, the Code also states that if instead the careless owner has assigned to him a “ransom,” he must “pay whatever is imposed, to redeem his life.”¹⁴⁹ Deaths of children are treated with markedly less severity, as the payment of a ransom is the sole prescribed punishment, and the goring of a slave presumptively even less severely—the stoning of the ox and the payment of thirty shekels.¹⁵⁰

Such forms of strict liability have persisted to this day. Using an example of Salmond’s: “If my horse or my ox escapes from my land to that of another man, I am answerable for it without any proof of negligence.”¹⁵¹ While this application of strict liability for trespass may be based on a reasonable presumption of negligence upon such occurrences, Salmond suggests that its truer origins may be in a vicarious liability, placing upon the owner of property responsibility for injuries caused by such property, such as a master’s responsibility for the actions of his slaves under Roman law.¹⁵²

H. Defamation and False Witness

In the speech *Against Konon*, Demosthenes gives a very clear public order rationale for a civil action for slander in these words: “For instance, there are cases of slander; these, they say, were instituted in order that men who are abused should not be induced to hit one another.”¹⁵³

Several ancient cultures evidently considered defamation or false witness to have such a corrosive effect on the public peace and order as to require the most severe penalties. In ancient Egypt, one tried for defamation could, as today, interpose truth as a defense. Interestingly, if found liable, the libelant was not punished for this first transgression. Instead, he or she was required to take an “oath of mutilation,” covenanting that they would

148. Exod., *supra* note 52, at 21:28–30.

149. *Id.* at 21:30–31.

150. *Id.* at 21:31–32.

151. SALMOND, *supra* note 13, at 430–31, (citing *Ellis v. Loftus Iron Co.*, L. R. 10, C. P. 10 (1874)).

152. *Id.* at 431.

153. MACDOWELL, *supra* note 2, at 123 (quoting Demosthenes, *Against Konon* 54.17–19).

submit to amputation of their nose, ears, or both should they engage in a further transgression.¹⁵⁴ In the Koran, Sura 104 condemns “every backbiter, defamer.”¹⁵⁵ Though the believer may, as is common to cultures old and new, trust in amassed wealth, the defamer is admonished to bear in mind “being flung into the Crushing Fire.”¹⁵⁶

Elsewhere, the Koran condemns anyone defaming a “virtuous” woman unless the author of the writing or utterance has four witnesses who support the account.¹⁵⁷ Without the witnesses, in which Sura 24 is seemingly more interested than whether or not the account is true, the responsible party will receive “fourscore stripes,” and is barred in perpetuity from giving testimony.¹⁵⁸ Should a husband accuse his wife, the word of God was to pay no heed to the testimony of witnesses and instead required the husband to first testify four times as to the truth of the accusation.¹⁵⁹ When the husband repeated the accusation the fifth time, should he be untruthful, “the malison of God be upon him.”¹⁶⁰ If in his fifth oath the husband speaks the truth, it will “call down the wrath of God” upon the wife.¹⁶¹ Republishers of a defamation too would face a “sore” punishment.¹⁶²

Variations in the severity of the response to a delict might turn upon the status of the victim. Under ancient Indian law, defamation of a Brahmin by one of a lesser caste might be punished corporally.¹⁶³ For more prosaic libel and slander between social equivalents, a fine would be the suitable punishment.¹⁶⁴ This differentiation seems to be the exception that tests the rule of equal protection often, but not invariably, represented throughout ancient law.¹⁶⁵

154. LAW IN ANCIENT EGYPT, *supra* note 91, at 179 (citing Ellen Bedell, Criminal Law in the Egyptian Ramesside Period 138 (1973) (unpublished Ph.D. dissertation, Brandeis University)).

155. THE KORAN, *supra* note 39, at 104:1.

156. *Id.* at 104:4.

157. *Id.* at 24:4.

158. *Id.*

159. *Id.* at 24:6.

160. *Id.* at 24:7.

161. *Id.* at 24:9.

162. *Id.* at 24:18.

163. CODE OF MANU, *supra* note 43, at 143.

164. “If a man arrogantly makes false statements about someone’s learning, country, caste, occupation, or physical features, he should be fined 200. If a man calls someone ‘one-eyed,’ ‘lame,’ or some other similar name, he should be fined at least [one] *karsapana*, even if what he says is true.” *Id.* It is noteworthy that these examples hew to the modern limitation upon defamation as relating solely to false statements of fact, and excluding opinion, such as, e.g., “miserly” or stupid.”

165. For example, inscribed on the tomb of the Egyptian Vizier Rekhmire (1479-1425 B.C.) is: “I judged both [the insignificant] and the influential; I rescued the weak man from the

Pursuant to Mesopotamian law, should the slander pertain to the sexual honor of another, the punishment might be shaming or flogging.¹⁶⁶ This was true also of the Torah.¹⁶⁷ Later scholars, including Locke, would describe such rules as those of “positive morality,”¹⁶⁸ or “the law of opinion or of reputation.”¹⁶⁹ These rules “consist[] of the rules imposed by society upon its members and enforced by public censure or disapprobation.”¹⁷⁰

I. Deceit and False Report

In our time, we can refer to the children’s expression “Cross my heart and hope to die” as an affirmation of the community’s disapproval of deceit.¹⁷¹ The proscription of trespass to chattels or conversion, the occurrence of which has always been common to the playground, remains imbedded in several children’s rhymes that indicate a strong community aversion to any initiative by a giver of goods to engage in self-help to regain possession.¹⁷² One such folk axiom is found in a French children’s rhyme, reduced in writing as “[o]nce given, stays given; [t]aking away is stealing!”¹⁷³ More severe consequences are suggested in a saying attributed to Dutch, Flemish, German and French children, to this effect: “Once given, taken away, [g]o to Hell three times.”¹⁷⁴

Prohibitions upon the making of false reports have been quite common throughout legal systems or groupings of legal norms. The Koran provides that one committing a crime or an “involuntary fault” (suggesting negligence or even blamelessness), but who then “layeth [the blame] on the

strong man; I deflected the fury of the evil man and subdued the greedy man in his hour . . . I was not at all deaf to the indigent.” LAW IN ANCIENT EGYPT, *supra* note 91, at 23 (quoting T.G.H. JAMES, PHARAOH’S PEOPLE: SCENES FROM LIFE IN IMPERIAL EGYPT 57 (1984)).

166. Westbrook, *supra* note 100, at 81 (citing the *Laws of Hammurabi* § 127 and the *Middle Assyrian Laws* §§ 17–19).

167. Deut. 22:13–19 (The Jerusalem Bible).

168. SALMOND, *supra* note 13, at 21.

169. *Id.* (referring to JOHN LOCKE, AN ESSAY CONCERNING HUMANE UNDERSTANDING, bk. 2, ch. 28 § 7 (5th ed. 1848)). The inclusion here of a potential punishment for opinion may be explained by the sanctity accorded one’s reputation for sexual probity. This would in later times be manifest in such rules of law defining slander per se as including false statements as to another’s sexual conduct.

170. JOHN SALMOND, JURISPRUDENCE 47 (2d ed. 1907).

171. See A.F. Chamberlain, *Legal Folklore of Children*, 16 J. AM. FOLKLORE 280 (1903), reprinted in FOLK LAW, *supra* note 4, at 417–19.

172. In general terms, as has often been put, “[t]he common law does not favor self help.” A.W.B. Simpson, *The Common Law and Legal Theory*, in OXFORD ESSAYS IN JURISPRUDENCE (1973), reprinted in FOLK LAW, *supra* note 4, at 121.

173. Chamberlain, *supra* note 171, at 419.

174. *Id.*

innocent” will be punished by being required to “bear the guilt of calumny and of a manifest crime.”¹⁷⁵

In Tibetan folk law, deceit regarding the ownership of animals was punishable more severely than even the intentional killing of an animal. Within its rules regarding lost animals, Rule 31 of the *Rules of Punishment for Tibetans* provided for a fine of three “nines” for anyone “falsely claim[ing] possession of such an animal,” and one “nine” for anyone attempting to hide them.¹⁷⁶ In other instances, too, the punishment of deceit exceeded that applicable to delicts involving arguably less economic dislocation. An individual falsely reporting a theft could be fined three “nines,” with the fine distributable equally “between the elder in charge and the person falsely charged.”¹⁷⁷ Vigilance against deceit is manifest further in Rule 19, pertaining to land transfers. For any new transferee who discovers “traces” of another’s pasturage within three days of the vesting of the transferred interest, the new transferee must so report within three days. The transferor must thereupon “swear an oath” that no competing pasturage or third-party rights exist on the land.¹⁷⁸ The acceleration of the “limitations” period for a claim arising from this wrong seems sensible in a setting in which the effect of grazing will disappear within days, and with it, the possibility of proof.

The Koran reflects God’s prohibition of deceit, as followers are enjoined to “be not false in your own engagements, with your own knowledge”¹⁷⁹ Additionally, in the circumstance of a death, the Koran details the testimony that must be sworn and the accompanying safeguards against deceit. Two “just” men are to be chosen to swear as to the circumstances of the death, and included in that oath should be words to the effect that “We will not take a bribe though the party be of kin to us”¹⁸⁰ Importantly, any oath of the first two men selected can be challenged “if it shall be made clear that both have been guilty of a falsehood”¹⁸¹ Should this occur, two other men “nearest in blood” to the first affiants will speak to the truth.¹⁸² The scripture notes with satisfaction that the prospect of a challenge to the veracity of the first oaths will facilitate truth telling in the first

175. THE KORAN, *supra* note 39, at 4:110–120.

176. Yü Li, *supra* note 4, at 527.

177. *Id.* at 526.

178. *Id.* at 524.

179. THE KORAN, *supra* note 39, at 8:27.

180. *Id.* at 5:106.

181. *Id.* at 5:107.

182. *Id.*

instance: "Thus will it be easier for men to bear a true witness, or fear lest after their oath another oath be given."¹⁸³

Differing from but related to deceit, an act of "imposture" is interpreted to mean taking undue advantage of another through the device of being an "imposter." It is logical that in defense of the faith adherents to the Koran would be sensitive to claims that they themselves were imposters for proclaiming Muhammad's words as those of God. To this potential claim, Sura 10 reinforces the confidence of believers in declaring what they believe to be true in matters of faith with the suggestion that "if they charge thee with imposture, then SAY: My work for me, and your work for you. Ye are clear of that which I do, and I am clear of that which ye do."¹⁸⁴ Elsewhere at Sura 22 believers castigated as imposters are reminded that they can recall to their accusers that so many of the great and accepted prophets, including Abraham, Noah, and others, were so charged and ultimately prevailed.¹⁸⁵

J. Covetousness and Hoarding

Among certain Aleutian groups, cultural and economic norms developed to protect limited resources and to deter noncooperative appropriation or hoarding.¹⁸⁶ The indigenous tribes considered natural resources such as wildlife not the subject of private, but rather of common ownership, a form of distributional necessity among subsistence cultures.¹⁸⁷ The harsh subsistence environment in which the Aleuts dwelt generated rules adhering to strict efficiency norms.¹⁸⁸ Among such groups, in the words of one scholar, "life is hard and the margin of safety small, and unproductive members of society cannot be supported."¹⁸⁹ It will be seen that to the characterization of "unproductive" can be added those whose conduct disrupts the allocative efficiencies of the group.¹⁹⁰ Thus, these norms

183. *Id.* at 5:108.

184. *Id.* at 10:42.

185. *Id.* at 22:42-44.

186. DENNIS LLOYD, *THE IDEA OF LAW* 236-37 (1976).

187. This approach is carried forward today in the United States' recognition of collectively-held aboriginal rights to certain fish, wildlife, and marine mammals. Along kindred lines, the protection of similar collective rights is the very essence of the law of public nuisance, both antiquarian and modern, providing, in different circumstances, remedies against interference with rights held jointly by the public in matters of health, safety, and welfare. *See generally* JOHN L. DIAMOND ET AL., *UNDERSTANDING TORTS* (2d ed. 2001).

188. *See* LLOYD, *supra* note 186, at 237.

189. *Id.* (quoting E. ADAMSON HOEBEL, *THE LAW OF PRIMITIVE MAN* (1954)).

190. *See id.*

penalize resource overreaching and the arrogation of resources beyond one's needs.¹⁹¹

Similarly, the Aleutians considered the treatment of land as commonly held, rather than susceptible of private ownership, to be the most efficient manner of maximizing hunting resources. Further, although captured game and hunting instruments might be considered private property, the community was "strongly hostile to the idea of anybody accumulating too much property for himself[,] and thereby limiting the amount of property that [could] be effectively used in the community."¹⁹² The ordinary remedy might be confiscation.¹⁹³ The influential anthropologist Hoebel identified one Aleutian grouping that considered keeping an excess amount of goods as a "capital crime."¹⁹⁴

Muslims are warned against the vice of covetousness in such language as is found in Sura 113: "SAY: I betake me for refuge to the Lord of the DAYBREAK . . . against the mischief of the envier when he envieth."¹⁹⁵ Further, "Covet not the gifts by which God hath raised some of you above others. The men shall have a portion according to their deserts. The women shall have a portion according to their deserts. Of God, therefore, ask of his gifts."¹⁹⁶

An Indian folk tale relates the travails that may follow one who covets the wife of another. The story is titled *The Village Teacher*,¹⁹⁷ and is told in this way:

Following the passing of a village's old and respected teacher, there arrived a new teacher "gifted with all those qualities which make us look wistfully on our departed youth: energy, health, ambition, hope and vanity."¹⁹⁸

The vanity of the young school teacher and his condescension together prompted him to desire female companionship, and, in particular, a pretty and prosperous housewife. The woman's son attended the school teacher's school, and at the closing of school he would tell the boy: "Remember me to your mother."¹⁹⁹ The mother, being both intelligent and perceptive, deduced the teacher's motives, and planned her response. One day, the boy

191. *See id.*

192. *Id.*

193. *Id.*

194. *Id.*

195. THE KORAN, *supra* note 39, at 113:1-5.

196. *Id.* at 4:32.

197. SADHU, *The Village Teacher*, Chap. 25, in FOLK TALES FROM KASHMIR, *supra* note 122.

198. *Id.*

199. *Id.*

told the teacher that his mother would like a word with the teacher at her home, and, further, that her husband was expected to be away. Quite excited and dressed at his best, he arrived at the woman's house, where he was received warmly.

As he drank the proffered tea, a call came from the yard. It was the husband. The wife began to tremble. "I am undone," she said, "if he discovers you here he will kill me and not spare you either."²⁰⁰ "Have no fear," the teacher said, "he cannot be so harsh."²⁰¹ "I know better how ruthless he is," she quickly corrected the increasingly anxious teacher.²⁰² "Would to God I were dead rather than be surprised in this compromising situation," she said as she began to beat her breast.²⁰³ "Is there no other exit?" the teacher asked.²⁰⁴ "No, none," she replied "[and if] [h]e sees you here [then] I am killed. . . . Nothing can save me unless"²⁰⁵ "Unless what?" he interjected.²⁰⁶ "Unless," she said, "you disguise yourself to escape his suspicion."²⁰⁷ The teacher answered that he would do anything for her sake. She gave him a working woman's cloak and scarf, and placed him in front of a basket of maize and two millstones.²⁰⁸

When the husband entered the home, he asked "What is that grinding sound upstairs?"²⁰⁹ His wife told him it was the sound of "[a] deaf woman turning out maize flour."²¹⁰ As the husband and his wife passed time "in the kitchen garden and in the barn," the teacher wore his hands to blisters pretending to be a working woman.²¹¹ Revealing his awareness of the ruse, the husband said, finally, "The fellow must be tired now and feeling bitter . . . [y]ou had better dismiss him now. The lesson must have gone home to him."²¹² The housewife gave the teacher his clothes and he left hurriedly. The wife and her husband preserved the secret. The people in the village remarked the next day that the teacher had lost a great deal of his spirit and liveliness. Some time later, the housewife sent a message to the teacher

200 . *Id.*

201 . *Id.*

202 . *Id.*

203 . *Id.*

204 . *Id.*

205 . *Id.*

206 . *Id.*

207 . *Id.*

208 . *Id.*

209 . *Id.*

210 . *Id.*

211 . *Id.*

212 . *Id.*

asking if he should like to visit again. This time he simply responded: "Ask her if she has consumed the flour ground previously."²¹³

III. CONCLUSION

Was H. G. Wells correct when he offered a vision of the history of law as "based upon a confused foundation of conventions, arbitrary assumptions, . . . and [constituting] a very impracticable and antiquated system indeed"?²¹⁴ Every observer must reach his or her own determination. To this observer, the preponderant evidence is that law, taken as a whole, demonstrates a tropism towards rationality and progressive values.

The legal subset of tort law is at once discrete and sprawling. The above discussion of ancient and primitive law confirms what Gregory C. Keating wrote regarding accident law alone, which is that:

[tort law] curbs the freedom of prospective injurers and enhances the security of potential victims. Risk impositions thus pit the liberty of injurers against the security of victims and the law of accidents sets the terms on which these competing freedoms are reconciled. Its task is to find and fix terms that are fair.²¹⁵

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

Further, our legal exploration cannot be to congratulate ourselves that modern Western civil code and common-law legal systems have seemingly

213. *Id.*

214. H. G. WELLS, *THE OUTLINE OF HISTORY* 536–37 n.1 (3d ed., Garden City Publishing Co. 1929) (1920).

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

achieved consistent levels of efficient and moral norms. For example, for every arguably progressive initiative one state of this nation may take, such as the implementation of social host liability for permitting an inebriated guest to say good evening and drive away, there is a setback, such as the decisions of courts to disallow public nuisance claims to be brought against the manufacturers of small concealable handguns that by their marketing drown counties surrounding large metropolitan areas with these weapons well knowing that the guns will end up on the city streets.

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

What has this inquiry revealed? What are the identifiable consistencies between the discrete but representative cultures referenced? First and foremost, it is shown that a standard of egalitarianism and equal application of law typically characterizes primitive groups deriving sustenance from hunting or agriculture.²¹⁶ Beyond this, perhaps the greatest consistency between and among the legal norms and rules discussed is that of proscriptions of unconsented-to taking. Whether the delict involved deprivation of another's right to their own reputation or the theft of goods, no human group, even in the earliest time, permitted one individual to take from another simply because he was stronger, crueller, faster or less principled, i.e., simply because he could otherwise get away with it. The collective was better served by deterring such behavior with such remedies as requiring the return of what was owed, be it the return of the object or its equivalent, or its money equivalent, or, in the case of a dignitary harm, the rendering of an apology or its symbolic equal, or alternatively suffering the penalty that would accompany the false allegation had it been true.

A similar congruence can be seen in the treatments of trespass to land or private nuisance. If the harm to the property, or the interruption of the occupant's right to profitably exploit it, could be quantified in lost crops or otherwise, the amends would be in kind. Otherwise the injured party could be made whole by money damages. In turn, under the law of public nuisance, which in all times has been described as behavior that detracted from good of the general community, a culprit might first receive a sound thrashing, in the hope that it would deter continued deleterious behavior.

216. ASIAN INDIGENOUS LAW, *supra* note 50, at 251.

Lastly, it is seen that the remedies available under numerous law systems were quite sophisticated in the rectificatory quality of permissible awards, and included not only compensation in rough equivalence to the immediate severity of the harm suffered, but also, when appropriate, costs of care and rehabilitation, as well as lost income.

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

While this article has provided a sometimes diverting romp in the fact and the lore of ancient normative treatment of civil wrongs, it is also a précis to a longer inquiry into the wheres, the whens, and the whos of the origins of our modern tort law. It can be seen that the carbon dating of the roots of modern common law reach back further than the rise of a lawyer class in pre-empire England, and with regard to the modern civil code treatments for extra-contractual harm, antedate even the Roman law that underlay the *Napoleonic Code*.