Fault and Causation in Early Roman Law: An Anthropological Perspective

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Although the notions of fault and causation, especially the former, have been much discussed, modern writers seem to have experienced considerable difficulty in determining their relationship not only in the earliest law but also in the decisions of the classical jurists. There has, however, been agreement in the selection of fault and causation as the two focal points for any analysis and reconstruction of the conditions entailing delictual or criminal liability in Roman law during the various phases of its development (1). Disagreement has centred on the relative significance to be attributed to each notion. Until recently the view most commonly expressed was that Roman law started with a principle of causation and only gradually introduced the notion of fault in its various forms as a means of restricting the range of acts for which an individual might be liable (2). Thus the earliest law knew in effect a principle of

(1) Cf. the discussions of Verursachung and Verschulden in Jörs-Kunkel-Wenger, *Römisches Recht*, 3rd ed. (1949), 171; M. Kaser, *Das römische Privatrecht* I, 1st ed. (1955), 139, 2nd ed. (1971), 502.

(2) E.g. R. Ihering, De la faute en droit privé, in *Études complémentaires de l'esprit du droit romain*, tr. O. de Meulenaere (1880), 10; T. Mommsen, *Römisches Strafrecht* (1899, reprinted 1961), 85; B. Kübler, *Der Einfluss der griechischen Philosophie auf die Entwicklung der Lehre von den Verschuldensgraden im römischen Recht*, in *Rechtsidee und Staatsgedanke* (*Festschrift für Binder*), ed. K. Larenz (1930), 65f; Jörs-

strict or even absolute liability according to which an individual was made liable for all damage or loss that he could be said to have caused, irrespective of whether he had intended to cause injury or had acted carelessly or had been at fault in any other way (3). As the law developed regard began to be paid to the individual's state of mind. At first in some cases — and this stage had already been reached before the Twelve Tables — he was made liable only if he had both caused and intended to cause the injury in question. Subsequently at a period rather later than that of the Twelve Tables elements of fault other than intention were taken into account until the position finally reached was that for most crimes and delicts fault of some description was an essential prerequisite of liability.

This account of the origins of liability has been attacked and, although not altogether abandoned, is less dominant than it was. The rival theory, associated principally with the name of Max Kaser, takes the opposite starting point (4). It assumes that the earliest rules were based not on causation but on fault and indeed a particular species of fault, namely intention

KUNKEL-WENGER, *op. cit.*, 172; G. MARTON, *Un essai de reconstruction du développement probable du système classique romain de responsabilité civile*, RIDA (1949), 178; KASER, *Römisches Privatrecht* I, 1st ed., 420; H.F. JOLOWICZ, *Historical Introduction to the Study of Roman Law*, 2nd ed. (1952), 177f, 3rd ed. by B. NICHOLAS (1972), 173f; U. VON LÜBTOW, *Untersuchungen zur lex Aquilia de damno iniuria dato* (1971), 83f. This approach has been strongly criticised by D. DAUBE, *Roman Law* (1969), 163ff: "All this talk about reine Erfolgshaftung ... is nineteenth and early twentieth century mythology" (171).

(3) The causation theory is often put in the form of an appeal to the principle of revenge. The victim of an injury is thought to desire revenge irrespective of the circumstances in which the injury has been sustained.

(4) M. KASER, *Typisierter "dolus" im altrömischen Recht*, BIDR 65 (1962), 79ff; *Das römische Privatrecht* I, 2nd ed., 155, 503; JOLOWICZ, *Historical Introduction*, 3rd ed. by B. NICHOLAS, 174. Earlier writers had regarded *dolus* (without going into the question of its nature or proof) as a necessary condition of liability in the early law. See, for example, K. BINDING, *Die Normen und ihre Übertretung* IV (1919, reprinted 1965), 46ff; V. ARANGIO-RUIZ, *Responsabilità contrattuale in diritto romano*, 2nd ed. (1958), 225ff.

to cause the injury or harm which has occurred. The proponents of this approach, fully aware of the difficulties involved in proof of intent, especially for societies which lack sophisticated means for the collection and assessment of evidence, argue that there need not be actual proof of intent. The law assumed that anyone who committed an act of a certain type or class intended to cause the injury which resulted. Not only was intent inferred from the circumstances of the case but the inference once made was irrebuttable. Hence the earliest Roman law operated a principle under which a necessary condition of liability was not *dolus* in fact but *dolus* presumed. *Dolus* was presumed where the act in question fell within a class of acts to which *dolus* as a matter of course was attributed.

Apart from providing an "origin" for the notions of causation and fault in developed Roman law the theories have been put to a more practical use in the resolution of certain ambiguities in the wording of early Roman laws. Sometimes legislation makes it plain whether fault in a particular case is a condition of liability and if so what the nature of the required fault is, and in other cases, although not specifically mentioned, fault is necessarily implied in the act constituted an offence. But there remain cases where there is neither an express statement nor a necessary implication of fault. Examples are the provisions of the Twelve Tables relating to *membrum ruptum, os fractum* and, at least on some interpretations, *iniuria,* and the first and third chapters of the *lex Aquilia.* In such cases a fuller interpretation of the legislation is supported or justified by appeal to the general theory of liability held to obtain in early Roman society. One who subscribes to the causation theory will hold that unless the law has specifically made an exception or the nature of the offence is such that fault is necessarily to be implied, liability is "strict" or "absolute" (5). Consequently a person who breaks

(5) The argument is usually put in the form that the "primitive" theory of liability based on causation shows that in a given case (*membrum ruptum, os fractum, iniuria, damnum iniuria datum*) liability cannot have been limited to intentional acts. Certainly the consequence

another's bone or damages his property will be liable even though he had no malicious intention or had not in any way been careless. The introduction of fault as a condition of liability is a development of the later law. On the other hand one who subscribes to the fault theory will assume that the law takes the presence of a malicious intention for granted. A person who breaks another's bone or damages his property is presumed to have acted with malice (6).

With such different theoretical assumptions one would expect the practical results equally to be different. Yet, as has been pointed out by U. von Lübtow (7), the application of the theories apparently leads to the same results. A person who breaks another's bone cannot escape liability by pleading that the injury was accidental. On the causation theory a defence of this kind is irrelevant and on the fault theory he cannot be heard to plead accident because in the class of case under consideration the presumption of malice is irrebuttable. A difference would arise only if one accepted a less strict form of the fault theory and held that whereas malicious intention was normally to be inferred it was nevertheless open to the person accused to show positively that he had not acted with this intention. However there is one circumstance perhaps overlooked by von Lübtow. The causation theory applies to any

often seems to be implied that there is liability for a wide range of non-intentional acts including ones in which no discernible fault is present. Cf. MOMMSEN, *Strafrecht* 836 and n4; P. HUVELIN, *La notion de "l'iniuria" dans le très ancien droit romain* (1903, reprinted 1971), 16f; B. PERRIN, *Le caractère subjectif de la répression pénale dans les XII Tables*, RHD (1951), 385; A. MANFREDINI, *Contributo allo studio dell' "iniuria" in età repubblicana* (1977), 64.

(6) See the literature cited note 3. Sometimes the history of *membrum ruptum, os fractum, iniuria* and *damnum iniuria datum* is taken to commence with liability for *dolus* alone although no general theory of liability in early law is invoked. Cf. Ph. HUSCHKE, *Gaius* (1855), 151f; O. KARLOWA, *Römische Rechtsgeschichte* II (1901), 792 (both with reference to *membrum ruptum, os fractum* and *iniuria*); U. WESEL, *Rhetorische Statuslehre und Gesetzesauslegung der römischen Juristen* (1967), 49 (with reference to *damnum iniuria datum*).

(7) VON LÜBTOW, *Untersuchungen zur lex Aquilia*, 84.

case in which someone is killed or injured or his property is damaged, and yields the result that the person who "caused" the harm is liable. The presumed *dolus* theory applies only of the act in question belongs to a class of act which is held to raise the presumption of *dolus*. Henre there is no liability on this theory if the act does not belong to such a class.

I do not think that either of the two theories which I have described provides an acceptable starting point for the history of delictual or criminal liability in Roman law. Each seems to me to be the product of a rationalistic approach to legal history; reason suggests that early man or the early Romans must have thought in a particular way. Of course there is often some element of reason or plausibility in an approach derived in this way but its drawback is that it tends to be over-general and over-simple, so concealing the shades of differentiation that arguably occurred in the treatment of cases. Fresh insight into the conditions entailing liability in early Roman law can only be obtained, it seems to me, from a consideration of results reached by modern anthropology. Anthropologists for some decades have studied intensively what used to be called "primitive" but now are called "simple" or "small-scale" societies. Many of these in their kin relations and patterns of life closely resemble Roman society of the sixth and fifth centuries B.C. Hence the conclusions reached by the anthropologists may at least suggest an approach to the interpretation of the Roman data; at the same time one will be able to test the credibility of the causation theory which is often presented as possessing a universal application to "primitive" or "archaic" societies.

However, there is an important difference between early Roman society and the societies which have been studied by anthropologists. The former was literate; it not only knew the use of writing but had already begun to record its rules in writing. The latter are preliterate, at least in their indigenous state, and their rules are discovered through discussion with senior members of the society and from the actual disputes which occur. One cannot ignore the fact that the introduction

of writing and the formulation of rules in a permanent, written form is likely to have had some effect on the content of the rules themselves. In particular it is possible that the rules when written tend to become more general and more abstract than in their previous unwritten state. Consequently the anthropological data is best used as a means to reconstruct the general background out of which the Roman rules in their written form emerged; only in this sense can the data legitimately be of help in the interpretation of the rules.

Anthropologists have varied in the attention which they have given to problems of liability. Some have described fairly fully the conditions under which an individual is held liable where he has killed another or inflicted some harm; others have been content with a brief description which barely touches upon the point. The latter species of account does raise a problem in that its very brevity may conceal a complex state of affairs which the investigator has either not bothered to explain or which he has overlooked. Another point is the degree of variation present in the characteristics of the societies studied. Some are nomadic, others sedentary, some have agriculture, others not, some have well developed governmental institutions, others have no chiefs or headmen. In all the most important ties are those constituted by kinship and marriage but again there are considerable variations in the actual kinship structures. However, it is worth noting that many have a kinship structure similar to that of early Roman society; they are organised on the basis of agnatic clans and lineages. Nevertheless in so far as concerns the treatment of fault I have not been able to discover any particular correlation between the way in which a society is organised or conducts its life and the emphasis it places on fault as a condition of liability.

I have attempted no more than a rough summary of the conclusions reached by anthropologists who have concerned themselves with questions of causation and fault. Even so I think it possible to obtain sufficient information to yield a perspective from which the Roman material may be regarded. These questions are generally discussed most amply in connec-

tion with homicide. The reason is that killing causes more concern than any other act except possibly sorcery and adultery and in these cases it is not possible to speak of the accidental commission of the act. Hence most, if not all, societies are concerned with the circumstances under which someone is killed and do make distinctions between various states of affairs.

The two most important factors which determine the treatment of killings are the relationship between the parties and the question of intent. As will be seen these two factors are not entirely unconnected. I do not want to go too far into the question of relationship, important though it is. It is perhaps sufficient here to state that where the killer and the victim are close kin the penalty is different from, and generally far less severe than, that incurred where the relationship is not close. Frequently the killer is required merely to make some ritual atonement; there is no blood revenge and no payment of compensation (8).

Where the killing is deliberate, even if not exactly premeditated, and the parties are not closely related, the normal response is that the kin of the person slain will seek to obtain either blood revenge or compensation from the killer and his kin. In many societies the absence of the intent to kill while not exempting the killer from all liability does permit a mitigation of the consequences of the killing. That is, in socie-

(8) The literature is immense. I cite only some of the fullest and most instructive accounts: R.F. BARTON, *Ifugao Law* (1919, reprinted 1969), 60; L. HOLY, *Neighbours and Kinsmen. A Study of the Berti People of Darfur* (1974), 130f; W. GOLDSCHMIDT, *Sebei Law* (1967), 91f; P.P. HOWELL, *A Manual of Nuer Law* (1954), 210ff; J. LA FONTAINE, *Homicide and Suicide among the Gisu*, in *African Homicide and Suicide*, edited by P. BOHANNAN (1960), 98f; M. HASLUCK, *The Unwritten Law in Albania* (1954), 210ff; A.W. SOUTHALL, *Alur Society* (reprinted 1970), 136ff (in some areas a person who killed another lineage member was put to death); E. WINTER, *The Aboriginal Political Structure of Bwamba*, in *Tribes without Rulers*, edited by J. MIDDLETON and D. TAIT (1958), 152f. See also I. SCHAPERA, *The Sin of Cain*, *Journal of the Royal Anthropological Institute* 85 (1955), 33.

ties where blood revenge or retaliation is the rule, absence of intent may allow the two families concerned to agree on the payment of compensation and in societies where compensation is acceptable even for a deliberate killing the amount payable will be less where the killing is not deliberate (9). In these societies the main line of distinction is that between an intended and non-intended killing. Although further distinctions may be made, such as whether the killing was in self-defence or not, or for a reason accepted as legitimate (killing a thief or adulterer), there may be no regard paid to the question whether a non-intended killing was inflicted through carelessness or other fault or was a pure accident. Or perhaps one had better say that the accounts given by the anthropologists who have studied these societies make no distinction of this kind (10). However there are also societies whose members do distinguish between non-deliberate killings which are the result of carelessness and those which are the result of accident (11). In the former case some compensation is payable, in the latter there is no penalty except possibly a token payment or fine. Finally

(9) See C. DUNDAS, *Native Laws of some Bantu Tribes of East Africa, Journal of the Royal Anthropological Institute* 51 (1921), 236ff; HOWELL, *Nuer Law*, 41f, 54, 59; A. KENNETT, *Bedouin Justice* (1925, reprinted 1968), 63; J. BLACK-MICHAUD, *Cohesive Force. Feud in the Mediterranean and the Middle East* (1975), 111ff; H. ASHTON, *The Basuto* (1952), 255; SOUTHALL, cited note 8; BARTON, *Ifugao Law*, 58f, 71f; HOLY, *Neighbours and Kinsmen*, 132f; HASLUCK, *Unwritten Law in Albania*, 239f. Again in some societies where execution is the penalty for deliberate killing, a payment is accepted in cases of non-deliberate killing: R.S. RATTRAY, *Ashanti Law and Constitution* (1929, reprinted 1969), 289f, 296; L. POSPISIL, *Kapauku Papuans and their Law* (1958), 146f; K. OBERG, *Crime and Punishment in Tlingit Society, Am. Anthrop.* 36 (1934), 146f, 150.

(10) One cannot always be sure what is meant when an anthropologist speaks of "unintended" or "accidental" killing and does not define these terms further. For a case where "accidental" is used to include killing arising from a quarrel see HOLY, *Neighbours and Kinsmen*, 132.

(11) Cf. DUNDAS; BARTON; ASHTON; SOUTHALL all cited at note 9; I. SCHAPERA, *A Handbook of Tswana Law and Custom* (1955), 261; J. GILLIN, *Crime and Punishment among the Barama River Carib of British Guinea, Am. Anthrop.* 36 (1934), 337.

there are societies of which it is asserted that deliberate and non-deliberate killings are treated in exactly the same way (12). However even those who make such an assertion often go on to indicate that in fact there is some degree of mitigation in the consequences where the killing is not deliberate (13). Where the assertion is not qualified one cannot be sure that the investigator has considered the question as fully as is necessary (14).

So far I have been speaking in a general and abstract fashion of deliberate, non-deliberate killing, carelessness and accident and so on. General propositions framed in these terms are commonly found in the writings of anthropologists. But some of the more detailed investigations and analyses which have become available as well as the examples given in the literature to illustrate the propositions put forward suggest that the conclusions to be derived from the data should be of a more limited and concrete character. It does not seem that the people who operate the rules focus specifically upon the elements of intention, accident or carelessness which figure significantly in the statements of the rules given by the anthropologists. The members of the societies studied on the whole appear to think of acts of killing in terms primarily of the relationship between the parties and the actual circumstances

(12) Cf. DUNDAS, cited note 9; J.P. REID, *A Law of Blood. The Primitive Law of the Cherokee Nation* (1970), 76, 94ff, 100ff; P.H. GULLIVER, *Social Control in an African Society. A Study of the Arusha* (1963), 128f; C.R. HALLPIKE, *Bloodshed and Vengeance in the Papuan Mountains* (1977), 191; L.S.B. LEAKEY, *The Southern Kikuyu before 1903* III (1977), 1014; K.-F. KOCH, *War and Peace in Jalemo* (1974), 86ff; R.F. GRAY, *The Sonjo of Tanganyika* (1963), 140f; I. SCHAPERA, *The Khoisan Peoples of South Africa* (1930), 153.

(13) Sometimes attention is drawn to the difference between theory and practice. In practice (whatever the theoretical statement of the rules) non-deliberate homicide appears generally to have been treated differently from deliberate.

(14) Or it is possible that the investigator is most concerned to bring out the similarity in the treatment of deliberate and non-deliberate killing and hence overlooks or ignores differences.

in which they occur. Sometimes it is the relationship of the parties that is most relevant or receives the most stress, sometimes the actual circumstances of the killing.

If a member of one clan kills a member of another the killing is likely to be assessed by both clans in terms of the relationship existing between them. If the clans are in a state of feud the killing will be assumed to be deliberate and indeed simply treated as a normal incident of their relationship. The relatives of the person killed will in due course attempt in retaliation to kill someone belonging to the killer's clan, and so on. If on the other hand the relationship between the clans is friendly and co-operative the killing will not be regarded as a normal incident of the relationship. Hence there will be a closer examination of the circumstances in which it took place; questions of premeditation, provocation, carelessness will all affect the response to the killing, and determine whether compensation is to be acceptable and, if so, the amount. Where one member of a clan kills another member the relationship is still important because, first, it shows that the killing is an entirely wrong mode of behaviour, second, it rules out certain types of response such as blood revenge or even payment of compensation, and, third, it focuses attention sharply upon the circumstances in which so unexpected an act occurs. Was it a deliberate attack, or the result of a fight in hot blood arising from a quarrel, or induced by drunkenness, or an accident occurring while the members of the clan were hunting or engaging in some other dangerous activity? It is the whole set of facts providing the background to the killing which will determine the fate of the killer, whether he is to be made to leave the group and, if so, for how long, whether he is to lose his property, or whether, in a few societies, he is to be executed. Thus one can say (as a general proposition to which there may well be exceptions) that the questions raised in simple societies are not: was the killing deliberate, careless or accidental, but, what was the relationship between the parties, was the killing the result of a fight, a drunken brawl or a hunting accident and the like? Indeed the questions asked

might not even attain such a level of generality; the killing could be discussed as a single, unique incident (15).

I shall return to the question of intention, carelessness and accident below. But first I should like to say something about physical injury and damage to property, both topics treated in the literature much less extensively than homicide. So far as one can tell there is considerable variation in the treatment of these offences. The relationship between the parties remains of fundamental importance in that there is generally no remedy if they are close kin. Otherwise differences between societies are marked. With respect to physical injury one sometimes gets the impression from the literature that only deliberately inflicted wounds attract penalties (16), but one cannot always be sure that the writer has specifically considered, or sought information on, cases in which injuries are caused accidentally. Some accounts make it clear that there was liability for intentionally or carelessly inflicted injury but not for that incurred through accident (17). Others stress that intention, carelessness or accident made no difference to the fact of liability even though on occasion these matters could affect the response to the injury (18). Provocation and justification also appear to have been treated differently in different societies (19). However, the range of information available on this point is so limited that

(15) For a general discussion of the relation between intention and status see M. GLUCKMAN, *The Ideas in Barotse Jurisprudence* (1972), Chapter 7.

(16) Cf. HOWELL, *Nuer Law*, 68; GOLDSCHMIDT, *Sebei Law*, 129; POSPISIL, *Kapauku Papuans*, 152f; RATTRAY, *Ashanti Law*, 310, 329.

(17) BARTON, *Ifugao Law*, 72; SCHAPERA, *Tswana Law*, 260; ASHTON, *Basuto*, 257; GILLIN, *Am. Anthrop.* 36 (1934), 337.

(18) J.O. IBIK, *The Customary Law of Wrongs and Injuries in Malawi*, in *Ideas and Procedures in African Customary Law*, edited by M. GLUCKMAN (1969), 315; KOCH, cited note 12; LEAKEY, *Kikuyu* III, 1019; OBERG, *Am. Anthrop.* 36 (1934), 150; HASLUCK, *Unwritten Law in Albania*, 241.

(19) In Zambia, for example, neither justification nor provocation appears to have been accepted as a defence. See A.L. EPSTEIN, *Injury and Liability in African Customary Law in Zambia*, in *Ideas and Procedures*, ed. GLUCKMAN, 292.

generalizations are difficult. Another factor that sometimes affected liability was the seriousness and type of injury (20).

A similar range of possibilities is found with respect to damage to property (21). Occasionally, it seems, liability is imposed only where property is deliberately destroyed or damaged (22). At the other extreme a person may be liable even if he damages another's property through an accident where there has been no fault on his part; but the absence of intention or some other fault may regulate the amount of compensation payable (23). Finally liability may be excluded in cases of pure accident but imposed where there has been carelessness or intent (24). The type of property damaged may also be relevant to liability (25). Again one has to bear in mind that this account of the rules both for physical injury and damage to property is over-general or, at any rate, isolates too sharply the factors of intention, carelessness and incident. The tendency of the societies under discussion is to think in terms of specific types of injury or specific types of damage to property occurring in specific situations such as hunting, drinking, quarrelling or fighting.

The tendency in cases both of killing and the other wrongs to think in terms of specific situations and of the particular relationship of the parties has important consequences for the way in which the notions of intention, carelessness and accident require to be understood. There is nothing startling in the proposition that these notions are inferred from the circumstances of the case rather than from an independent examination of the state of mind of the person concerned. What is of

(20) Cf. GOLDSCHMIDT, *Sebei Law*, 129; SCHAPERA, *Tswana Law*, 258f.

(21) I am not considering damage to property caused by animals. This is often the subject of special rules.

(22) Cf. POSPISIL, *Kapauku Papuans*, 196; LEAKEY, *Kikuyu* III, 1022f. However one has to rely on the specific instances recorded by the investigators and one cannot be sure that these supply a full account.

(23) Cf. IBIK, in *Ideas and Procedures*, ed. GLUCKMAN, 315; KOCH, *War and Peace in Jalemo*, 89; HOLY, *Neighbours and Kinsmen*, 131f.

(24) SCHAPERA, *Tswana Law*, 270f; ASHTON, *Basuto*, 273.

(25) SCHAPERA, cited note 24.

interest is the particular circumstances from which inferences of a certain content are made. Important is the relationship of the parties. Where they belong to groups feuding with each other the presumption may be that the killing was intentional (26). On the other hand if the killer and the victim are brothers the presumption may be that the killing was accidental or at least done without premeditation (27). Of course such presumptions might be rebutted by the actual circumstances in which the killing took place provided there was sufficiently clear evidence. But one does find cases where the status of the parties gives rise to a presumption that may not be rebutted whatever the actual circumstances and no matter how clear the evidence. Thus among some Bedouin people the killing of a woman is always regarded as an accident. The normal consequence of intentional killing is a killing in retaliation. But, a woman being of inferior status to a man, it is not thought worthwhile that so grave a consequence should be incurred in her case and hence the matter is treated as an accident and settled by the payment of compensation (28). The activity in which the parties are engaged is another highly relevant fact. If they are both fighting a common enemy or engaged in hunting and the weapon of one slips and kills or injures another the injury will prima facie be treated as accidental. However if the parties are known to be enemies or to have quarrelled this presumption will not be made (29). Again the type of implement with which death is inflicted may be important. If it is a spear normally used only in fighting a presumption of intent or premeditation will be made more readily than if it is a spear used for catching fish or a stick used for digging up roots (30). It is expected that people might quarrel and fight especially if they have been drinking and injuries or deaths resulting from such a fight are not regarded as inflicted with

(26) See GLUCKMAN, cited note 15.

(27) Cf. HASLUCK, *Unwritten Law in Albania*, 217; M. FORTES, *The Web of Kinship among the Tallensi* (1949), 265.

(28) BLACK-MICHAUD, *Cohesive Force*, 112.

(29) Cf. BARTON, *Ifugao Law*, 72.

(30) HOWELL, *Nuer Law*, 48.

premeditation. Indeed they may be treated as accidental because of the presumption that there was no intention to produce the actual consequences that occurred (31).

A final point should perhaps be made. I have been speaking generally about intention, carelessness and accident, although I have tried to stress that these notions are to be understood in terms of the relationship of the parties and the actual facts of the case. However this neat, tripartite decision is not found quite in this simple form. On the one hand some societies do recognise different categories of "intent to kill" and on the other some do not recognise, or at least articulate, any difference between carelessness and accident. One has the intention to kill which is premeditated and carried out in cold blood; one has the intention to kill formed and carried out only because of flagrant provocation (adultery) or in virtue of a compelling justification (self-defence). Then there is the sort of intent characteristic of those engaged in a fight where one might say there is some intent to injure but the circumstances are so confused and governed by emotion that one cannot speak of a specific intent to kill. To distinguish between these situations in terms of intent is already a sophisticated exercise and one can see why simple societies tend to think in terms of killing resulting from certain types of situation rather than in terms of the kind of intent involved (32). Although some societies, at least according to those who have investigated their rules, distinguish between killing or other harm caused carelessly and that caused accidentally where no fault is to be imputed to the person who has caused the harm, it seems that in others no distinction is made. Harm brought about unintentionally, whether by carelessness or accident, is subsumed in the

(31) HOLY, *Neighbours and Kinsmen*, 132.

(32) "Simple" people do recognise that there is a difference between premeditated killing and killing resulting from a fight, although they may not differentiate between them in terms of consequences. Compare the attitudes of the Nuer (HOWELL, *Nuer Law*, 55) and the Joluo (G.M. WILSON, *Homicide and Suicide among the Joluo of Kenya*, in *African Homicide and Suicide*, ed. BOHANNAN, 182f).

reported descriptions under the head of accident. Again, however, one has to avoid attributing to the members of a simple society too abstract a way of thinking. It is possible that no conceptual distinction is made between careless and accidental acts, and yet that in determining the appropriate response all the circumstances of the case are in fact considered. In this way some judgement as to whether the person causing the harm was at all to blame might be made with a consequent effect upon the form and amount of compensation.

From the above account of the treatment of liability in simple societies the following points may be summarised as most relevant to a sketch of the background against which to consider the Roman rules. In the first place should be noted the absence of general statements of liability based upon intention or degrees of fault. Such statements may be found in the writings of the anthropologist who has investigated a society but on the whole they do not appear to reflect the approach of the members of the society themselves. The latter consider questions of liability in a concrete manner, paying particular attention to the relationship of the parties (including that of the groups to which they belong) and the actual circumstances under which the act causing harm occurs. In this way a striking degree of flexibility is achieved in the response made to killing, injury or damage to property and in the treatment accorded the person held to be responsible. Regard is almost always paid to intention of various kinds, and sometimes to carelessness or other fault, either in order to exclude liability altogether or, more commonly, to determine the nature of the response, whether compensation should be paid and, if so, the amount. The presence or absence of intention or other fault is not made a separate subject of inquiry in the sense that intention or fault is treated as an independent requirement of liability or punishment. The facts of the case are considered together and questions of intention or carelessness are not isolated as a separate issue. Frequently intention or fault is presumed from the circumstances of the case among which the relationship of the parties has an especial importance.

These points suggest that neither the strict causation nor the presumed *dolus* theories provide satisfactory assumptions for a consideration of the early Roman law. They do not prove that liability in the early law could not have been founded on one or other of these theories, but they do at least argue in the direction of a more varied, complex state of affairs. More positive results may be obtained if one considers the early Roman material in the light of three propositions that may be said to be generally characteristic of simple societies: the importance of the relationship between the parties, the stress on the particular and the concrete, and the absence of prominence accorded to intention or other fault in the framing of rules. It is necessary, however, to bear in mind an important caveat. The Roman material is already cast into the form of written rules. Even if one doubts whether the *leges regiae* were known in a standard, written form at the period to which tradition ascribes them, it is clear that with the enactment of the Twelve Tables much of the law was reduced to writing. This process in itself is likely to have induced a greater degree of abstraction and generality than had been the case in the earlier, preliterate period.

Apart from one very significant exception, shortly to be mentioned, there is nothing in the *leges regiae* or the Twelve Tables which suggests that the relationship between the parties might determine the question of liability. Nevertheless it is obvious that in at least one area this must have been the crucial question. The basic unit of early Roman social organization was the agnatic family whose members lived under the control (*potestas*) of the senior male (*paterfamilias*). The size of such a unit depended mainly upon the number of generations of which it was composed. In the case of three or even four generations it might be quite numerous. The evidence from other simple societies shows fairly conclusively that the taking or damaging of property, the infliction of physical injury or killing within the family group were not treated in the way they would have been if the parties had come from different families. Presumably in early Rome such offences if they

occurred as between members of the same family were dealt with by the *paterfamilias* and the senior male members of the family. It seems to me, therefore, that one has to read a limitation into some of the provisions of the Twelve Tables, those on theft and physical injury, for example.

These provisions only apply where the victim and the offender do not belong to the same family. If two brothers both subject to the same *paterfamilias* quarrel and one breaks the other's arm in a fight the offence of *os fractum* within the meaning of the Twelve Tables is not committed. I would not even rule out the possibility that injuries as between people of the same *gens* were treated differently from those as between people from different *gentes* but it is impossible to obtain certain information.

The exception in which there is possibly an implicit reference to the relationship of the parties is the *lex Numae* on deliberate killing: *si qui hominem liberum dolo sciens mortui duit, paricidas esto* (33). The interpretation of this cryptic provision is much disputed. The approach which I find most convincing (partly because it is substantiated by the anthropological data) supposes that in a period antecedent even to that of Numa the killing of a kinsman was treated in a fundamentally different fashion from the killing of a non-kinsman. The object of Numa's law was to provide that the deliberate killing of someone who was not a kinsman should be treated in the same way as if he had been. I have used the vague term kinsman because it is difficult to be sure what the relevant degree of kinship was. The most plausible suggestion, I think, is that which sees in the *gens* the crucial dividing line. Prior to the law of Numa killing *intra gens* was treated differently from that *inter gentes*; the law establishes that the latter is now to count as the former.

The provisions of the Tables show an interesting variation between the specific and the general. Those dealing with theft are general in the sense that they do not relate to specific

(33) G. MacCormack, *A Note on a Recent Interpretation of "Paricidas esto"*, *Labeo*, forthcoming.

types of property (34) but they still make a distinction according to the circumstances under which the thief is caught. The clauses on physical injury are framed in varying degrees of generality. That on *os fractum* refers to the specific injury of a broken bone. The precise sphere of reference of *membrum ruptum* is uncertain. It appears to be wider than *os fractum* but not so wide as to cover any serious injury. I am inclined to take it in its literal sense of loss, amputation or rendering useless of a limb including what may have been most common occurrences: loss of fingers, thumbs, toes, ears or eyes (35). There has also been much dispute over the clause on *iniuria* and, indeed, one of the matters giving rise to doubt has been the apparent generality of its reference. It has been argued that in its present wording the clause is too abstract and general for so early a period (36). However the best explanation still seems to be that which accepts the generality of the clause as it stands and finds the reason for the wording in the type of injury for which a remedy was given (37). The two other clauses were able to define the wrongful act by reference to the type of injury. But the whole point of the third clause was that it covered a multitude of trifling injuries which could not be designated except in the generic form "if anyone injure another", "if anyone has done wrong". Perhaps also significant is the fact that the clause occurs in a written code. One can imagine that it was the attempt to express concisely in a written, definitive form the penalty for a whole variety of minor injuries (or blows) that led to the adoption of a general formulation.

Of the two provisions on killing the *lex Numae* on *paricidas* is already phrased in a general fashion, though one should note

(34) On the other hand D. PUGSLEY, *The Roman Law of Property and Obligations* (1972), 28f has argued that in the early law *furtum manifestum* applied only to *res mancipi* and *furtum nec manifestum* only to *res nec mancipi*.

(35) Possibly teeth were also included.

(36) U. VON LÜBTOW, *Zum römischen Injurienrecht*, *Labeo* 15 (1969), 134f.

(37) D. DAUBE, *Societas as a Consensual Contract*, CLJ 6 (1936-8), 402f.

that the specification of *dolus* imports some restriction. However there is no description of the circumstances in which the killing might take place. The *lex* merely says *si qui hominem liberum dolo sciens mortui duit*. One can see the reason for this. Its object is to attach a certain consequence to the premeditated killing of a free man. But the very fact that the killing contemplated is premeditated means that it is impossible to foresee and so specify the actual circumstances in which it might take place. A person who plans to kill another may do so whenever opportunity presents itself. By contrast the other provision on killing is highly specific: *si telum manu fugit magis quam iecit, aries subicitur* (38). Here the whole emphasis is on the specific circumstances which give rise to the killing. What appears to be contemplated is the common but dangerous practice and sport of javelin throwing. Accidents no doubt were frequent and in the past there may have been doubt and argument as to how resulting deaths were to be treated. The rule that came to be settled was that in a clear case of accident a ram was to be offered to the agnates of the victim. It is almost universally held that the rule in effect establishes that for any non-deliberate killing the "penalty" is to be a ram (39). This seems to me an unwarranted interpretation. Where someone was killed under circumstances that precluded premeditation on the part of the killer it is possible the response was a matter for negotiation between the parties and varied according to the circumstances of the case. Payment

(38) 8.24a. The rule almost certainly antedates the Tables. Servius ascribes a version of it to Numa: *In Numae legibus cautum est, ut si quis imprudens occidisset hominem, pro capite occisi agnatis eius in contione offerret arietem* (FIRA I, 13). This appears to be a paraphrase and cannot be taken as giving an accurate record of any law enacted by Numa. If genuine it would show that as early as Numa a general classification of killing as either deliberate (premeditated) or non-deliberate had been made by the law. What would be particularly remarkable here is the subsuming under one head of all the many varieties of non-deliberate killing.

(39) See, for example, W. KUNKEL, *Untersuchungen zur Entwicklung des römischen Kriminalverfahrens in vorsullanischer Zeit* (1962), 40f.

of a ram to the agnates may have been the appropriate response but one certainly cannot be sure that it followed in all instances. What, for example, would have been the position if someone was killed in a fight or a drunken brawl?

Neither the *leges regiae* nor the Twelve Tables normally make an explicit reference to intention or other fault. There is no reference to fault other than intention, no mention for example of *culpa* or *neglegentia* (40), and the only provisions which specify intention or knowledge as a condition of liability are the *lex Numae* on *paricidas* and the *lex* of the Twelve Tables dealing with the burning of houses. The former has already been quoted. The latter provides: *Qui aedes acervumve frumenti iuxta domum positum combusserit, vinctus verberatus igni necari iubetur, si modo sciens prudensque id commiserit; si vero casu, id est neglegentia, aut noxiam sarcire iubetur, aut, si minus idoneus sit, levius castigatur* (41). The first question which arises is, why should there be a specific reference to intention or knowledge just in these cases? Clearly the legislator wishes to make an explicit distinction between intentional and non-intentional killing and burning because the presence or absence of intention or knowledge is to have a very consi-

(40) Pliny ascribes to the Twelve Tables a clause in the following words: *Fuit et arborum cura legibus priscis cautumque est XII tabulis ut, qui iniuria cecidisset alienas, lueret in singulas aeris XXV* (N.H. 17.1.7). However he seems more to be giving the substance of a law in his own words than reproducing the actual words of the *lex*. For varying views on the question whether the Tables themselves contained the word *iniuria* see HUVELIN, *Iniuria*, 98f; B. KÜBLER, *Review of Huvelin*, ZSS 25 (1904), 443; A. FLINIAUX, *L'action de arboribus succisis*, in *Studi in onore di P. Bonfante* I (1930), 528f, 537; O. CARRELLI, *I delitti di taglio di alberi e di danneggiamento alle piantagioni nel diritto romano*, SDHI 5 (1939), 336f; PUGLIESE, *Iniuria*, 38; S. SCHIPANI, *Responsabilità "ex lege Aquilia". Criteri di imputazione e problema della "culpa"* (1969), 63f; D.V. SIMON, *Begriff und Tatbestand der "Iniuria" im altrömischen Recht*, ZSS 82 (1965), 137 n27; R. WITTMANN, *Die Körperverletzung an Freien im klassischen römischen Recht* (1972), 11 n40; C. GIOFFREDI, *I principi del diritto penale romano* (1970), 67 n13; MANFREDINI, *Iniuria*, 111f.

(41) 8.10, reported by Gaius *4 ad XII tab.* D.47.9.9.

derable effect on the penalty. But why should the distinction be made explicit only in certain cases? As a tentative answer one might say that the seriousness of the offence, the danger both killing and burning represent to the community, impels the legislator to separate the deliberate from the non-deliberate or non-premeditated commission of the act and impose in the former case a particularly drastic penalty both to mark its wickedness and provide an appropriate deterrent. It is in the proliferation of deliberate killing or burning that the real danger to the community would lie (42).

Before considering some of the provisions of the Twelve Tables in which no specific reference to intention or fault is made, one might pause to glance at the drafting technique employed in the clauses on killing and burning. That on killing is a straightforward statement in which the essence of the offence is the premeditation employed in the killing. It shows that well before the Tables legal analysis was sufficiently advanced for the notion of intention to be detached from the circumstances involved in a killing and made into an independent requirement of liability to apply generally over a range of circumstances. The clause on burning demonstrates a different technique (43). Initially the offence is defined without reference to knowledge or intention. It is only after the mention of the penalty that a section is added to make it clear that this is to apply only if the burning is done with knowledge (premeditation). The final section then states what the position is to be where the burning has occurred through *casus*. The phrase *id est neglegentia* is almost certainly a gloss introduced by Gaius to explain the meaning of *casu* and should not be taken as part of the original wording of the *lex*. Prima facie *casus* appears to cover all instances of burning which have not been

(42) The other serious offences constituting a grave danger to the community, especially various forms of sorcery, can only be committed if there is intent and hence there is no call for the law to distinguish between the intentional and the non-intentional commission of the offence.

(43) See generally on this clause, MacCormack, *Criminal Liability for Fire in Early and Classical Roman Law*, *Index* 3 (1972), 382f.

intentionally caused, that is, carried out with premeditation. However the word is sufficiently vague for there to have been some flexibility in the operation of the sanction. Thus in the probably rare case where demonstrably there was no fault at all it may not have applied.

The structure of the provision suggests to me an admittedly highly speculative hypothesis for the development of the rules on burning. Originally, that is, sometime prior to the writing down of the rule in the Twelve Tables, the position would have been expressed in the form that if someone set fire to a house or adjoining corn he was to be put to death by fire. But the sanction was understood to attach in circumstances where intent was presumed. If it could be shown that there was no intent to cause the fire the person responsible was not taken to have committed the offence. Nevertheless it is still possible, even likely, that he was visited with some penalty, its nature and severity depending upon the circumstances of the case. When the legislator was required to cast the rules into a permanent, written form he took the primary rule on burning as his basis and then worked in the other rules by making the application of the former conditional on *scientia* and adding a further clause on fires brought about *casu* and prescribing a fixed penalty for such cases.

Granted that one can detect a reason for the specific mention of intention or knowledge in the cases of killing and burning one is still faced with the problem of the other provisions of the Tables which contain no such specific mention. Indeed, as has often been pointed out, in a number of cases, for example *furtum, malum carmen, fruges excantare* and those contained in 8. 21, 22, 23, specific mention of intent or knowledge was unnecessary since it was already implied in the description of the offence. But one is still left with some provisions, in particular those on physical injury, where there is no specific mention and also no necessary inference of intent or knowledge (44). Is

(44) It has sometimes been argued that there is a necessary implication of intent in the provision on *iniuria*: PUGLIESE, *Iniuria*, 13 n2; SIMON, ZSS 82 (1965), 174f; GIOFFREDI, *Diritto penale romano*, 66.

it possible to argue either that this very fact shows that the offences in question (*membrum ruptum, os fractum* and *iniuria*) might be committed in the absence of intention, or that the presence of intention should be read in as a condition of liability precisely because it so appears, expressly or by implication, in so many of the other provisions of the Tables? Neither argument should be treated as conclusive.

A more fruitful way of tackling the problem is to ask whether there is any reason for the failure of the legislator to specify intention or knowledge as a condition of liability. An answer may be found in the fact that the offences were not thought of primarily in terms of intention or fault at all but in terms of situations from which physical injuries of one sort or another were likely to result. The most obvious situation for the legislator to have in mind is that of a fight or a scuffle. If someone is hurt or injured in this way one may assume that the provisions of the Tables applied and that there was no specific inquiry into intent or fault. Equally one can be sure that the provisions applied if the injuries were inflicted with premeditation, although I doubt whether this was the case primarily under consideration. It is however possible that in what was regarded as the most serious form of injury (*membrum ruptum*) premeditation had an influence upon the penalty. There is some plausibility in the suggestion that *talio* was most likely to be applied where the injury had been deliberately inflicted ([45]).

Where the injury arose not from a fight but from some accident liability may have depended upon the circumstances. For example where the parties had engaged in some dangerous activity such as javelin throwing and injuries resulted it may have been understood that liability was incurred. Yet there may have been no such clear understanding in other cases where someone was injured by another and liability may have depended very much on the specific circumstances of the case.

(45) S. CONDANARI-MICHELER, *Über Schuld und Schaden in der Antike*, in *Scritti in onore di C. Ferrini* III (1948), 72f.

When one comes to examine the first and third chapters of the *lex Aquilia* on damage to property one notices an interesting difference from the language found in the extant provisions of the *leges regiae* and Twelve Tables. There is no mention of *dolus, sciens* in the *lex Aquilia*. Nor is the wording confined to a description of the physical act constituting the offence, *occidere, urere, frangere* and *rumpere*. These acts are qualified by the addition of the word *iniuria*. Why should this be so? Included in this question are really two questions: why was the language of *dolus, sciens, casus* not used, and why was the description of the offence not confined to the enumeration of the physical acts of damage? The answer to the first question is probably the same as that given in the case of *membrum ruptum, os fractum* and *iniuria*. The legislator is not thinking primarily of degrees of fault but of typical situations in which the various types of damage to property occur. This does not mean that fault is an entirely irrelevant consideration, merely that it has not been singled out and made an independent criterion of liability. The result is again that there would have been some flexibility in deciding which cases were to count as *occidere, urere, frangere* or *rumpere*. If the suggestion that the first and third chapters were enacted during times of disturbance and violence is correct (46), then it becomes very likely that the damage to property which the legislation was principally intended to repress was that occurring in the course of looting and pillage. But it need not have been confined to these cases. Whether accidental destruction or injury came within the scope of the chapters may have depended upon the circumstances of the case. It does not seem that the question of liability was determined by asking whether there had been intention to cause damage or whether any other fault had been disclosed; on the other hand it does not follow that there was always liability in the absence of anything that a modern scholar would call fault. The point is that one cannot suppose

(46) B. Beinart, *Once more on the Origin of the Lex Aquilia, Butterworths South African Law Review* (1956), 73.

that hard and fast rules framed in terms of fault governed liability at this time.

From what has been said it follows that the reason for the insertion of the word *iniuria* cannot have been the desire to introduce a standard of liability referable to fault. One basic meaning of *iniuria* is "unlawful" in the sense of "that for which there is no right" (*non iure*) (47). Does one have here a clue to the reason for the presence of the word *iniuria* in the first and third chapters? If one supposes that the legislator introduced *iniuria* because he wished to make the absence of a right a necessary condition of liability under the chapters, he may be taken to have understood "absence of a right" in either of two senses. He may have been thinking of certain specific "rights" to kill slaves or cattle, or to damage another's property, established by prior *leges* or clearly established in custom. An obvious example is constituted by the clause of the Twelve Tables which provides that if a thief is killed at night *iure caesus esto* (48). Killing in self-defence may have been justified by custom. Likewise a person who killed or injured an animal which strayed onto his property may have been justified in his act under customary law. However, except for the provisions concerning the thief there is no very clear evidence on the extent of such rights, and with respect to inanimate property (if we conceive the third chapter as dealing with such) it is difficult to imagine what rights to destroy or damage might have existed. If A had destroyed B's plough would B have been justified in destroying A's? Alternatively the legislator may have taken a broader view and not intended to confine *iniuria* to the absence of such rights as were already specifically acknowledged in the law and known to him. He may have intended the word to refer generally to the absence of any right which might be found to exist or indeed which

(47) This is often thought to be the meaning borne by the word *iniuria* at the time the *lex Aquilia* was enacted. I have already suggested that this may be too dogmatic an approach. Cf. *Aquilian Studies*, SDHI 41 (1975), 52f with references.

(48) 8.12.

might develop in the future. Further possibilities may be imagined. The legislator may have been thinking primarily of a limited number of acknowledged rights but nevertheless intended that the word should be capable of including any additional rights which might be developed. Or if the legislator had intended the reference to be confined to the specific, acknowledged rights the interpreters of the *lex* may have been prepared to widen the word's sphere of reference.

I am not sure that it is feasible to do more than sketch the possibilities of the approach which takes *iniuria* in the sense of "absence of a right". There is not really sufficient evidence to warrant the expression of a preference for any one of the various interpretations outlined. Yet in any case, whichever interpretation (if any) is correct, it is worthwhile noting the advanced legal technique shown. The law and legislative drafting have progressed to the point of framing a classification of acts based upon the presence or absence of a right. The degree of generality and abstraction possessed by the classification depends upon whether *iniuria* is taken as referring to the absence of a limited number of known rights, such as that operating with respect to the nocturnal thief, or to the absence of any conceivable right which might exist (49).

Although I have postulated "absence of right" as the meaning of *iniuria* and discussed the reason for its inclusion in the first and third chapters of the *lex Aquilia* on this basis, I do not think that the possibility of a different interpretation should be ignored. If one supposes that the most general signification of *iniuria* is "what is unlawful" and presses for further elucidation one is led, perhaps primarily, to the notion "that for which there is no right". But one may also be led in a slightly different direction that places more emphasis on the positive aspect of wrongdoing than the negative aspect of

(49) It is not clear whether the *lex Aquilia* was the first legal formula to use *iniuria* in this sense. The Twelve Tables may have contained a clause on *arbores iniuria caedere*, although this is doubtful. See note 40 above. The formula of the *legis actio per sacramentum in rem* contains the phrase *iniuria vindicare* but it is not clear how early this usage is.

acting without right. Although there does seem to be a difference between "acting without a right" and "acting wrongfully" it is not easy to express the precise content of the difference. The latter expression seems to convey more than the notion of "acting without a right"; there is an implication that one has done wrong in a positive sense. And yet it does not necessarily incorporate a reference to fault as a specific criterion of liability. Perhaps all one can say is that "acting wrongfully" conveys an undifferentiated sense of acting in a way one should not have done, that is, in a way which contravenes the generally accepted standards of conduct observed within the community. Hence to hold that the phrase *iniuria occidere* carried with it the implication of "to kill wrongfully" does not mean that *iniuria* incorporates a reference to fault in the sense of a specific criterion of liability viewed in isolation from the other facts of the case. Rather the word expresses a conception of killing or of certain kinds of killing in a general sense as wrong, as something that should not be done, without specifying the particular nature of the wrong.

These two senses of *iniuria* "acting without right" and "acting wrongfully" are not necessarily inconsistent. It is perfectly possible that in the context of the *lex Aquilia* the word conveyed both senses. On which lay the emphasis is very difficult to tell. The primary notion may have been that of "acting without right" with an additional overtone of "acting wrongfully". Or the notion of "acting without right" while conceptually distinct may itself have been subsumed under the broader notion of "acting wrongfully", that is, to kill in circumstances where there is no acknowledged right to do so is one of the ways of killing wrongfully. It might be said that whenever one kills wrongfully one kills without a right and therefore that the two expressions "without a right" and "wrongfully" in this context are equivalents. However it would, I think, be a mistake to press the argument quite in this way, if the conclusion which one reached was that the statement "to kill without right is to kill wrongfully" is a tautology. The matter resolves itself into a consideration of the features

of the particular case under discussion. Sometimes the emphasis will be on the question whether there is in existence a right or not, perhaps with the implication that if there is no right the act is wrongful. But very often the question of a specific right may not be in point because it is perfectly obvious in the circumstances that there can be no right to do the act. In such a case wider dimensions of wrongfulness will fall to be considered, and it is in this process that one can detect the beginnings of the development in legal analysis which eventually produces *dolus* and *culpa* as standards governing liability under the *lex Aquilia*.

It is now time to draw together the main threads of my argument. What I have been trying to do is to use material taken from contemporary "primitive" peoples in order to compile a background against which can be set the provisions of the *leges regiae* and the Twelve Tables. I have, of course, been considering not the entire corpus of archaic Roman law but only those provisions which raise questions of causation and fault. I am not suggesting that the social background to the Roman rules can be reconstructed in detail. The position which obtains in many "primitive" societies provides the inspiration for a possible approach to the interpretation of the Roman rules. I would myself go a little further than this and say that the approach so indicated is probable and not just possible. The "primitive" material suggests, first, that there is unlikely to have been current in Roman society of the sixth or fifth centuries B.C. doctrines or theories of causation and fault applied to the solution of legal problems. In particular the Romans of this period are unlikely to have constructed a theory of obligation in which fault or any species of fault such as *dolus* functioned generally as an independent criterion of liability. Therefore neither the Erfolgshaftung nor the presumed *dolus* theories can be considered as acceptable starting points for the history of criminal and delictual obligation in Roman law. Second, one may infer that the early Romans discussed questions of liability and redress in highly concrete terms. For them the most important factors in a

dispute were the specific relationship between the parties including that of the groups to which they belonged and the kind or type of incident which produced a death or injury or other harm. Thus the relevant questions would have been: did the parties belong to the same *gens* or family, was there a history of trouble between them or the families or *gentes* to which they belonged, was the death or injury the result of an accident while hunting or engaging in military exercises or in sports or was it the result of a fight or a drunken brawl and so on?

I should stress again that these conclusions provide a background only for the interpretation of rules found in the Twelve Tables or among the *leges regiae*. They help one understand the point of the enactment on parricide and they suggest caution in the interpretation of the provisions on physical injury or those of the later *lex Aquilae* on damage to property. But it is clear that in some respects early Roman law had advanced beyond the "primitive" conceptions which I have described. An important factor accounting for this advance is, I suggest, the use of writing. A legislator required to provide a written statement of an offence or its sanction is forced to identify and single out the essence of the state of affairs he wishes to describe. Although it is possible for a people unacquainted with writing to formulate rules in a simple and clear fashion the likelihood is that they will not do so. Rather they are prone to discuss disputes and questions of how people should have behaved and what remedies are available to those who have been wronged in a complex and detailed way with much argument over the actual facts of the case. In the course of the discussion appeal to normative standards may be made; yet these are likely to be general principles of conduct such as "you have acted wrongfully" or, if a more specific rule is invoked, there may be little agreement on its content or formulation. What one does not find is recognition and application of a set of conditions which establish authoritatively whether a specific offence has been committed. Only gradually does a people reach the point in the regulation of its conduct when

it is able to specify in advance the conditions which need to be satisfied before a certain type of offence is committed. In essence what is involved is a process of generalization and classification. In order to achieve this state of affairs some means for the permanent expression and recording of rules is needed and it is writing which fulfils this function. The *leges regiae* and the Twelve Tables already provide evidence of this advance in legal technique. In the provisions on parricide and arson a variety of fault (*dolus*) is singled out, detached from the facts of any particular case and presented as an independent requirement of liability.

From the point of view of legal technique the appearance of the word *iniuria* in the first and third chapters of the *lex Aquilia* presents something of a problem. If it is taken purely in the sense of "wrongfully" one might consider that its use reflects no particular advance in the drafting of legal rules since any people, however "primitive", can be said to be capable of formulating a distinction between acting wrongly and acting rightly. Yet there is still something odd about the usage since one would not expect to find killing, for example, expressly qualified as wrongful; its wrongful nature would be deemed to be self-evident. Hence one might argue that in the context of the *lex Aquilia* the occurrence of *iniuria* does reflect a conceptual advance since it evidences a classification between killings which are wrongful and those which are not. If, on the other hand, *iniuria* is taken to express "acting without right" one can immediately perceive a more complex ordering of ideas underlying its usage. Legal thinking has become sufficiently abstract to conceive of acts as done in pursuance of a right or not and to frame a classification on this basis.