The Coherence of the *Lex Aquilia*

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I. Introduction (1)

When in 1816 NIEBUHR's discovery of the Gaius palimpsest also brought to light the missing second chapter of the Lex Aquilia, the newly revealed text should have laid to rest centuries of speculation and argument. It did not. For, contrary to all expectations, the second chapter as summarized by Gaius did not form a bridge between the killing of Chapter I and the wounding of Chapter III; it dealt with a totally unrelated topic, the fraudulent *adstipulator* (2).

Speculation as to the relationship between the three parts of this law has therefore continued. According to DAUBE, their

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1) An earlier version of this paper was presented to the 1993 meeting of the *SIHDA* at Oxford. It was read in manuscript by Professor P. BIRKS and Dr. A. WYGANT, for whose comments and criticisms I am grateful. Responsibility for the content rests as usual with the author.

2) For a review of earlier theories as to the content of Chapter II, see C. CANNATA, "Considerazione sul testo e la portata originaria del secondo capo della 'Lex Aquilia'", *Index* 22 (1994) 151-52.

order is the result of an historical accident (3). The law originally consisted of the first two chapters only, on different topics. When the third was added to supplement the first, the text of the existing law was already too familiar and too fixed, in inscription or in people's minds, for the new chapter to be inserted between its members, and it was therefore tacked on the end. DAUBE cannot adduce examples of this process, although he applies his reasoning elsewhere, to explain the apparently curious order of the laws in a number of Biblical passages (4).

In fact, there exists one example not mentioned by DAUBE which would seem to support the feasibility of his hypothesis. In the Great Code of Gortyn, the provisions are organized by topic, but at the end there are two sets of supplementary provisions, the first being independent and the second relating to various rules already formulated in the main body of the text (5). The reason for this order would appear obvious: the Code being inscribed on a stone wall, it was not physically possible to insert later provisions in their logical place among the earlier ones. The

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3) "On the Third Chapter of the Lex Aquilia", *Law Quarterly Review* 26 (1936) 266-8; "On the Use of the Term *Damnum*", *Studi in onore di Siro Solazzi* ed. V. ARANGIO-RUIZ, Naples 1948, 154-6; *Studies in Biblical Law*, Cambridge 1947, 74-85.

4) *Biblical Law*, 85-98. In our view, the order of the biblical examples yields to a far different explanation. See the discussion of the organization of ancient Near Eastern law codes in Section IV below. As regards the theft laws of Ex. 21:37-22:3, discussed by DAUBE 91-5, we have offered an entirely different interpretation: *Studies in Biblical and Cuneiform Law*, Cahiers de la Revue Biblique 26, Paris 1988, 111-28.

5) Col. IX 24 - Col. X 32 and Col. XI 24 - Col. XII 19 respectively. Ed. R. WILLETS, *The Law Code of Gortyn*, Berlin 1967.

supplementary provisions, however, are separated from their earlier counterparts by a great deal of text; the third chapter of the Lex Aquilia by but a single short provision. A change of order would not therefore meet any comparable practical obstacle. DAUBE surmises that the first two paragraphs constituted only a small fraction of the earlier statute from which they were taken to form the present version through the addition of a third (6). In those circumstances, however, the problem of rearranging an existing text carved on stone no longer applies.

The underlying difficulty with DAUBE's thesis is that, while it seeks to provide a plausible explanation for the separation of Caps. I and III, it fails to account in any way for the connection between Caps. I and II. DAUBE can only suggest the model of a *lex satura* (7), a statute comprising miscellaneous reforms — which begs the question why these two provisions, unrelated in substance, should have been thrown together, and in such intimacy that they could not then be parted by a provision with a better claim.

The difficulty is equally acute in PRINGSHEIM's proposal, which claims to see in our textual witnesses the traces of a highly systematic process of historical evolution (8). PRINGSHEIM suggested that the law passed through no less than six stages of amendments by successive legislators. Cap. I was first followed

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6) *Biblical Law* 84-5.

7) "Third Chapter..." 267-8.

8) F. PRINGSHEIM, "The Origin of the 'Lex Aquilia'", *Mélanges Henri Lévy-Bruhl*, Paris 1959, 233-44.

by a new statute, Cap. II, and then by four other enactments, which were ultimately combined to form Cap. III: i) wounding slaves and fourfooted *pecudes*, ii) killing and wounding fourfooted animals who are not *pecudes*, iii) killing and wounding other animals, iv) damage to inanimate objects. While many objections could be made to his treatment of Chapter III, such as its failure to distinguish between legislation and juristic interpretation, at least it may be said that the stages represented by Chapters I and III follow a logical pattern of expansion. Not so the insertion of Chapter II as stage two, which as PRINGSHEIM admitted is "rather odd" (9). His explanation, that it is easier to understand on the assumption that there were six independent enactments, of which it formed one, effectively undermines his own logic, since it abandons the idea of rational expansion on which his division of Chapter III into chronological steps depends.

In this regard PUGSLEY is more consistent. He takes the model of the *lex satura* to extremes, denying a connection between any of the three chapters (10). Again, we are not concerned with his interpretation of Chapter III (although it does depend on an approach that we regard as methodologically unacceptable, namely emendation of the text on the basis of the author's theory rather than of independent criteria). Our objection is to the assumption, common to all these three authors, that

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9) "Origin..." p. 238.

10) D. PUGSLEY, "The Origins of the Lex Aquilia", *Law Quarterly Review* 85 (1969) 51-73.

because the organization of the Lex Aquilia is not immediately apparent, it did not exist. Given the amount of effort that has been expended by modern scholars to arrange the fragments of the XII Tables in a rational order, it is remarkable how readily the opposite has been assumed for the Lex Aquilia, whose order is known to us and was regarded as fixed by the Roman jurists themselves.

II. The text

It is of course impossible to reconstruct the original text itself from our present sources, not least because the language in them has undergone a process of modernization (11). The best we can hope to attain is its most faithful representation in the extant sources, by relying on the most direct textual witnesses (12).

Cap. I presents the least difficulty, since it is reproduced in similar versions in Gaius' Institutes and in the Digest, where Gaius is purported to quote the text directly:

> D. 9.2.2 pr. (*Gaius ad edictum provinciale*): <*si quis*>[a] *servum servamve alienum alienamve quadrupedem vel*

11) For example the term *erus* has been replaced by *dominus*: D. 9.2. 11.6. Attempts at reconstruction inevitably rely on substitution of the author's words for those of the extant sources. See J.M. KELLY, "The Meaning of the Lex Aquilia", *Law Quarterly Review* 80 (1964) 73-83; "Further Reflections on the 'Lex Aquilia'", *Studi in onore di Edoardo Volterra* Vol. I, Milan 1971, 235-41.

12) Cf. the remarks of J. CROOK ("Lex Aquilia", *Athenaeum* 62 (1984) 67-77) and his proposed text for Caps. I and III.

pecudem iniuria occiderit, quanti id in eo anno plurimi fuit, tantum aes dare domino damnas esto.

[a] Gaius *Inst.* III 210: «*ut qui*».

For Cap. II we have only a paraphrase by Gaius, which will have to serve as our text:

Gaius *Inst.* III 215: *Capite secundo <adversus> adstipulatorem qui pecuniam in fraudem stipulatoris acceptam fecerit, quanti ea res est, tanti actio constituitur.*

Cap. III exists in several conflicting versions, but only D. 9.2.27.5 purports to be a direct quotation by Ulpian of the whole text (13):

D. 9.2.27.5 (*Ulpianus ad edictum*): « »[a] *si quis alteri damnum faxit quod usserit fregerit ruperit iniuria, quanti ea res erit in diebus triginta proximis, tantum aes domino dare damnas esto.*

[a] *ceterarum rerum praeter hominem et pecudem occisos*

Following LENEL, we have omitted the opening clause (14). The phrase *praeter hominem et pecudem occisos* has long been regarded as suspect, not least because it is ungrammatical (15).

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13) Gaius *Inst.* III 217-218 and Justinian *Inst.* 4. 13. 14 are paraphrases.

14) O. LENEL, (Review of JOLOWICZ, *LQR* 38, 220), *ZSS* 43 (1922) 575.

15) See already A. PERNICE, *Zur Lehre von den Sachbeschädigungen nach römischem Rechte*, Weimar 1867, p. 14. For a summary of the arguments, see A. HONORÉ, "Linguistic and Social Context of the *Lex Aquilia*", *The Irish Jurist* (1972) 138-41.

LENEL rejected *ceterarum rerum* on the grounds that 'other things' could not refer back to Cap. II, since it concerned a debt, not a thing. HONORÉ, however, regards these words as genuine, referring not to things other than slaves and animals but to 'matters other than those comprised under the first two chapters of the statute' (16). In the absence of a substantive link between Cap. I and Cap. II, however, the phrase is meaningless. Any provision would be bound to deal with 'other matters' than the first two chapters because they deal with entirely different matters themselves. It only makes sense on the assumption either that Cap. II has been omitted, which was of course the situation in Justinian's day, or at least is to be disregarded, which seems to have been the attitude of Gaius (17).

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16) "Social Context..." 141-45.

17) Gaius states: '*Capite tertio de omni cetero damno cavetur*' (Inst. III 217), but fails to give other examples of loss by fraud, even though this sentence immediately follows his discussion of Cap. II. His examples are all extensions of the principle in Cap. I. (On *damnum* = 'loss' see DAUBE, "Damnum..." 93-156).

As evidence for the antiquity of the phrase HONORÉ adduces D. 21. 1. 42, citing the aedilician edict *de feris*. The edict contained two specific provisions, dealing with killing and wounding a free man, followed by a residuary clause introduced by *ceterarum rerum* dealing with all other cases (p. 144). It may equally well be argued, however, that this edict provided the compilers with the model for interpolating the phrase in 9.2.27.5, since 'other cases' is obviously restricted to other cases of damage by wild beasts kept contrary to the edict. It is thus parallel to a Lex Aquilia untrammeled by an intervening provision on an entirely different matter. The question is not whether the compilers invented the phrase but how it is used in the particular context. This distinction applies *a fortiori* to the other examples of *ceterarum rerum* adduced by D. NÖRR, "Texte zur Lex Aquilia", *Festgabe für Max Kaser* (ed. H. BENÖHR *et al.*) Vienna 1986, 213-16, which are not genitives of respect.

The special feature of this version is the verb *erit*; G. III 218 has *fuerit* and D. 9.2.29.8 (Ulpian) has *fuit*. Although the latter two represent the classical jurists' understanding that damages were to be assessed by reference to the preceding thirty days, the form *erit* is still to be preferred, without reference to the content of the clause (18), because it is both a direct quotation and the *lectio difficilior*. It would have been unthinkable to a jurist in Ulpian's day or subsequently that the third chapter could refer to a future period of time. At the same time, the discussion among classical jurists of Sabinus' proposal to imply the term 'highest' in the third chapter and their attempt to justify it by an historical fiction reveals a certain disquiet which may point to an innovative interpretation, changing the direction of the clause, as DAUBE surmised (19).

Nonetheless, ANKUM argues that the word *erit* is no more than a scribal error in the manuscript that now constitutes our primary witness (20). His grounds are threefold. Firstly, he points out that while the passage in Gaius' Institutes is admittedly a paraphrase, D. 9.2.29.8, containing *fuit*, purports to be a direct quotation of Ulpian no less than in the passage under

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18) The theory that the law originally referred to the next thirty days, propounded by DAUBE ("Third Chapter..."), has been the subject of much debate. See H. ANKUM, *infra* n. 20, 172-80, for a summary of the copious literature.

19) "On the Third Chapter..." 262-3.

20) H. ANKUM, "QUANTI EA RES ERIT IN DIEBUS XXX PROXIMIS dans le troisième chapitre de la *lex Aquilia*: un fantasme florentin", *Mélanges Jacques Ellul*, Paris 1983, 171-83.

discussion (21). They are not *pari passu*, however. Our passage cites the whole law; 29, 8 only the offensive clause — in the context of Sabinus' tendentious interpretation! It should be added for good measure that the exact same limitations, i. e. discussion of the one clause and acceptance of Sabinus' interpretation, characterize Gaius' paraphrase in III 218.

Secondly, ANKUM argues that it is *fuit* or *fuerit* that should be regarded as the *lectio difficilior*, since the phrase *quanti ea res erit* is far more common in the Digest and the scribe was therefore likely to write *erit* in error instead of *fuit*, rather than the other way round (22). The term *lectio difficilior* used in this way is a misnomer. Properly speaking, it indicates a writing against the accepted meaning of the passage, which *erit* clearly is (and was at all material times: of the Florentine manuscript and of Justinian's and Ulpian's compilations) and *fuit* or *fuerit* are not. ANKUM's argument amounts to no more than a possible rationale for scribal error. That possibility is not strong enough to overcome the stringencies of the *lectio difficilior*: the phrase *quanti ea res erit* is frequent but not universal, and its use is therefore not inevitable. It does explain, however, how the interpretation of "last thirty days" could have prevailed among the classical jurists in spite of the express wording of the *lex*. It was possible to relate *erit* to the idea of what the facts at the coming trial would prove to be (as regards the highest value in the thirty days preceding the damage), which is the meaning the phrase *quanti ea res erit* has in

21) *Op. cit.*, p. 178.

22) *Op. cit.*, p. 177.

the *condemnatio* of a classical formulary action (23), but which is irrelevant to the question of the point in time to which the value should be imputed (24). The use of such reasoning would account for Gaius' choice of *fuerit* in his paraphrase, namely 'the highest it shall turn out to have been in the preceding thirty days...' (25).

ANKUM's final argument is that the sixth-century Greek translation of D. 9.2.27.5 in the *Basilica* has the verb in the past tense (ἦν) and the translator therefore had the word *fuit* before him. It should be remembered, however, that the *lectio difficilior*

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23) As e.g. in G. *Inst.* IV 47. See W. BUCKLAND, *A Textbook of Roman Law*, 3rd ed. P. STEIN, Cambridge 1966, p. 658.

24) The same reasoning has been used by some scholars to suggest that the phrase originally related to purely procedural matters connected with the trial. Thus J. ILIFFE suggests: "... the thirty day period in the third chapter may have referred to the period between the first appearance *in iure* and the second. The parties may have been required to make an *aestimatio* on the first appearance and then have been allowed to prove extra damage when the case was heard by the *iudex*. Alternatively, they may not have needed to do more than, as we should say 'show cause', on the first appearance". ("Thirty Days hath Lex Aquilia", *RIDA* 5 (1958) 503-5). Similarly, for J. KELLY the thirty days represent "... the time within which compensation - on the perfectly simple basis of *quanti ea res erit* - shall be payable" before the judgment debtor became liable to *manus iniectio*. ("Further Reflections on the 'Lex Aquilia'", *Studi in onore di Edoardo Volterra*, Milan 1971, 239-41). It is not clear to us why procedural provisions that must have been of general application under the *legis actio* should be linked to one particular action. It is certainly not the case with comparable provisions in the Twelve Tables, such as *in ius vocatio*.

25) As PERNICE ("Sachbeschädigung" p. 15) put it in arguing for Gaius' *fuerit* as the original verb: "... und sodann erhielten wir damit den vollkommen sachgemessen Sinn: wieviel die Sache werth gewesen sein wird, d.h. wieviel der Richter finden wird, daß die Sache werth gewesen sei". (It would also account for Gaius' gratuitous use of *fuerit* over *fuit* in his discussion of Cap. I in *Inst.* III 214).

is no less valid an approach to translations than to original transcriptions. As with ancient copyists, there was a tendency for ancient translators to harmonize 'difficult' words or phrases in the original with the accepted interpretation of the passage in their day (26). For a Byzantine translator of this text, to use the future tense would be to mistranslate, since the resulting law would have made no sense to him.

III. The Structure of the Lex

A formal analysis of the text thus established gives rise to two simple observations. Firstly, it presents two casuistic laws, beginning *si quis*. It does not necessarily follow, but it is reasonable to suppose that the middle law originally had a similar form, at least casuistic, if perhaps beginning *si adstipulator*, rather than *si quis* (27).

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26) See e.g. D. BARTHÉLEMY *et al.*, *Preliminary and Interim Report on the Hebrew Old Testament Text Project*, 2nd ed., New York 1979, p. IX: "When a text was particularly difficult, there was a tendency for ancient scribes and translators to simplify the text by employing more fitting lexical, grammatical, and stylistic forms (these modifications are often spoken of as 'facilitating')". NÖRR ("Texte..." p. 217) suggests that *erit* might have been a mistranslation of an archaic latin verb, especially since archaic latin lacked precision in dealing with *consecutio temporum*. Be that as it may, the *concept* of past, present and future time was certainly not lacking in early Rome, and it is pointless to speculate about the ambiguities of a putative Ur-text that we do not have, when *consecutio temporum* is clearly expressed by the received text that we do have.

27) Cf. the reconstruction of CANNATA, "Considerazione..." p. 151. Gaius mentions two further provisions of the Lex Aquilia, a double penalty against one who denies the accusation (D. 9.2.2.1, *Inst.* III 216, cf. Ulpian D. 9.2.23.10 and Paul D. 9.2.24) and noxal liability (*Inst.* IV 76, cf. Ulpian D. 9.4.2.1). It is difficult to know what form these provisions took, whether

Secondly, there is one feature that all three laws have in common, namely a clause beginning *quanti*. In the successive clauses, however, the tense of the respective verbs follows a strict chronological order: *quanti id fuit, quanti ea res est, quanti ea res erit.*

In our view, that sequence is the key to understanding the structure of the Lex Aquilia. The connection between the three laws lies not in their protasis, in the circumstances to which they apply. It lies in the apodosis. The purpose of the apodosis in all three laws is to establish not liability for the wrongs described in the protasis, but the point in time upon which assessment of damages is to be based. In the first and third laws, the element of time (and the rationale for the tense of the verb) is clear. Express reference is made to a point in time preceding commission of the wrong (up to a year) and to one following it (thirty days).

In the second law, the element of time is not so evident, since the time of the offence would naturally be the moment at which to assess damages in most laws. It could be of significance only if there were something in the circumstances of the protasis that could give rise to a claim that the time of the offence was *not* appropriate. Given the emphasis on time in the two surrounding laws, it is reasonable to suppose that there was such a claim, and

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separate chapters like the first three or sub-clauses within those chapters or suggestive terms in the three chapters that were interpreted as laying down these rules. Since both are secondary rules, not special to the Lex Aquilia, the first possibility is the least likely. On the insertion of subordinate rules, see n. 36 *infra*.

circumstances can be posited to which it would apply. (It should be stressed that we have insufficient information about the nature of the fraud and the loss occasioned by it to establish more than the feasibility of a time-conditioned assessment). *Adstipulatio* was used to ensure the performance of a promise in the absence, or after the death, of the principal stipulator (28). Gaius informs us that *acceptilatio* was a sort of imaginary payment (III 169), which means that it could be used for remission of obligations not performed. Thus if *acceptilatio* of an obligation were made by the *adstipulator* before its due date, for example, the question might arise whether damages should be assessed as of the time of the *acceptilatio* or as at the due date (29).

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28) G. III 117; See BUCKLAND, *Textbook* 443-4.

29) This conventional view of *acceptilatio* has been challenged by H. LÉVY-BRUHL, who argued that *acceptilatio* in Cap. II meant receipt of a real payment and that the fraud was therefore nothing more than failure to pay over to the debtor the sum received ("Le deuxième chapitre de la loi Aquilia", *RIDA* 5 (1958) 507-17). His reasoning is that the phrase *acceptum facere* "ne décèle aucune idée de fiction. Elle désigne le comportement du créancier qui se déclare satisfait..." (p. 510). The second proposition, however, does not complement the first. The phrase describes the creditor's state of mind, not an objective state of facts. Precisely because it will apply whether the debt has actually been paid or not, it is an ideal vehicle for a fictional payment. Cf. A. WATSON, who points out that *acceptum facere* is a technical legal term, which always means 'to make an *acceptilatio*' ("The Form and Nature of Acceptilatio in Classical Roman Law", *Studies in Roman Private Law*, London 1991, p. 196). Real payment is a possibility, it is true, but for the purposes of the *acceptilatio* it is irrelevant. Furthermore, the existence of such a fiction has a clear rationale: it is sometimes expedient for creditors to remit obligations. In the context of *adstipulatio*, the most obvious example of fraud that springs to mind is remission of an obligation in pursuance of a corrupt bargain. This is dismissed by LÉVY-BRUHL as "rarissime" (p. 511), an assessment that we would question, but in any case the validity of legal rules does not depend on statistics and, however rare, the possibility is a real and present danger of the

To summarize so far: the Lex Aquilia has a logical structure. Three examples are given of different circumstances which give rise to a different point in time for assessment of damages: prior to the wrong, at the same time as the wrong, and subsequent to the wrong.

IV. The Background to the Lex

To a scholar trained in classical Roman law, the appearance of these three clauses in chronological sequence would seem to be nothing more than coincidence.When placed against the background of ancient Near Eastern law codes, however, it can be seen in an entirely different light.

The nine extant law codes from the ancient Near East, seven preserved in cuneiform script and two found in the Hebrew Bible, show, in both form and content, the marks of a common intellectual tradition (30). As to form, they all consist of endless

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sort that laws exist to guard against. Failure to pay over the debt to the principal creditor, on the other hand, is fraud not in respect of the *acceptilatio* but of a collateral contract (cf. CANNATA, "Considerazione..." p. 154). Both aspects will be covered by the classical contract of mandate, but the one that is likely not to have been covered in an earlier period (unless one believes that mandate sprang into existence overnight and fully grown) is the fraud wherein the *adstipulator* acts legally in form but not in substance. It will only be caught by the priciples of good faith developed by the jurists of the late Republic.

30) The seven cuneiform codes are: Codex Ur-Nammu (Sumerian, 21st century B.C.), Codex Lipit-Ishtar (Sumerian, 20th), Codex Eshnunna (Akkadian, 18th), Codex Hammurabi (Akkadian, 18th), Hittite Laws (Hittite, 16th-13th), Middle Assyrian Laws (Akkadian, 12th), Neo-Babylonian Laws (Akkadian, 6th). A recent translation of all these codes is to be found in

lists of individual cases, formulated casuistically, for the most part after the pattern: "if a man does x, the legal consequence is y".

When first deciphered, the codes were regarded as little more than random concatenations of such cases, a *satura legum*, but more recent research has shown them to be endowed with a tight organizational structure, in which various techniques are used to draw several disparate examples together so as to mark the parameters of a given theme. Rhetorical devices include chiasm, progression and what may be called 'extreme opposites' (31).

A particularly popular form of progression is the chronological sequence. Thus Codex Eshnunna 25-35 discusses the theme of marriage by culling examples from its various

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Texte aus der Umwelt des Alten Testaments Bd. I, Lieferung 1: *Rechtsbücher*, ed. R. BORGER, *et al.*, Gütersloh 1982. The two Hebrew codes are found inserted into the narrative of the Pentateuch. They are (part of) the 'Covenant Code' (Ex. 21:1-22:19) and the Deuteronomic Code, which consists of provisions scattered through the book of Deuteronomy, with the main concentration in Caps. 15, 21 and 22. The Deuteronomic Code is usually associated with the reign of king Josiah (7th century) and the Covenant Code is thought to be somewhat earlier, although not even an approximate date can be assigned with confidence.

31) See esp. H. PETSCHOW, "Zur Systematik und Gesetzestechnik im Codex Hammurabi", *Zeitschrift für Assyriologie* 57 (1965) 146-72; "Zur 'Systematik' in den Gesetzen von Eschnunna", *Symbolae iuridicae et historicae Martino David dedicatae*, ed. J. ANKUM *et al.*, *Studia et Documenta ad Iura Orientis Antiqui Pertinentia* 2, Leiden 1968, 131-43; and B. EICHLER, "Literary Structure in the Laws of Eshnunna", *Language, Literature and History: Philological and Historical Studies Presented to Erica Reiner*, ed. F. ROCHBERG-HALTON, New Haven 1987, 71-84.

stages: betrothal, marriage, and children (32), while contractual provisions in Codex Hammurabi 241-272 follow the rhythm of agricultural work, from planting to harvest (33). In a sequence in Dt. 20:1-21:9 on the theme of war, four laws deal successively with the mustering of the army, declaring war, conduct of a siege and banditry after the supposed cessation of hostilities (34). An example brief enough to be cited in full is furnished by Codex Hammurabi 1-5:

> 1. If a man accuses a man of murder and does not prove it, his accuser shall be killed.
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> 2. If a man accuses a man of witchcraft and does not prove it, the one accused of witchcraft shall go to the river and 'leap the river'. If it overcomes him, his accuser shall take his house; if the river clears the man of guilt, the one who accused him of witchcraft shall be killed. The one who 'leapt the river' shall take his accuser's house.
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> 3. If a man comes forward to give false testimony in a lawsuit and does not prove what he said, if it is a capital case that man shall be killed.
>
> 4. If he comes forward with evidence concerning barley or silver, he shall bear the penalty of that case.

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32) PETSCHOW, "*Eshnunna*..." 137-8.

33) PETSCHOW, "Hammurabi..." p. 166.

34) WESTBROOK, "Riddles in Deuteronomic Law", *Bundesdokument und Gesetz*, ed. G. BRAULIK, *Herders Biblische Studien* 4, Freiburg 1994, 168-72.

> 5. If a judge gives a judgment, renders a decision and has a sealed document drafted but afterwards changes his judgment: they shall prove that the judge changed the judgment he gave and he shall pay 12-fold whatever claim is in that case and be expelled from his judge's seat in the assembly. He shall not sit again with the judges in a law-suit.

The unit discusses the topic of litigation by choosing examples from the three chronological stages of a law-suit: accusation, testimony and judgment.

In the sequences discussed so far, the theme linking the individual rules is found in the circumstances to which they apply. The common factor of a group of laws need not, however, be confined to the facts in their protasis. In Exodus 21:12-16 we find the following four laws:

> 1. He who strikes a man so that he dies shall be put to death. As for him who did not lie in wait, but God forced his hand, I shall establish for you a place to which he may flee. But if a man plots against his neighbour to kill him with cunning, you shall take him from my altar to die.
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> 2. He who strikes his father or mother shall be put to death.
>
> 3. He who steals a man and sells him or in whose hands he is found shall be put to death.
>
> 4. He who curses his father or mother shall be put to death.

The only link between these laws is in their legal consequence: they are all cases involving the death penalty.

The tradition exemplified by these scattered examples that we have considered so far was not confined to the Near Eastern codes but appears to have cast its shadow further westward. The Great Code of Gortyn was referred to above as a possible model for DAUBE's theory of subsequent additions. It also may serve as a model for our thesis, since it not only shares the basic casuistic form of the Near Eastern Codes but also shows signs of similar structural patterns (35). Thus we find the chronological sequence:

Seduction (2.16-20)
Adultery (2.20-45)
Divorce (2.45-3.16)
Widowhood (3.17-37)
Children (3.44-4.23).

It is interesting to compare a sequence from the Laws of Eshnunna that we have already mentioned:

Seduction/rape of betrothed (25-26)
Adultery (27-28)
Desertion (29-30)
Children (32-35).

In both cases, it should be noted that there is a gap in the paragraphs that constitute the sequence. The reason is the same:

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35) On the structural coherence of the Gortyn code, see M. GAGARIN, "The Organization of the Gortyn Law Code", *Greek, Roman, and Byzantine Studies* (1982) 129-146.

the chronological sequence is broken by another familiar sequence: that of free/slave (3. 37-44 and 31 respectively) (36).

At Rome, the only law of greater antiquity than the Lex Aquilia is (by conventional dating) the Twelve Tables. For the most part, the order in which the individual provisions of the Twelve Tables are arranged in modern editions exists only for the purposes of convenience; it has no claim to historical authenticity. One sequence that could be regarded as authentic is that of the provisions on personal injury now found in VIII. 2-4. Although the text given by Gaius in III 223 is not a direct quotation, its accuracy is confirmed by direct quotations of its individual laws by other authors (37). If the order given by Gaius is correct, then, it follows a familiar pattern in the Near Eastern codes, namely a list of injuries by body part in the protasis and a (generally) declining severity of penalty in the apodosis, with intervening sub-sequences of free man, slave, as victim (38).

We have argued elsewhere (on grounds of form and substance, but not of structure) that the Twelve Tables belong to the same scholastic legal tradition as that of the ancient Near

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36) Free/slave sequences usually concern the status of the victim, but in the provisions of the Hittite Laws I 93-100 we find the sequence: burglary of house, burglary of granary, arson of house, arson of barn, on which is imposed a free/slave sequence concerning the culprit which lays down noxal liability. Noxal liability might possibly have been dealt with in the Lex Aquilia in a similar way. See n. 27 *supra*.

37) E.g. Festus 550, 3; Gellius XX 1 12, 14; Paul, *Collatio* II 5 5.

38) See e.g. Codex Eshnunna 42-7, esp. 42, Codex Hammurabi 196-205, Hittite Laws 7-9, 11-16; cf. WESTBROOK, "Twelve Tables..." 106-8.

Eastern codes (39). The evidence for the Lex Aquilia also belonging to this tradition seems to us as strong if not stronger. Three laws in casuistic form are organized in a pattern that is not identical to any particular law from the ancient Near Eastern codes, but matches exactly the type of structures in which the latter are organized. Structure is all the more significant because it is purely a product of intellectual effort; it cannot be dismissed as the coincidental recurrence of an everyday legal problem, as is sometimes claimed with regard to similarities of content between laws in different codes (40).

V. The Nature of the Lex

The interpretation here proposed for the Lex Aquilia faces an immediate objection in respect of function. It is difficult to believe that a legislative reform, even a technical reform of the assessment of damages, would have been structured in this way. The assembly of three different cases as examples of different means of assessment and their arrangement in a chronological order is more appropriate to an academic discussion than to a statutory enactment.

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39) WESTBROOK, "The Nature and Origins of the Twelve Tables", *ZSS* 105 (1988) 74-121.

40) E.g. M. DAVID, "The Codex Hammurabi and its Relation to the Provisions of Law in Exodus", *Oudtestamentische Studien* 7 (1950) 153-4. Cf. the response of R. YARON, "The Goring Ox in Near Eastern Laws", *Israel Law Review* 1 (1966) 398-406. The nature of possible connections between similar laws is discussed by M. MALUL, *The Comparative Method in Ancient Near Eastern and Biblical Legal Studies*, Neukirchen - Vluyn 1990, esp. 133-9.

The reason, in our view, is precisely that: the text of the Lex Aquilia was in origin an academic document. To return to the law codes of the ancient Near East, a series of studies in recent years has shown that they were not, as first assumed, legislation of any sort, but scholarly treatises on the law which were purely descriptive in character. They belong to a wider tradition of Mesopotamian science whereby intellectual inquiry was pursued by the compilation of lists — lists of legal cases and their resolution, of omens and their meaning, of medical symptoms and their prognosis, of words and grammatical forms (41).

The casuistic formulation is both characteristic of this genre of literature and marks its limitations. Lacking all-embracing categories, definitions or any of the analytic tools at our command, Mesopotamian science could only compile endless lists of examples, and relied on structure, on its organization of those examples, to give some analytical shape to the discussion. As EICHLER concludes with regard to the organization of the paragraphs of Codex Eshnunna, "This structure would rather seem to add further support for placing the Eshnunna law compilation within the orbit of Mesopotamian scholastic tradition. The features of the structure suggest a legal textbook, featuring

41) See our earlier discussion of this question in "Twelve Tables", 82-97, and further in "Cuneiform Law Codes and the Origins of Legislation", *Zeitschrift für Assyriologie* 79 (1989) 201-22, with a summary of the opposing views. Two recent studies take up more extreme positions in favour of the legislative character of the codes on the one hand and of their scholastic character on the other: respectively, W. LEEMANS, "Quelques considérations à propos d'une étude récente du droit du Proche-Orient ancien", *Bibliotheca Orientalis* 48 (1991) 409-20, and M. MALUL, *The Comparative Method*, esp. p. 105 n. 13.

a 'socratic' methodology, designed for the teaching of Mesopotamian legal thought and the appreciation of the complexities of legal situations" (42).

The Lex Aquilia, if it derives from this background, would have begun life as part of a body of learning, a scholastic document or oral tradition. Its classification as a *lex* is a reflection of subsequent events which removed it from its original context and gave it a new role as the basis of the law of wrongful damage. To understand the process involved, we may refer again to the Near Eastern sources, and to the one ancient legal system that continued in use in Hellenistic times.

The Bible, as we have noted, contains two law codes which are based on the tradition of Mesopotamian science, having strong connections in content with earlier cuneiform codes and being cast in its characteristic 'scientific' style, the casuistic formulation. They were, therefore, originally independent sources or oral traditions, but were incorporated into a historical narrative that attributed their origin to an act of divine legislation in the Sinai desert prior to settlement of the Israelites in the promised land. The process of incorporation is a complex and much disputed problem, but must have been complete by the 4th century B.C., before the closing of the biblical canon.

The Mishnah is a compilation, committed to writing in the early 3rd century A.D., of the jurisprudence of the Tannaim,

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42) "Literary Structure..." p. 81. See also WESTBROOK, "Riddles..." 159-63.

Rabbinical jurists who were active from the mid-first century B.C. The Mishnah regards the biblical laws as still valid, indeed as holy writ, but its use of them completely transforms their meaning. Casuistic laws applying to very narrow cases are re-interpreted as broad basic statements of the law which they touch upon. From then on the old laws are interpreted as if they were recent, general legislation, often in complete contradiction with their earlier meaning or with an entirely new emphasis. For example, Dt. 24:1-4 presents a complicated case of divorce and remarriage:

> If a man marries a woman and it happens that she finds no favour in his eyes because he found something of unseemliness in her and he writes her a bill of divorce and gives it into her hand and sends her from his house,
>
> and she goes forth from his house and goes and becomes the wife of another,
>
> and the latter hates her and writes her a bill of divorce and gives it into her hand and sends her from his house, or the latter husband who marries her dies:
>
> her first husband cannot take her again as his wife, after she has been made unclean to him ...

The purpose of the law is to prevent remarriage by the original husband when there has been an intervening marriage by the wife. The rationale of this prohibition and the exact

circumstances to which it applied have been much debated (43). It is clear, however, that the question of divorce is subsidiary to the main point of the law: the divorce procedure is mentioned in passing, in the recital of circumstances in the protasis; it is not regulated in the apodosis. In the Mishnah and later jurisprudence, on the other hand, this text is taken to be the basic law on divorce as such. Its opening clause, "If a man marries a woman and it happens that she finds no favour in his eyes because he found something of unseemliness in her" is interpreted by the Tannaitic jurists as follows (Gittin 9.10):

> The School of Shammai say, A man may not divorce his wife unless he has found in her something improper, as it is said, *because he found something of unseemliness in her.* But the School of Hillel say, Even if she spoiled a dish for him, as it is said, *because he found something of unseemliness in her* (i.e.understanding the phrase to mean "unseemliness or something else"). Rabbi Akiba says, Even if he found another more beautiful than she, as it is said, *And it happens that she finds no favour in his eyes.*

The background to this transformation is an intellectual revolution in which ancient Israel was caught up when it became part of the Hellenistic world: the replacement of Mesopotamian

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43) The literature is summarized in C. PRESSLER, *The View of Women found in the Deuteronomic Family Laws*, Berlin 1993, 45-62, to which should be added E. OTTO, "Soziale Verantwortung und Reinheit des Landes", *Prophetie und geschichtliche Wirklichkeit im alten Israel*, ed. R. LIWAK, Stuttgart 1991, 290-306.

scientific thought by Greek philosophy (44). The ability that the latter gave to define terms and create universal categories allowed jurists to create a new legal system, but not *ex nihilo*; rather by placing existing legal material in an entirely different intellectual framework, so as to change in effect its substantive meaning.

The same process was, we suggest, at work at Rome in the late Republic, where the influence of Greek thought is too well known to require demonstration (45). In the case of the Lex Aquilia, this meant that a very specialized rule on the assessment

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44) See WESTBROOK, "Twelve Tables..." 119-21; "Origins of Legislation..." 218-22. DAUBE has demonstrated the reliance of Tannaitic jurisprudence on Greek systems of logic in their interpretation of biblical texts ("Rabbinic Methods of Interpretation and Hellenistic Rhetoric", *Collected Works of David Daube* Vol. I, ed. C. CARMICHAEL, Berkeley 1992, 333-55). It is important to understand that our thesis proposes a more fundamental change than does DAUBE's. Being unaware of the earlier phase represented by Mesopotamian science, DAUBE assumes that the biblical codes were legislation and that Rabbinical interpretation was merely a more sophisticated version of existing canons of statutory interpretation.

45) For an overview, see E. RAWSON, Roman Tradition and the Greek World, *Cambridge Ancient History* Vol. VIII, 2nd ed., Cambridge 1989, 448-76. We would draw particular attention to RAWSON's discussion of the unconscious infiltration of Greek thought on the one hand (448-9) and the influence of Greek scientific method on the other: "A Greek treatise on almost any subject, a *techne* or, as the Romans were to say, an *ars* (as both subject and treatise were known) first defines its subject, and then subdivides it, going on to deal separately and in order with the various parts, kinds or aspects. This is a method that goes back through the great philosophers to the sophists, who first taught the Greeks to think and speak in an orderly fashion. In the first century B.C. at Rome Varro treated agriculture on this model, criticizing all his predecessors, including Cato, for not starting with an accurate definition of the subject and for including irrelevant material. In fact, it seems pretty clear that it was only from the start of the first century that Greek method was used by the Romans for organizing treatises on any subject — rhetoric, grammar and the rest" (456-7).

of compensation was elevated to the status of a basic statement on the law of wrongful damage.

VI. The Origins of the Lex

The assumption that the Lex Aquilia was a legislative reform raises the question, what was the object of the reform? Two answers have been proposed.

The first is associated with the date found most frequently in text-books (albeit with varying degrees of scepticism) for promulgation of the Lex, namely 287/6 B.C. (46). According to BEINART, the law was passed by the *plebs* after their third secession in order to exact reparations from the patricians (47). BEINART surmises that the secession was attended by disorders, during which plebeians suffered undue attacks on their property at the hands of the patricians. Since it was difficult to prove who had been the author of particular attacks, the retrospective provisions of the law (assuming both Caps. I and III to be retrospective) served as a sort of collective fine for any previous damage inflicted by the defendant's brothers-in-arms.

BEINART's theory has not found acceptance, for two reasons. Firstly, as VON LÜBTOW points out, there is nothing in

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46) O. TELLEGEN-COUPERUS, *A Short History of Roman Law*, London 1993, 50-51; cf. R.W. LEE, *Elements of Roman Law*, 4th ed. London 1956, p. 393.

47) B. BEINART, "Once more on the Origin of the *Lex Aquilia*", *Butterworths South African Law Review* (1956) 70-80.

the law's provisions of a political character or of substantive connection with secession of the *plebs* (48). Nor, we would add, is there anything to suggest that the law had any bearing whatsoever on the struggle between the orders (49).

Secondly, the sources that suggest a connection, namely the assertions of certain Byzantine jurists, are not to be relied upon (50). They have been dismissed as historical fantasies, concocted from scraps of information such as Ulpian's remark (D. 9.2.1.1) that the Lex Aquilia was a plebiscite and Pomponius' account (D. 1.2.2.8) (51) of how plebiscites became binding on the whole people by the Lex Hortensia after a secession of the *plebs* (52). We would add that Cicero at the end of the Republic seems to know nothing of a tradition linking the Lex Aquilia with civil strife and general destruction; on the

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48) U. VON LÜBTOW, *Untersuchungen zur Lex Aquilia de damno iniuria dato*, Berlin 1971, 15-16.

49) In attempting to find some social dispute to explain the origin of the *Lex Aquilia*, however, VON LÜBTOW appears to adopt the very approach that he has just rejected in BEINART's theory. He suggests that the occasion for the law was disputes between patricians and wealthy plebeians over *ager publicus*, 'bei denen gegenseitige Gewaltakte stattgefunden hatten, deren zivilrechtliche Sühne eine zusammenfassende, abschließende Regelung verlangte' (p. 16).

50) Theophilus states that the law was passed at the time of the dissension (*diastasis*) between the *plebs* and the patricians (*Paraphrasis* 4.3.15), and the scholiast to the *Basilica* that it was the work of Aquilius, who was the *plebs*' leader when they rebelled against the patricians and seceded from them (60.3.1).

51) Cf. Livy III 55, G. *Inst.* I 3, J. *Inst.* 1.2.4.

52) W. GORDON, "*Dating the Lex Aquilia*", *Acta Juridica* (1976) 315-21; A. HONORÉ, "Social Context..." 145-6; VON LÜBTOW, *Untersuchungen*, *loc. cit.*

contrary, he contrasts its provisions, suited to ancient times when killing was a rarity, with provisions enacted in his own day against the background of civil war to give a remedy against armed bands, for which the Lex Aquilia was inadequate (53). It is unlikely therefore that the Lex Aquilia was a measure of political reform.

The second object proposed for the Lex Aquilia's reforming zeal is to protect the interests not of disaffected plebeians but of wealthy creditors. According to HONORÉ, the main point of the legislation was to substitute for the fixed penalties of the earlier law an assessment of damages based on the value of the thing killed or the actual loss suffered through burning, breaking or tearing another's property (54). Fixed penalties such as those in the Twelve Tables of 150 *asses* for breaking a slave's bone and 25 *asses* for cutting down a tree ceased to be of use to property owners when inflation destroyed their value. HONORÉ accordingly attributes the passing of the Lex Aquilia to the period of high inflation at the end of second Punic war.

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53) 9. et *cum sciret de damno legem esse Aquiliam, tamen hoc ita existimavit, apud maiores nostros, cum et res et cupiditates minores essent et familiae non magnae magno metu continerentur, ut perraro fieret, ut homo occideretur, idque nefarium ac singulare facinus putaretur, nihil opus fuisse iudicio de vi coactis armatisque hominibus...* 10. *his temporibus, cum ex bello diuturno atque domestico res in eam consuetudinem venisset, ut homines minore religione armis uterentur, necesse putavit esse... et poenam graviorem constituere, ut metu comprimeretur audacia, et illam latebram tollere DAMNUM INIURIA* (*Pro Tullio*, 4).

54) "Social Context..." 147-50.

The difficulty with HONORÉ's proposal is that the provisions of the Lex Aquilia are singularly ill-suited to the purpose of compensating for the effects of inflation. It is pointless to look back to the previous year for the highest value of a slave when inflation ensures that his value will always be highest at the latest possible date (55). Even the next thirty days provision of Cap. III will be of little help; the only fair measure in a time of high inflation is value at the time of judgment. Ironically, Cap. II appears the most suited to the task attributed by HONORÉ to the *lex*, but only perhaps because of our uncertainty as to the details of that provision.

BIRKS suggests that Cap. II was indeed promulgated to deal with the effects of inflation, albeit of a different kind. It was designed to prevent corrupt bargains between debtor and *adstipulator* to accept repayment of a loan made in *asses* in silver coins of a higher denomination, such as *denarii*, at less than the going commercial rate of exchange between the silver and bronze coins. This could only have occurred during the inflationary conditions of the Punic wars, when the exchange rate was "floating" i.e. a matter for free bargaining. Thereafter, return to currency stability made the law obsolete (56).

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55) Inflation is to be distinguished from seasonal fluctuation of prices, which is identified by G. CARDASCIA as the rationale for the retrospective highest value in Cap. I: "La portée primitive de la loi Aquilia", *Daube Noster*, Edinburgh 1974, 62-4.

56) P. BIRKS, "Wrongful Loss by Co-Promissees", *Index* 22 (1994) 181-88.

Stipulatio, however, was an obligation *stricti iuris*, with all the rigour in favour of the creditor thereby implied. Even assuming that a situation existed wherein the exchange rate was a matter for bargaining between creditor and debtor *at the time of repayment* (57) and further that the *adstipulator* had a discretion to bargain with the debtor over repayment in terms that did not amount to *datio in solutum* (58), then it is still not clear why legislation would have been necessary to remedy a wrong that any intelligent creditor could have avoided by formulating his *stipulatio* more tightly, so as to bar payment in unfavourable coinage.

To return to Caps. I and III, it is true that, even without the factor of inflation, the Aquilian measure of damages appears to be more sophisticated than that of the Twelve Tables, and certainly by Ulpian's day it had superseded the latter in areas where they were deemed to overlap (59). It would be rash to assume

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57) BIRKS (p. 184) imagines the following scenario: "The debt of 5000 *asses* in this state of affairs might require a payment of only, say, 300 *denarii*, though the exact number will not be discoverable except through a bargain between the parties... The honest debtor will offer what he perceives to be the going rate, say 300 *denarii*, and he will insist that, if he pays that sum, the debt must also be artificially discharged... The discussion will very likely end in compromise. The debtor will pay 325...".

58) "The conscientious *adstipulator* will do his best to defend his principal's interest. He will try to push the debtor up to, say, 350... If these same parties are less than perfectly honest they will see that the unstable currency conditions leave room for secret advantage to themselves. The *adstipulator* will be easily tempted to do a deal with the debtor. He will discharge the debt at a not wholly implausible 280 *denarii*, so long as he receives 20 into his own pocket..." (BIRKS, p. 184).

59) D. 9.2.1. Note, however, that Ulpian merely says *derogavit*; he does not suggest that the passing of the statute abrogated existing laws.

however, as for example DAUBE does (60), that the one was necessarily a reform of the other. The relationship between the two laws can be put in perspective by recourse once more to sources from the ancient Near East.

The example that served DAUBE as a model for the idea of emerging damage in Cap. III is the case in Ex. 21:18-19, where a man injured in a fight is paid compensation, after his recovery, for his medical expenses and loss of work. That case is a standard scholarly legal problem that recurs in other ancient Near Eastern law codes, namely paragraph 206 of Codex Hammurabi and paragraph 10 of the Hittite Laws (61). Those same law codes, however, contain another legal problem on wounding, which takes the standard form of a list of injuries with either talionic punishment or a tariff of fixed payments according to the part affected: eye destroyed, bone broken, face slapped etc. We have argued elsewhere that the fixed payments are not by way of compensation, but just as *talio* represents a limit on permissible revenge, so fixed payments set a limit on the ransom payable in lieu of revenge (62).

Thus two measures of damage coexist in the same law code (63). The reason, we suggest, is that they are concerned

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60) "On the Third Chapter..." p. 255.

61) See further WESTBROOK, "XII Tables..." 95-7.

62) *Studies*, 39-77.

63) Paragraph 10 of the Hittite Laws for good measure adds a small fixed payment to the compensation. 104, incidentally, sets a fixed payment for cutting down trees, while 98 applies indemnification of loss where the culprit burns down a house.

with separate offences. The one deals with injury where there is a low level of culpability or damages or some mitigating circumstance and the other with assaults that represent an affront to the victim's dignity, as the case of the slap in the face graphically illustrates (64). The one therefore emphasizes indemnification as the measure of damages, while the other emphasizes revenge, as exemplified by *talio*. In our view it is no accident that the same dichotomy (expressed by the terms *contumelia* and *culpa*) is found in the developed actions of *iniuria* and *damnum iniuria datum*; it represents the original scope of apparently overlapping provisions of the Twelve Tables and the Lex Aquilia, with *talio* and fixed payments on the one hand, and indemnification on the other.

To summarize: the view that the lex Aquilia was a legislative reform is unsupported by evidence linking it to any historical object of reform. In particular, there is no basis for supposing that it embodied a political reform such as might be implied by the use of a plebiscite.

The evidence for the latter proposition is, as we have seen, a statement attributed to Ulpian in the Digest. Ulpian's statement is of an antiquarian character. On the one hand, it may reflect a long-standing tradition. On the other, it is possible that the tradition itself is no more than a historical fiction, that at some

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64) Our arguments are set out in "The Trial Scene in the Iliad", *Harvard Studies in Classical Philology* 94 (1992) 61-64. On the voluntary nature of the second category, see G. CARDASCIA, "Le caractère volontaire ou involontaire des atteintes corporelles dans les droits cunéiformes", *Studi in Onore di Cesare Sanfilippo* vol. 6, Milan 1985, 200-207.

point the law's origins had been attributed to a plebiscite as a sort of pedigree, a way of accounting for its authority by reference to the customary mode of legislation in the late Republic (65).

Assuming, nonetheless, that at some point during the Republic a plebiscite was promulgated at the instance of one Aquilius, there is no need to suppose that it was a reform *ex nihilo*. For on the one hand the use of the plebiscite mode in this case lacks any demonstrable political or economic implications, and on the other the narrow technicality of its contents and the pedantry of its formulation are unequal to the role of a considered innovation. Rather, they evoke the adoption of an existing scholarly text or oral tradition. HONORÉ points out that the *terminus post quem* for the plebiscite could theoretically be as early as 449 B.C. (66), but it is unnecessary to seek an early date

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65) Methodologically, a distinction should be made between the received text of a law and an historical notice about a law. The former is a primary source which has been transmitted because of its function, namely its use by succeeding generations of lawyers as a source of law. Even if we question the authenticity of parts of the present text, there is no reason for us to dismiss the whole as a fabrication. The historical notice, on the other hand, is not a primary source, nor can it claim any ongoing legal function.

Ulpian's statement about the legislative pedigree of the Lex Aquilia is of no legal significance: it was not necessary for citation or for establishing the validity of such an old law, which Ulpian in any case examined through the prism of the praetorian edict. It therefore falls within the second category: it is an historiographical assertion about an *event* that took place more than five hundred years earlier. We must judge it by the same criteria by which we judge the works of native Roman historians (one of which was possibly the source of Ulpian's statement). Those works can certainly not be read uncritically, as if their sources were primary, their purpose objective and their understanding of former times not tainted by the projection backwards of conditions prevailing in the writer's own time.

66) "Social Context..." p. 146; see also J. THOMAS, *Textbook of Roman Law*, Amsterdam 1976, p. 19. A. BISCARDI argues for an early

if the plebiscite is not itself the origin of its provisions. They go back to an indefinable point in early Roman history, being an element of traditional legal learning that for some reason had not been canonized in the Twelve Tables (67).

Conclusion

The Lex Aquilia is a source that goes back to a shadowy period of Roman law for which native historiographical traditions are unreliable. We do however possess a text which, if not entirely in its original form, retains enough thereof to discern the original focus of the law and the sequence of its clauses. That sequence has generally been regarded as arbitrary, but when placed against the background of far more copiously documented scholastic legal traditions from the ancient Near East, attests to a coherent set of provisions. They follow an organizational pattern widely employed in the ancient Near Eastern law codes, namely the chronological sequence.

The organization of the ancient Near Eastern law codes is predicated upon the fact that they were not legislation in the modern sense but academic treatises, a part of a more general scientific tradition in which the same type of organizational

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date on the basis of G. *Inst.* IV 37: "Sulla data della Lex Aquilia", *Scritti in memoria di Antonino Giuffrè* I, Milan 1967, 75-88.

67) Ulpian provides a *terminus ante quem* by citing an interpretation of the consul M. Iunius Brutus (D. 9.2.27.22), a jurist of the 2nd century B.C.

patterns prevailed. While some of those patterns would not be inconceivable in a legislative reform, the sequence found in the Lex Aquilia is too pure an example of this type of academic discourse. Its structure was a consequence of its academic character.

The Lex Aquilia of classical Roman law was therefore the culmination of a two-fold process of transformation. On the one hand it developed from three technical rules on a narrow question of the point in time to which the assessment of damages should be referred to the general basis of liability for wrongful damage. On the other, it acquired the status of normative legislation, through insertion into a known legislative form and by juristic interpretation within that conceptual framework. Neither development affected the integrity of the original text; rather, they were achieved by a change in attitude to the ancient source, a shift in the way the text was read.

In this respect Roman law reflects the same process that was undergone by the one ancient Near Eastern system to acquire a classical form, namely Biblical law. For behind both cases lay an intellectual revolution, in which Greek philosophy replaced Mesopotamian science as the basis of jurisprudence. The original coherence of the Lex Aquilia, therefore, and its subsequent rereading, are emblematic of Roman intellectual as well as legal history.