

Rechtsgeschichte

www.rg.mpg.de

<http://www.rg-rechtsgeschichte.de/rg2>
Zitiervorschlag: Rechtsgeschichte Rg 2 (2003)
<http://dx.doi.org/10.12946/rg02/040-057>

Rg **2** 2003 40–57

James Q. Whitman

Long Live the Hatred of Roman Law!

Dieser Beitrag steht unter einer
Creative Commons cc-by-nc-nd 3.0



Abstract

Perhaps understandably, legal historians have preferred to forget the long history of the hatred of Roman law. It is a topic that has painful associations with the Nazis, who denounced the supposed link between Roman law and the »materialistic world order.« It is also a topic that seems particularly out of place in the current world of European legal politics, in which the future of Roman law in the European order seems to depend on demonstrating the cosmopolitan appeal of the Roman texts. Nevertheless, the topic cannot be allowed to die. Roman law has been dogged by anxiety and hatred for many centuries, for reasons that deserve sustained attention in our scholarship, and that are of real public importance. Even the association between Roman law and the »materialistic world order« – an association made not only by the Nazis but also by Marxists, and indeed by observers well back into the Middle Ages – deserves serious discussion. This essay argues that the best way to understand the history of these hatreds is to return to the defenses of Roman law offered by Schulz and Kaser in the 1930s, who focused on the striking omission of *mores* from the Roman texts. The resulting narrowness of the legal texts made them seem dangerous and immoral for many centuries. Indeed, anxieties about the apparently »immoral« narrowness of the Roman texts date back to the Middle Republic, and the same sorts of anxieties underlie many denunciations of western law to this day.



Long Live the Hatred of Roman Law!

I

Legal historians all know that Roman law was hated and feared for many centuries. Herbert Jolowicz identified three of the reasons in 1947: »In the first place«, he wrote, Roman law has been regarded, »as a foreign system, and objectionable as such; secondly as absolutist and inimical to free institutions; thirdly – and this is the chief charge in modern times – ... as the bulwark of individualist capitalism, materialist in its outlook and favoring selfishness at the expense of the public good«. ¹ All three of these accusations have indeed been made, and there have been others too. For centuries there were Europeans, like the venerable Bede, who distrusted Roman law simply because it was not Christian. ² Indeed, Pope Honorius III went so far as to ban the teaching of Roman law in Paris in 1219 – a »narrow bed«, as he described it, »in which there is hardly room for the sons of the prophets«. ³ After the mid-nineteenth century, German nationalists hated Roman law for yet a different reason: because it represented *Juristenrecht*, »lawyers' law«, rather than *Volksrecht*, »people's law«. It was the hatred of lifeless, rationalistic *Juristenrecht* that led Heinrich Brunner to describe the spread of Roman law as the spread of an »infection« – surely the most dramatic metaphor ever to make its way into the literature of legal history. ⁴

The hatred of Roman law was, in fact, a constant of western history until 1945. Indeed, the hatred of Roman law is, we might say, half the tale of the history of Roman law itself, which has always been haunted by suspicion, anger and anxiety. Yet I think it is fair to say that scholars today have little sense of how to talk about it – and most commonly little desire to talk about it either. The topic still seemed unavoidable fifty or sixty years ago, when scholars were struggling with Nazi ideology. The Nazi party program of 1920 denounced Roman law as the vehicle of the »materialistic world order«, and many specialists of the following decades felt the need to respond. Jolowicz' essay belongs to this period, as does Koschaker's *Europa und das Römische Recht*, written to vindicate the cosmopolitan values of Roman law against

1 HERBERT JOLOWICZ, The Political Implications of Roman Law, in: Tulane Law Review 22 (1947) 62.

2 JOHN F. WINKLER, Roman Law in Anglo-Saxon England, in: Journal of Legal History 13 (1992) 105.

3 »coangustatum est illic stratum et fere artus est locus ibidem filiis prophetarum.«, in: HENRICUS DENIFLE, Chartularium Universitatis Parisiensis, Paris, 1889, I, 92.

The language is borrowed from the Vulgate, Isaiah 28:20.

4 Surveyed in: JAMES WHITMAN, At the Scholarly Sources of Weber's Melancholy, in: Quaderni Fiorentini 26 (1997) 325–362.

Nazi denunciations.⁵ Also dating to the same era is one disturbing, but important, defense of Roman law, composed for a Nazi audience: Max Kaser's 1939 *Römisches Recht als Gemeinschaftsordnung*.⁶ Fritz Schulz' *Prinzipien des römischen Rechts* of 1934 should be understood as a defense against the attacks of the national socialists as well.⁷ To all of these scholars, it seemed impossible to write the history of Roman law without grappling with the bitter history of the hatred of Roman law.

But most contemporary authors regard the topic as a bit *passé*, and probably a bit unsavory as well. There are certainly a few historians who still kick around some of the old charges against Roman law. Antonio Hespanha gives some attention to the role of Roman law in the making of European commercial values – though he finds relatively little to say.⁸ Peter Stein, in his humane and learned *Roman Law in European History*, gives repeated glances to the history of the hatred Roman law – though again only glances.⁹ Medievalists like Manlio Bellomo or Ennio Cortese are well aware of the importance of the conflict between the claims of the Church and the claims of Roman law.¹⁰ The topic is not wholly extinct in our literature.

Nevertheless, it sometimes does seem threatened with extinction. Thus there are texts, like Hermann Lange's *Römisches Recht im Mittelalter*,¹¹ that find simply nothing to say about the hatred of Roman law. Such silence often seems, in fact, all too likely to descend over the whole field. In truth, post-classical history of Roman law today has too often become a history of manuscripts, methodologies, movements: of glossators, commentators, humanists, neo-scholastics and so on. It has become the history of learned men who have lovingly enlarged our knowledge of the law. It has become the history of what Wieacker, searching for value-neutral ways to talk about Roman in the wake of the Nazi experience, called »Verwissenschaftlichung« – mere scientization and professionalization of the law.¹² It has become anything but the history of the supposedly corrosive role played by Roman law in the making of things like the »materialistic world-order«.

This is a tendency that has been dramatically reinforced by the current politics of law in Europe. With legal unification of Europe looming, the future of Roman law seems to hang on demonstrating its peculiar beauties, and its special power to bring Europeans together. Under these circumstances, specialists in Roman law have

5 PAUL KOSCHAKER, *Europa und das Römische Recht*, München 1947.

6 MAX KASER, *Römisches Recht als Gemeinschaftsordnung*, Tübingen 1939.

7 FRITZ SCHULZ, *Prinzipien des römischen Rechts*, München/Leipzig 1934.

8 ANTONIO MANUEL HESPANHA, *Introduzione alla storia del diritto europeo*, Bologna 1999, esp. 87–88.

9 PETER STEIN, *Roman Law in European History*, Cambridge 1999, at e.g. 2, 56.

10 MANLIO BELLOMO, *The Common Legal Past of Europe, 1000–1800*, trans. Cochrane, Washington 1995, e.g. 102; ENNIO CORTESE, *Le Grandi Linee della Storia Giuridica Medievale*, Rome: Il Cigno 2001.

11 München 1997.

12 FRANZ WIEACKER, *Privatrechtsgeschichte der Neuzeit. Unter besonderer Berücksichtigung der deutschen Entwicklung*, 2d ed., Göttingen 1967.

been drawn onto a path marked out by Koschaker in 1947. They have sought to treat the hatred of Roman law as something that belongs to the ugly nationalist past that Europe is today seeking to overcome. Roman law, its champions seem to suppose, simply *must* be presented as the cosmopolitan law of universalism and reason.

And yet the hatred of Roman law is no minor theme. Fear and distaste for Roman law have exerted a formative influence on western culture and society. The ideas of Marx, of Weber, of Tönnies, of Durkheim were all formed in the course of acid debates over the value of Roman law. Indeed, European society itself was formed in the course of those same debates. For of course is true that Roman law has acted as factor for social change in Europe, regardless of whether we call its effects »destructive« or »corrosive«. In fact, there is no way to write the social history of Roman law in Europe, or the social history of Europe itself, without writing the history of the hatred of Roman law.

Not least, the failure to write the history of hatred of Roman law is a failure to do justice to the demands of our modern-day conflicts with non-western societies. As I want to suggest in this essay, the hatred of Roman law has not by any means ceased to matter: Many of the very things that once stirred distrust and fear against Roman law are now the things that Islamic fundamentalists and self-described neo-Confucians denounce in western law. If historians of Roman law do not engage the history of these hatreds in the west, they will fall down on a responsibility to the larger western community: the responsibility of accounting historically for the tensions that are besetting contemporary global legal politics.

We must not stop talking about the history of the hatred of Roman law. That does not mean that we ought to revive the excesses and illogic of the past. We need intelligent and persuasive ways to talk about the history of the hatred of Roman law, ways that will comport with the scholarly tenor of our own time. But the topic must not be allowed to die.

II

And in fact, there are perfectly intelligent and persuasive ways to talk about the history of the hatred of Roman law – ways that,



we can all agree, deserve a place in both our scholarship and our teaching.

In some cases, this is because the old accusations are still alive in the minds of the public, regardless of what specialists may think. Take the notion that Roman law was somehow to blame for princely absolutism on the continent. This is a claim that specialists learned to view skeptically a long time ago. It is true that Roman law includes some texts that helped justify princely political pretensions in pre-modern Europe – most importantly the maxim »princeps legibus solutus«, which inspired the very concept of »absolutism«. ¹³ More significantly, Roman law served well for the training of bureaucrats, at least in some parts of Europe; and princely government and bureaucracy certainly went hand in hand. Still, thoughtful specialists have known for decades that the case is not a strong one. Bureaucracies and princely governments have arisen in many parts of the world without Roman law, as Max Weber long ago observed. Most importantly, even in Europe, princes were not the only ones who profited from citing Roman texts. The reality, as Myron Gilmore already argued sixty years ago, is that Roman law can be cited by many camps, for many propositions, and careful studies have shown that princes never had a monopoly on the political use of Roman law. ¹⁴

Specialists thus all know that it is foolish to speak as though Roman law caused princely absolutism in any simple way. But for the general public, the idea of the »absolutist« impact of Roman law is not dead by any means: There are still influential authors who insist that the presence of Roman law helped prevent British liberty from establishing itself in France and Germany – notably Larry Siedentop, who loudly blames Roman law for the despotic continental refusal to accept true democracy in Europe. ¹⁵ If we have any interest in addressing ourselves to the larger public, rather than to the narrow community of lawyers, we ought to be responding to such claims. Our own scholarship and teaching would be the livelier for it.

There are, moreover, other accusations that deserve an even more serious airing. One such is the idea that Roman law brought a triumph of »rational« *Juristenrecht*, leaving an unsophisticated »people« to be dominated by a class of trained lawyers. This is the sort of charge that all lawyers will find misguided, if not preposterous: To people with technical legal training, there is nothing

13 Cf. DIETER WYDUCKEL, *Princeps Legibus Solutus. Eine Untersuchung zur frühmodernen Rechts- und Staatslehre*, Berlin 1979.

14 MYRON PIPER GILMORE, *Argument from Roman Law in political thought, 1200–1600*, Cambridge 1941; cf. HERMANN KRAUSE, *Kaiserrecht und Rezeption*, Heidelberg 1952.

15 LARRY SIEDENTOP, *Democracy in Europe*, New York 2001, 13 and often.

alienating about rational law. Nevertheless, it is a charge with an obvious kernel of truth. Roman legal method *does* have a seductive beauty, to which scholars still often attribute its appeal throughout the world; and of course a legal system founded on training in Roman law *is* a legal system that relies on sophisticated lawyering.¹⁶ Alienation from the rationalized processes of technocratic government *is* a reality of everyday life for ordinary people; and so of course is the distrust of lawyers. What is more, this charge has had a particular importance for the making of western social science: The nationalist belief in the destructiveness of Roman legal rationalism directly influenced Max Weber's sociology;¹⁷ and through Weber the same idea has passed to Foucault and many lesser figures as well. These are matters about which historians of Roman law could say things of real public interest – if they were willing to venture a little deeper into the hatred that has dogged their subject.

Even the claim that Roman law was a force for evil because it was »foreign« merits some space, much though it seems like the silliest accusation of all. To be sure, this is another claim that is very doubtful in the form in which it was made in the nineteenth and early twentieth centuries. Nineteenth-century nationalists projected their own nationalistic anxieties into the past, as Marcel Senn rightly observes.¹⁸ This led to some real distortions – especially with regard to the most violently contested topic of the nineteenth century, the so-called »Reception of Roman law« in sixteenth-century Germany. Lay historians like Gerald Strauss still write about this topic as though sixteenth-century Germans mounted »resistance« and »opposition« to the introduction of »foreign« Roman law.¹⁹ Yet today specialists all know that the picture of German history that underlies the debate over the supposed »Reception of Roman Law« is problematic. What was »received«, in Germany, was not Roman law as such, but the *ius commune* system. That system, especially through the use of Canon law and the *Sachsenspiegel*, had already begun to penetrate the German-speaking world well before the sixteenth century. The use of the *ius commune* system did not by any means necessarily involve the application of Roman law, and there is little evidence that anyone in the German-speaking world resisted Roman law as such before the era of Hermann Conring, several generations later. In any case, the hatred of Roman law cannot have been the result of

16 E.g. H. PATRICK GLENN, *Legal Traditions of the World: Sustainable Diversity in Law*, Oxford 2001.

17 JAMES WHITMAN, *Sources of Weber's Melancholy* (Fn. 4).

18 MARCEL SENN, *Rechtsgeschichte – ein kulturhistorischer Grundriss*, Zürich 1997, 147–148.

19 GERALD STRAUSS, *Law, Resistance and the State: The Opposition to*

Roman Law in Reformation Germany, Princeton 1986.

pre-modern nationalism, simply because the hatred of Roman law is far older than the rise of European nation-states. The old nationalist historiography is simply not to be taken seriously.

Yet for all that, the idea of the »foreignness« of Roman law has not lost its significance and interest as a matter of historical sociology. It is a distinctive feature of the western world that we have had to live, for centuries, with a body of law – a body of law with unquestioned authority – that reflects the social circumstances of the profoundly different world of Antiquity. This has required some tense and difficult accommodation. As I have argued elsewhere, it affected the very history of our texts, and in particular the recovery of the Digest. The Digest included material that was incompatible with the program of the Gregorian Reform, and with Lombard marital property practices. It is, in my view, no accident that this very Roman material, contained in the so-called »Infortiatum«, was the last of the Digest to emerge into circulation. Roman law was dangerous, in the eyes of some eleventh-century readers.²⁰ But in the end it could not be suppressed or even ignored. In this sense, Roman law was indeed »foreign«, and we cannot understand its eleventh-century reception if we forget that fact.

More broadly than that: Westerners have spent centuries recasting their legal relations in terms concocted to deal with the social order of a long-dead pagan world. Of course this is a topic of fundamental importance.

III

But then – what about the most sensitive subject of all, the alleged association of Roman law with the »materialistic world order«?

This claim was never restricted to the Nazis, of course. The allegedly »capitalistic« and »materialistic« tendencies of Roman law were articles of faith on both the right and the left for generations. To Proudhon and the young Marx, this had to do primarily with property law: They thought of Roman law as the insidious carrier of property absolutism, the law of the »ius utendi et abutendi« – the right to use property, and to exhaust it at the expense of others.²¹ The mature Marx laid the emphasis differently: For the Marx of *Das Kapital* the most vicious aspect of the

²⁰ JAMES WHITMAN, A Note on the Medieval Division of the Digest, in: Tijdschrift voor Rechtsgeschiedenis 59 (1991) 269–284.

²¹ PIERRE-JOSEPH PROUDHON, Qu'est-ce que la propriété?, Paris 1848; KARL MARX, Debatten über das Holzdiebstahlgesetz, in: Marx and Engels, Gesamtausgabe, Berlin 1947, I, 199–236.

Roman legal tradition was its formal equality – its legalistic neglect of the real power relations in society.²² For the Nazis, for their part, the evils of Roman law had to do primarily with its supposed »individualistic« blindness to communal values. Nevertheless, the basic hostility was common to both extremes. Nor is this accusation simply a product of modern politics. In one form or another, this is the oldest and most widespread charge of all. Peter of Blois was already condemning the »avarice« of Roman law in the twelfth century, and he was not alone in the Middle Ages.²³ Marx and the drafters of the Nazi Party Program were simply the last in a very long line.

What should we make of all this? The idea of the commercial or materialistic character of Roman law is certainly hard to accept in the form in which it was presented in the nineteenth and early twentieth centuries. Despite its avowed property absolutism, ancient Roman law in fact presupposed many restrictions on the rights of ownership. Moreover, the post-antique Roman law of the *ius commune* created a vast range of further restrictions.²⁴ In practice, Roman law never created the kind of property order denounced by Proudhon. The same is true of the idea that Roman law embodies »selfish individualism«. Maybe the Romans were self-interested individualists, as Jhering was the first to maintain.²⁵ But Roman practice, and even the Roman texts, turn heavily on the *familia*, and are hardly unambiguously individualistic. Moreover, the use of Roman law for the making of commerce is quite doubtful: It never developed basic doctrines like agency, and so is poorly suited for modern commercial relations. Furthermore, vigorous commercial orders have developed in many parts of the world that had only a slight acquaintance with Roman law, or none at all: early modern England, Sung Dynasty China, Mauryan India, medieval Islam. It is just nonsense to suppose that Roman law »caused« the rise of western commercial society.

And yet the idea of link between Roman law and »materialistic« values deserves some serious attention – much more attention than it receives in most texts. A number of important arguments can be offered. Hespanha, for example, sees Roman law as providing a kind of *lingua franca* for merchants, even if it did not offer fully satisfactory commercial doctrine.²⁶ But the best argument, in my view, is the one that was common in the 1930s, among scholars who were confronted by Nazism – scholars like

22 KARL MARX, *Das Kapital*, Chap. 6, framing this argument in the language of economics, but with obvious roots in Marx's legal training.

23 PL 207, col. 92. For another famous medieval example: Petrarca, *Opere*, vol. 1, Florence 1975, 1060.

24 E.g. KARL KROESCHELL, *Zur Lehre vom »germanischen Eigen-*

tumsbegriff«, FS Thieme, Köln 1977, 34–71.

25 RUDOLF VON JHERING, *Geist des römischen Rechts*, 5th ed., Leipzig 1891, 1, 318 ff.

26 ANTONIO MANUEL HESPANHA, *Introduzione*, 87–88 (Fn. 8).

Fritz Schulz and Max Kaser. Indeed, the interpretations of Schulz and Kaser established the pattern that ought to guide all of our most careful reflection on the history of the hatred of Roman law.

What these men focused on, in addressing Nazi attacks on Roman law, was the Roman separation of *Recht* from *Sitte*, *leges* from *mores*. Why did Roman law seem so evil and »materialistic«? The answer they gave was akin to the answer given by the mature Marx. Just as Marx emphasized the formal equality of »bourgeois« law, its omission of the realities of social power, so Schulz and Kaser emphasized the many social realities omitted by the Roman legal texts. As they explained it, the ancient texts presented only a very narrow body of rules as »law«, passing over large realms of custom, ethics and religion in silence. »The Romans«, as Schulz put it, »not only distinguished very carefully between legal and extra-legal rules, but in principle left the latter out of their reckoning altogether.«²⁷ The result was that the Romans produced legal texts that often seemed cold and heartless. The ancient Roman *texts*, however, did not convey the full range of ancient Roman *law*. As these scholars tried to tell their far-right wing readers, in practice, values like *fides*, Roman fidelity, operated to combat the narrowness of the Roman »legal« rules. Thus it was mistaken, as Schulz insisted, to imagine that Roman law had in fact been »individualistic«. The practice of ancient Roman law was far more morally appealing than what was to be found in the texts.²⁸ The same observations were extended to the post-classical period by Kaser in his *Römisches Recht als Gemeinschaftsordnung*.

Now, there are some real weaknesses in this Nazi-era literature – even including Schulz' justly famous book. These were authors who presented their claims in ways intended to convince national socialist readers. Accordingly they routinely treated the separation of *Recht* from *Sitte* in Roman law as a separation of »individualistic« law from the values of *Gemeinschaft*. This is not terribly persuasive, and it needs to be updated: The ancient Romans were not subscribers to Nazi ideas of community. Kaser's lecture moreover is full of foolish and offensive material about race. The literature of the 1930s also suffers considerably from its near total omission of any comparative perspective. It will not do to declare that *Recht* is separated from *Sitte* in Roman law, without attempting some sustained comparison with other systems. Here again, some updating is needed.

27 FRITZ SCHULZ, *Principles of Roman Law*, Oxford 1936, 23.

28 *Id.*, esp. 223–238.

Nevertheless, this familiar literature has continued to guide scholars in subsequent decades, and it continues to offer real insight into the long history of hostility to the »materialistic« character of Roman law. The infamous »property absolutism« of Roman law, which so preoccupied nineteenth-century commentators, makes a fine and typical example. The Roman legal texts, by comparison with what we find in most pre-modern systems, permit extraordinary freedom of action to the »owner«, both during his life and after. But this stance in the legal texts, like so many other stances in the legal texts, was clearly overshadowed by everyday rules of right conduct. In the Republic, the Censor in particular kept up an active interest in penalizing abuses of property rights.²⁹ Other rules, notably customary limitations on free testamentary disposition, served the same function.³⁰ In fact, the seeming callous property absolutism of the texts is simply a *seeming* callous property absolutism – as far as Antiquity goes. The *texts* however survived to be misread by later generations of Europeans, as an inspiration for some, and an object example of property-law »materialism« for others.

Many similar examples can be offered. Perhaps the most important ones come from the rules of exchange, and in particular from the rules of just price. Indeed, it is in the history of just price reasoning that we see the closest connections between Roman law and the rise of European commerce.

Pre-modern Christian theologians insisted that it was sinful to profit by buying or selling goods at any price other than the just one. The Roman texts, however, presented a disturbingly different view. To be sure, Roman and Christian traditions both started from the assumption that all goods had, by some measure, an objectively correct price. But there was Roman authority that seemed to show a sinister willingness to permit deviations from that correct price. On the most liberal end of the spectrum, pre-modern readers of Roman texts found disturbing classical pronouncements: »With regard to price, contract-parties have the natural right to overreach each other.«³¹ Now, Schulz and others have shown how much this supposed *caveat emptor* norm in fact meant in the law of the Roman Republic and after. This is one of the prime examples of a facially »immoral« Roman textual rule that was combated through rules of *bona fides*. In actual practice, there is no true *caveat emptor* norm in classical Roman law, at least as between high-status

29 MAX KASER, *Das Römische Privatrecht*, München 1955, I, 109.

30 E.g. CHRISTOPH PAULUS, *Die Verrechtlichung der Familienbeziehungen in der Zeit der ausgehenden Republik und ihr Einfluß auf die Testierfreiheit*, in: ZRG RA 111 (1994) 426–428.

31 Statements of the classical rule can be found at D. 4.4.16.4; D. 19.2.22.3. See FRANCIS DEZU- LUETA, *The Roman Law of Sale*,

Oxford 1945, 19. See also JOHN ANTHONY CROOK, *Law and Life of Rome, 90 B.C.–A.D. 212*, Ithaca 1967, 181.

Romans.³² Upstanding Romans were not supposed to take advantage of their contract partners, whatever the texts of the law might say – a point that was driven home by familiar lore, like the story of Claudius Centumalus, reported by both Cicero and Valerius Maximus. »Sharp practices«, as Cicero said, were not pleasing to »maioribus nostris«.³³ Nevertheless, the sinister language of the texts survived, to be misread, once again, by later Europeans.

To be sure, that sinister classical language was not alone in the Roman texts. Alongside the classical rule came the famous late antique doctrine of *laesio enormis*, which allowed a seller to rescind the sale of a tract of real property for less than half its true value.³⁴ In the European tradition, jurists extended this doctrine beyond the case of real property, and beyond the class of sellers, making it a general rule against extreme overreaching. After late Antiquity, the Roman legal tradition thus continued to permit deviations, but only as long as they did not exceed half the correct price.

Nevertheless, for the purely Christian tradition, even allowing mispricing up to half the »true« value of goods ran strongly contrary to urgent moral needs in the government of markets. Here stood, against the seemingly immoral texts of Roman law, the authority of St. Paul: »No man«, declared First Thessalonians, »must overreach his brother in business transactions«. The Vulgate version of Paul's text used »circumveniat«, adopting the technical Roman contract-law term for »overreaching«;³⁵ and from late Antiquity onward, Christian theologians built, on Paul's text (supplemented by arguments from Aristotle), a substantial body of just price theory that condemned the Roman rule on overreaching as unchristian, and deeply dangerous to the soul.³⁶

In developing this tradition, medieval theologians were, to be sure, careful not to deny that Roman law had all of its authority. Indeed, the great difficulty in dealing with the »foreign« texts of Roman law was always that they could not be expunged from the canon of authorities. But theologians insisted that Roman law was trumped by a divine law that dictated obedience to higher principles. This tradition developed throughout the later Middle Ages, giving rise to a rift between theologians, who strongly resisted the teachings of Roman law, and canon lawyers, who were more receptive to those teachings.³⁷

32 For lower-status ones, see RAMSAY MACMULLEN, *Roman social relations, 50 B.C. to A.D. 284.*, New Haven 1974, 103, 115.

33 Cic. Off. III, 66; Val. Max. VIII, 2, 1.

34 C. 4.44.2; C. 4.44.8. See generally REINHARD ZIMMERMANN, *The Law of Obligations: Roman Foundations of the Civilian Tradition*, Capetown 1990, 255–270.

35 The Greek term was *hyperbainein*, translated in the Vulgate as »et ne quis supergrediatur, neque circumveniat in negotio fratrem suum«.

36 JACOB VINER, *Religious Thought and Economic Society*, Durham 1978, 81–85; ANDREAS WACKE, *Circumscribere, gerechter Preis und die Arten der List in: ZRG RA* 94, 1977, 186.

37 Esp. JOHN W. BALDWIN, *The medieval theories of the just price.*

Romanists, canonists, and theologians in the twelfth and thirteenth centuries, in: *Transactions of the American Philosophical Society*, N.S. 49 (1959) 31–74.

Far back into the Middle Ages, long before the Nazi party program, the learned European tradition thus regarded Roman law as justifying ugly and sinful market practices. Far back into the Middle Ages, Europeans had attempted, as it were, to combat »infection« by the Roman rules. The existence of this medieval tradition, in and of itself, would do a great deal to justify the notion that Roman law represented »materialism« to pre-modern minds. For the idea of any possible liberalization of the just price tradition drew always on the authority of Roman law; and when liberalization took place, it took place amidst citations of Roman texts.

Indeed, I have argued at length elsewhere that the Roman texts played exactly such a liberalizing role in the seventeenth-century Netherlands.³⁸ Many Dutch merchants will have carried handbooks like Bernhard van Zutphen's *Nederlandsche Practyque*, an alphabetized guide to Dutch law that first appeared in 1636. Zutphen treated overreaching as regards price in a wholly Roman way³⁹ – something that set him apart not only from the theologians of the Middle Ages, but also from most non-Dutch authors of his own day. Merchant readers of Zutphen and other vernacular authors were offered something extremely soothing for the soul: authority that told them they could drive a hard bargain. Where the Christian theological tradition had always preached the dangers of bargaining, these authors simply told their readers what they were permitted to do.

I will not argue the point fully here. All that I want to observe is that, throughout the Middle Ages and into the seventeenth century, there was good reason to associate the authority of Roman law with »venal« and commercial values – not because Roman society was peculiarly venal, but because the Roman texts were. This means that, from the traditional Christian point of view, there was a kind of sense in the long-standing charge that Roman law was, as Jolowicz says, the »bulwark of individualist capitalism, materialist in its outlook and favoring selfishness at the expense of the public good«. To be sure, Roman law can not be said to have offered much by way of developed commercial doctrine. But the moral example of Roman law was another matter. Merchants who were looking for comfort in the pursuit of profit could find it in the Roman texts, and it is a truth of human psychology that moral comfort matters immensely.

38 JAMES WHITMAN, The Moral Menace of Roman Law and the Making of Commerce: Some Dutch Evidence, in: Yale Law Journal 105 (1996) 1841–1889.

39 Cf. SYBRANDOS JOHANNES FOCKEMA ANDREAE, Het Oud-Nederlandsch Burgerlijk Recht, Tweede Deel, Haarlem 1906, 32; C. BECKER, Das Problem der Austauschgerechtigkeit, in: Das Römisch-holländische Recht:

Fortschritte des Zivilrechts im 17. und 18. Jahrhundert, ed. by ROBERT FEENSTRA and REINHARD ZIMMERMANN, Berlin 1992, 201–23.

IV

No account of the history of Roman law is complete without some careful reflection on these facts. Indeed, no account of the history of Europe is complete without careful reflection on them: Western culture was formed, in part, by the presence of a set of legal texts that seemed both unimpeachably authoritative and suspiciously immoral. There was always authority for immorality in the West. *Authority for immorality* is indeed what the Roman legal texts have frequently represented in the western world.

Nor does this truth matter only for the history of Roman law. It matters for the entire western world today. This is for the simple reason that the hatred that has long confronted Roman law is still with us – though today it takes the form of hatred of western law more broadly. And it remains hatred of a kind that is still best analyzed by Schulz and Kaser in the 1930s. It is hatred that has to do with the *narrowness* of the conception of law that has come down to us from the Romans – with a narrow concept of law that omits a striking range of matters of both custom and religion.

Thus we find exactly such hostility on a fundamentalist Islamic website, which condemns »the entire Western world and its legal system« as »narrow«, and insists that Islam is by contrast a »*Complete Way of Life*.«⁴⁰ We find it in the Confucian tradition, with its history of suspicion toward the narrow concept of »fa«, »law«, which must be corrected by »li«, sometimes translated as »ritual decorum.«⁴¹ We find it in Maimonides, for whom the »law« emphatically encompasses »all that the Rabbis have said [and decreed] concerning the prohibited and permissible, unclean and clean, invalid and valid, guilty or exempt, liable or not liable to pay, or to swear or not to swear an oath.«⁴² We find these sorts of declarations, in fact, all over the world. There are still hosts of people who, like Pope Honorius III, see western law as a »narrow bed« with too little room for »the sons of the prophets«.

This is of course a matter of burning public interest; and it is a matter on which historians of Roman law could speak with some authority, if they were willing to devote more attention to the history of the hatred of their texts. Indeed, if historians of Roman law were willing to see their texts through the eyes of hostile non-westerners, they could make advances in their account of their own subject. In particular, they would be able to appreciate something

40 http://www.muhammadanism.org/Government/Government_Sharia_Ideology.htm, dec. 2002.

DR. CHARLES B. CHAVEL, London
1967, 2, 361–362, 364.

41 E.g. NOAH EDWARD FEHL and CHO YUN HSU, Li: Rites and Propriety in Literature and Life, Hong Kong 1971.

42 The commandments: Sefer Ha-Mitzvoth of Maimonides; translated from the Hebrew with foreword, notes, glossary, appendices and indices by RABBI

implicit in the seventy-year-old arguments of Schulz and Kaser: The beginnings of the history of the hatred of Roman law lie in Antiquity itself.

Let us indeed try to see Roman law through the eyes of hostile non-westerners – of Islamic fundamentalists, neo-Confucians and others. To be sure, a full comparison of the Roman tradition with these rival Eurasian traditions would require far more work than I can offer here. Nevertheless, even a superficial comparative overview tells us a great deal, both about the character of Roman legal narrowness, and about its antiquity.

Seen through the eyes of hostile non-westerners, Roman law is indeed distressingly narrow, and it has been that way since at least the Middle Republic. This is not because the Roman texts omit Nazi values of »Gemeinschaft«. Rather, I think it is best to focus on two aspects of Roman law. First, the Roman texts omit almost all regulation of *ritual*. Second, they omit almost all of what we might call rules of *dutiful hierarchical conduct*. In both respects, Roman law is strikingly different from most (though not all) Eurasian traditions, and this was already creating evident tension in Antiquity.

Thus most Eurasian traditions quite naturally treat both communal and family ritual as a part of the »law«. Indeed, for believing Muslims or Hindus or orthodox Jews, it is strange and distressing to speak of a »law« that fails to regulate ritual as well as such matters as contract. (This is not quite the same as saying that these traditions do not distinguish law from *religion*, though I leave that point to be argued elsewhere.) As for the separation of law from rules of dutiful hierarchical conduct: This is a source of particular uneasiness within the Confucian tradition, but it can also be found much more generally. By rules of dutiful hierarchical conduct, I mean the rules of deference and duty that govern human relations in a hierarchical social order: rules about the correct forms of address, about correct gestures, about correct deferential and polite behavior in our interactions with superiors and inferiors. I also mean rules about what the Romans called »officia« – the social duties that we owe others in light of their social position, and our own, and in particular about the social duties that high-status persons owed to low-status persons.

The Roman legal texts, by contrast with most comparable traditions, generally omit regulation of both these aspects of life, as

scholars like Raymond Westbrook and Alan Watson have recently emphasized.⁴³ That is not to say that questions of correct ritual and correct hierarchical behavior did not matter in Roman *society*. Rules of right hierarchical conduct have been a subject of intensive study by Roman social historians over the last decades, and they have shown amply how much Roman society, both during the Republic and after, was a society of honor and *officia*. Like all pre-modern complex societies, Rome of the middle Republic was ruled by »kinship, friendship and patron-client relations«. ⁴⁴ The high-status Roman was a patron, with a following of clients, whose behavior would probably have been quite comprehensible to a Han dynasty notable, just as it would have been comprehensible to a nineteenth-century Mexican landed aristocrat. ⁴⁵ As for ritual: The Romans, who were proud of their proverbial piety, were quite as absorbed by sacrifice and family cult as their contemporaries in India, China or the Jewish communities, or later Muslims. It is not that Romans did not care about right conduct or right ritual. It is that, by the later third century at the latest, they distinguished rules of right conduct and right ritual from »law« in a way that most adherents of traditions east of the Tigris would have found strange, and that their descendants often find hateful.

Indeed, the Romans themselves seem to have experienced real difficulty in accepting the narrowness of their own law. For several centuries, Roman practice showed a constant struggle to overcome, somehow, the narrowness of the legal texts, and in particular to protect rules of right hierarchical conduct. This should not sound like a surprising claim. Quite the contrary: Ancient anxieties about the narrowness of Roman »law« are the very bread and butter of our scholarship. I mention only a few leading examples here. For good reason, Kaser emphasized the *regimen morum* of the Censor. ⁴⁶ But the Censor was not alone among officers concerned with enforcing »extra-legal« rules of »morality«. Classical civil procedure itself provided mechanisms for the correction of »law« by rules of right hierarchical conduct, as Peter Garnsey elegantly argued thirty years ago. Formulary procedure permitted considerable departure from the »law« in order to satisfy the demands of right hierarchical conduct. In part such departures will have come from the Urban Praetor, who »shared the feelings and prejudices of his rank«. ⁴⁷ But perhaps the main arena for this species of »correction« of the law came in the *apud iudicem* phase of classical

not as well defined or important in the Mediterranean as it was further east. There were some »eastern« forms of deference that were not current in the classical Mediterranean world, including most famously *proskynesis*. Perhaps, as Jhering believed, deference mattered less in the Mediterranean than it did anywhere else. Nevertheless, Mediterranean societies were very hierarchical indeed.

43 ALAN WATSON, *The State, Law and Religion: Pagan Rome*, Athens 1992, 73. RAYMOND WESTBROOK, *Nature and Origins of the Twelve Tables*, in: ZRG RA 105 (1988) 85, notes only the absence of religion. Both authors, like FRITZ SCHULZ and MAX KASER, treat the narrowness of Roman law as dating already to the Twelve Tables. This early dating is

unpersuasive to me, but I leave the point to be argued elsewhere.

44 Cf. E. WOLF, *Kinship, Friendship and Patron-Client Relations in Complex Societies*, in: MICHAEL BANTON, ed., *The Social Anthropology of Complex Societies*, London 1966, 1–22.

45 *Patronage in Ancient Society*, ed. by ANDREW WALLACE-HADRILL, London 1989. To be sure, it is possible that social hierarchy was

46 *Römisches Recht als Gemeinschaftsordnung*, 17–18.

47 PETER GARNSEY, *Social Status and Legal Privilege in the Roman Empire*, Oxford 1970, 181–206, quoted phrase on 206.

litigation, especially with regard to *bona fide* actions.⁴⁸ As Seneca put it, the good man was never a »rigidus iudex« but a »remissior iudex« – one who remained aware of the requirements of »officia«.⁴⁹ There were also comparable means of insuring that lower status persons would obey right rules of morality, both through the jurisdiction of the Curule Aediles, whose functions have recently been reconstructed by Evá Jakab, and the familial council. Both took notice of questions both of ritual and right hierarchical conduct.⁵⁰

These are all well-known »extra-legal« institutions that developed to compensate for the narrowness of the law, and much more could be said. To echo Brunner's distasteful but vivid metaphor, the »extra-legal« institutions of the Republic clustered around the »law« like antibodies, assuring that social relations would not be infected by the permissiveness of the legal texts. Evidently there was some felt need to compensate for the narrowness of the »law«: To put it in Confucian terms, the law of the Romans was a *fa* that needed official correction by *li*. As the byword went, »non omne, quod licet, honestum est«.⁵¹

Of course that does not mean that the »law« *never* addressed problems of right hierarchical conduct. Those problems were too important to be excluded entirely. All scholars will know that they were addressed in particular by the law of *iniuria*. The concept of *iniuria atrox* condemned precisely insults that violated norms of right hierarchical conduct – whether they were cases in which a low-status person insulted a high-status one, or ones in which a high-status person exceeded the bounds of propriety, like the patron who treated his freedman as though he were still a slave.⁵² Up to a point the law of *iniuria* did represent »legal« regulation of right hierarchical conduct.

Yet is is important to view even the law of *iniuria* in comparative perspective. Compared to other pre-modern systems, it is remarkable how much the Roman law of *iniuria* did *not* say. The law of *iniuria* condemned violations of the rules of right hierarchical conduct. But it said precious little about what those rules were, simply leaving them for the most part to be defined by »extra-legal« norms. In this respect, the Roman law of *iniuria* differed from many – though not all – comparable systems, which often positively legislated on the topic. We may take, for example, the Qing Code, which included such »rules of demeanor« as one

48 Ibid., 207–218.

49 Ep. 81, 4–6.

50 E.g. ELEMÉR PÓLAY, Der Schutz der Ehre und des guten Rufes im Römischen Recht, in: ZRG RA 106 (1989), 504–06; EVÁ JAKAB, Praedicere und cavere beim Marktkauf: Sachmängel im griechischen und römischen Recht, München 1997.

51 D. 50.17.144 pr.

52 D. 47.10.7.2.

threatening fifty strikes of the light stick to be inflicted on those who neglected the proper order of precedence at a village wine festival.⁵³ Or again, we may take the Dharmasutra of Gautama, which regulated such questions as the respectful form of greeting for one's parents, older brothers and teachers (one clasps their feet);⁵⁴ or a thirteenth-century treatise of Al-Nawawi, which tells judges in some detail what etiquette they should observe vis-à-vis litigants, depending on whether they are Muslims or *dhimmis*.⁵⁵ For those who seek more familiar examples, we may of course take the Ten Commandments, which briefly, but positively, enjoin the believer to »honor thy father and mother«.

Compared to these other systems, the Roman law of *iniuria*, while it certainly assumes the existence of a lively culture of right hierarchical conduct, does very little indeed to regulate that culture directly. Here it is particularly important to flag one misleading claim sometimes made in the literature. Scholars sometimes say that the law of *iniuria* guaranteed the respect that freedmen owed their former masters. This was done by generally denying actions to the freedman, who could not bring a claim of *iniuria* when he had been seized or subjected to certain other humiliations – just as the freedman could not bring infaming actions against his former master.⁵⁶ Yet manifestly these aspects of the law did not aim directly to enforce deferential relations. These are provisions by which the »law« refuses to get directly involved. Far from enforcing deference, they formalize the separation between rules of law and rules of deference. In this too, the law of *iniuria* is strikingly silent on the enforcement of deferential relations.

These are all familiar facts, testifying to familiar republican attitudes, which expressed themselves in familiar literary forms. By the time of Terence, we already find a version of the proverbial tagline *summum ius, summa iniuria*, later to reappear in Cicero. »The more law, the less justice«, as Romans liked to say: To many commentators this is evidence of the subtlety of Roman thought on the relationship between law and equity.⁵⁷ Maybe it is that; but it is something else as well: It is the slogan of a society that lived with a »law« that permitted far too much. There were other similar *topoi* as well – in particular the dichotomy *libertas/dignitas*, traced by Wirszubski in the *Libertas as a Political Idea at Rome*. »Libertas«, in republican parlance, referred to the equality before the law that was enjoyed in principle by all free persons. Such *libertas* was

53 The Great Qing Code, trans. and ed. WILLIAM C. JONES, Oxford 1993, 183.

54 PATRICK OLIVELLE, *Dharmastras: The Law Codes of Ancient India*, Oxford 1999, 88.

55 BRINKLEY MESSICK, *The calligraphic state: textual domination and history in a Muslim society*; BRINKLEY MESSICK, Berkeley 1993, 163–164; BRINKLEY MESSICK, *Kissing Hands and Knees:*

Hegemony and Hierarchy in Shari'a Discourse, in: *Law and Society Review* 22 (1988) 637–659.

56 WOLFGANG WALDSTEIN, *Operae Libertorum*, Stuttgart 1986, 63–66, with further references.

57 JOHANNES STROUX, *Summum Ius, Summa Iniuria*, in: JOHANNES STROUX, *Römische Rechtswissenschaft und Rhetorik*, Potsdam 1919, 7–66

however not to displace the differential standards of treatment that derived from *dignitas*, social standing and respect, and Wirszubski shows how scrupulously Romans kept *libertas* in its place.⁵⁸

Familiar Roman attitudes, all: Anyone who studies Roman law, or Roman social history, knows these facts. The failure of our literature is only the failure to see them in the light of comparative law – and the failure to see how much they attest to a malaise stirred by the narrowness of the »law« that already dates to the middle Republic. There was not some sharp distinction between the social world of Rome and the social worlds of East or South Asia. But the Roman definition of »law« was unusually narrow and straitened, and the Roman system grew in a way that showed a constant struggle to compensate for that fact. Roman law displayed a form of Marx's formal equality from the beginning, and from the beginning this brought with it tension. In this, we in the West have a past that ought to make the dilemmas of the non-western world far easier to comprehend.

V

The subsequent history of Roman law is frequently a history of efforts to burst these narrow limits. Already in the late Republic and the early Principate we see many such efforts, which deserve their own history;⁵⁹ and of course those efforts continued thereafter.

Nevertheless, the fundamental character of the Roman texts remained unaltered. From the eleventh century onward, westerners possessed a collection of highly authoritative texts, carrying the numinous name of »Roman law«, that generally omitted regulation of right ritual and right conduct. Such texts, we must understand, were shocking and dangerous things – just as western law often continues to seem shocking and dangerous. The Roman legal texts, as they were rediscovered and redeployed after the late eleventh century, were, if I may use a Nietzschean term, »dynamite«. They were a set of texts of incontestable moral authority. After all, they came from ancient Rome. But at the same time, they were texts that said almost nothing about the dictates of morality. This more than anything accounts for the hatred of Roman law, as Kaser rightly argued in 1939.

58 CHAIM WIRSZUBSKI, *Libertas as a Political Idea at Rome During the Late Republic and Early Principate*, Cambridge 1968, esp. 15–17.

59 Apart from Augustan legislation, we may point to the *Verrechtlichung* of the *querela inofficiosi testamenti* (PAULUS, *Verrechtlichung der Familienbeziehungen*); and the initial introduction of the distinction *humiliores/honestiores* into the law (ROLF RILINGER,

Humiliores-Honestiores. Zu einer sozialen Dichotomie im Strafrecht der römischen Kaiserzeit, München 1988, 14). These arguably reflect a growing sense that the »law« had to begin to intervene expressly to regulate dutiful hierarchical conduct. The same pattern can presumably be seen in the practices of *cognitio*. I leave this question to be discussed elsewhere.

These are, I hope, uncontroversial, and even unsurprising, things to say. Nevertheless, they deserve emphasis, because they are threatened by a frustrating and ill-advised neglect. At core, the problem is this: Specialists in Roman law are so entranced by the making of a new Europe that they are allowing their own collective memories to slip away. For purposes of assuring the future of Roman law in Europe, specialists want, understandably enough, to consign the hatred of Roman law to a dead nationalistic past. The hopeful »European« who studies Roman law wants to study a body of cosmopolitan and uncontroversial rules. Yet the idea of a truly »Roman« law for modern Europe remains a will-of-the-wisp. Modern circumstances, let us frankly admit, are simply too wildly different from the circumstances presupposed by our Roman texts.

In the end, the real future of Roman law continues to lie in the study of its past. The West, whose legal tradition is at its foundation Roman, is coming into contact, and conflict, with some very deeply different traditions, traditions in which the old hatreds that confronted Roman law – hatreds that reach back for centuries – are still alive. The great danger in forgetting the history of the hatred of Roman law is that we will have nothing to say to that world. In the end, this is a much greater danger than the danger that Europe will forget Rome.

James Q. Whitman