Western Legal Imperialism: Thinking About the Deep Historical Roots

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We live in an age of massive efforts to transplant Western institutions. Some of those efforts have involved the so-called "Washington Consensus"; some have involved International Human Rights; but all of them have brought the West to the rest of the world, and all of them reflect a kind of missionary drive. What are the historical sources of this legal missionizing? This Article argues that those sources long predate the twentieth century, and indeed long predate the colonial adventures that began in the sixteenth century. Western law was already culturally predisposed to spread well before Iberian ships reached the Americas. In particular, Western law began, in antiquity, as city-state law, and only gradually penetrated the countryside. This colonization of the countryside by the cities took place partly under the influence of Christianity. It also reflected a centrally important event in the development of Western law: the great northward shift of the center of gravity of Western culture from the Mediterranean to trans-alpine Europe, which we can roughly date to 700-1000 C.E. The long, slow internal colonization of the countryside in the West set much of the pattern for the external colonization of the non-Western world that eventually commenced in the sixteenth century.

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INTRODUCTION

We live in an age of massive efforts to transplant Western institutions into every corner of the globe. The end of the Cold War inspired Westerners of every stripe to carry their law to the rest of the world, and the two decades since 1989 have been an era of determined Westernization. Some of these post-Cold War efforts to Westernize the globe have been so weird that they almost beggar description: One thinks, for example, of the occupation of Iraq, where the first contingent of American officials included an eager 24-year-old charged with the task of setting up a stock exchange on the American model.[1] But most of the efforts have involved the routine, if intensive and often aggressive, work of familiar international institutions: the World Bank, the International Monetary Fund, the various international human rights agencies and organizations. All of these institutions have been heavily engaged in exporting Western law to the rest of the world.

How should we understand this moment in history? Are we simply experiencing the consequences of the collapse of Communism, which opened the global floodgates for the law of the Nato countries? Or does the current wave of exportation of Western law belong to a deeper and older history of Western legal diffusion? It is no surprise that there are observers on the left who see the post-1989 era as nothing fundamentally new — as simply the latest chapter in a long history of Western imperialism. Such is the view, for example, of Ugo Mattei and Laura Nader in their new book *Plunder: When the Rule of Law Is Illegal*. Mattei and Nader recognize that the age of direct colonial rule by Western powers has ended. But they insist that Western legal imperialism is still alive. Post-1989 "rule of law" campaigns, in their eyes, are simply strategems intended to guarantee that Western enterprises can extract wealth from non-Western peoples. They are a continuation of the colonialism of the past, and especially the British colonialism of the nineteenth and twentieth centuries.[2]

Now, I think most thoughtful observers would reject the jaundiced and one-dimensional cynicism of Mattei and Nader. It seems too obviously false to describe current Westernizing efforts as pure exploitation. Nevertheless, I think Mattei and Nader are entirely right to say that the transplantation of

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1 Rajiv Chandrasekaran, *Best-Connected Were Sent to Rebuild Iraq*, WASH. POST, Sept. 17, 2006, at A1.

2 UGO MATTEI & LAURA NADER, PLUNDER: WHEN THE RULE OF LAW IS ILLEGAL (2008), for example at 64 for the focus on Anglo-American material.

Western law long predates 1989. What we see today does indeed look like the most recent episode in a very long history of the exportation of Western law, and you do not have to view things from the far left to think so. Indeed, this history is much older than British colonialism of the nineteenth century. All thoughtful observers should agree that it is at least as old as the Iberian conquests in Latin America, and in this Article I shall argue that it is even older than that.

Where the claims of Mattei and Nader are off-base is not in their belief that Western legal imperialism has a long history. It is in their conviction that everything comes down in the end to the profit motive. Anybody who talks to contemporary legal reformers with an open ear and an open mind knows that the story is more complicated than that. There are certainly plenty of Westerners who want only to extract wealth from the rest of the globe (just as there are plenty of non-Westerners who want to do the same thing). At the same time, though, there are many Westerners indeed who are motivated by a kind of missionary impulse — a powerful, and for the most part idealistic, urge to bring the benefits of Western law to the rest of the world. Whether one encounters World Bank technocrats, officials of the Bush administration, or crusaders for human rights, one has much the same impression: One finds people who are convinced that they have a vocation to diffuse the wisdom of the west to the rest of the globe. To be sure, these are people who often despise one another. But in the end, their attitude is much the same in this regard: they share a sense of mission.

Indeed, they often share a sense that they are the agents of something tantamount to historic destiny. Here I cannot resist quoting a famous passage written by the philosopher Edmund Husserl in 1935. For Husserl, the spread of Western practices raised questions about the very meaning of human history. History posed, Husserl thought, a burning question:

> [W]hether European humanity carries within itself an Absolute Idea, rather being a mere anthropological type like "China" or "India." And again, whether the drama of the Europeanization of all foreign human societies announces the workings of some absolute Meaning, which belongs to a world that itself has Meaning, rather than being the locus of historical Meaninglessness.[3]

Most of the folks at the IMF and the Lawyers' Committee on Human Rights have probably never heard of Husserl, and undoubtedly most of them would

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3 EDMUND HUSSERL, DIE KRISIS DER EUROPÄISCHEN WISSENSCHAFTEN UND DIE TRANSZENDENTALE PHÄNOMENOLOGIE 16 (1977).

giggle at the pretentious idealism of this passage. But if Husserl's language is not theirs, I think his burning question is their burning question too. Most of them really do seem to want to believe that "European humanity" (or, as the case may be, American humanity) carries an "Absolute Idea" within itself, which must triumph over the "mere anthropological types" to be found in "foreign human societies." They may not use phrases like "the workings of some absolute Meaning," but they behave as though they believed in them. They are not just in it for the money. They are moved by much grander visions than that — visions of democracy, visions of the free market, visions of human rights. If we wish to account for the drive to spread Western law, we must explain, not just the profit motive, but these visions and missionary ambitions.

This Article will not directly address the greatest questions raised by the great contemporary Westernizing campaigns. I will not express any views here on whether the spread of Western law is good or bad, inevitable or impossible. I will certainly not wade into the debate over whether it is the free market, democracy, or human rights that truly represents the "Absolute Idea" embodied by human history. Like most comparative lawyers at work today, I am skeptical that legal institutions can be transplanted with the success aimed for by either the World Bank or the advocates of international human rights; but I leave discussion of the prospects for the success of legal transplants for other occasions.

Instead, like Mattei and Nader, I want to trace the historical sources of the missionary impulse, or, if you prefer, the colonizing impulse, in Western law. As I will argue, those historical sources are old — much older indeed than anything that Mattei and Nader discuss. The deep history of our current efforts, I want to argue, significantly predates the colonial era of the nineteenth and twentieth centuries. It even predates the sixteenth century. In fact, the sources of this impulse can ultimately be traced back into pre-Christian antiquity.

It is my argument that Western law had already developed an institutional tendency to spread long before the age of imperial adventures began. The drive to diffuse Western law is not simply the product of Western conquests since the sixteenth century. It is not simply an aspect of the growth of Western world domination. Nor is it the product of modern capitalism. Western law developed as a distinctively diffusing tradition from antiquity onward, and especially in the Middle Ages. The basic patterns of Western legal colonialism had already taken shape before the age of colonial expansion began. If I may use an admittedly overwrought metaphor, the genetic endowment of Western law already predisposed it to spread long before the era of overseas colonialization.

I am going to trace the rise of Western law as a diffusing tradition to two aspects of Western legal history. First and foremost, I will emphasize the fact that Western law began in Antiquity primarily as the law internal to *city-states*, and only very gradually spread into the countryside. This may seem to be a socio-historical factoid of minor interest, but I believe it is much more significant than that. The gradual spread of Western law from city to country established a pattern of diffusion that has continued down to the present. To some extent, the spread of law from city to country had already begun in antiquity. Nevertheless, I will put special emphasis on one remarkable fact about post-classical history. This is what I will call the Great Northward Shift: the shift in the center of gravity of Western civilization from the Mediterranean, a world dominated by city-states, to the lands north of the Alps, dominated by territorial entities.

This Great Northward Shift can be fairly dated to the seventh through tenth centuries. It was critical in the shaping of the Western diffusionist tradition. By the central Middle Ages, I will argue, law that was originally the product of a Mediterranean city-state world was diffusing into the transalpine countryside in ways that distinctly prefigured its spread around the globe since the sixteenth century. The movement of law from city to country set some of the basic terms for the subsequent movement of law from First World to Second and Third. To put it a little differently, Western colonization of the non-Western world was preceded by a fateful internal colonization of the Western countryside.

The distinctive movement of Western law from city to country is only part of my tale, though. I also want to lay some weight on a historical truth that is (I think) straightforward, obvious, and at the same time somewhat uncomfortable. This is a truth that was long ago emphasized by Ernst Troeltsch: the strong missionary impulse that we find in Western law today is largely Christian in origin.[4] Historically, the urge to carry Western law to the rest of the world has been quite literally a "missionary" impulse, one that is (once again) far older than the nineteenth or even the sixteenth century. A fair case can be made that the international human rights movement in particular is essentially Christian in origin. To say that is to say nothing of determinative significance about the nature of modern missionary movements, of course. For the most part, modern movements are no longer Christian in spirit or intent. The fact remains, though, that they are outgrowths of a Christian tradition that reaches back many centuries.

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4 ERNST TROELTSCH, DIE SOZIALLEHREN DER CHRISTLICHEN KIRCHEN UND GRUPPEN 156-65 (1912).

I know that the observation that modern movements have Christian sources is likely to make many of us shift uneasily in our seats. Modern legal evangelists (if I may call them that), whether they hail from the World Bank or from Human Rights Watch, do not welcome the manifest historical truth that they have Christian antecedents. If nothing else, there are too many parts of the world in which their work can suffer serious ideological damage if it is associated with Christianity. Nevertheless, it is a truth that deserves to be emphasized. There is too much about contemporary movements that we will not understand if we do not remember their Christian antecedents.

I. WESTERN LAW: A DISTINCTIVE CITY-STATE TRADITION

I begin by asserting a large proposition: Western law is quite distinctive in its missionary/colonizing tendencies. The other great legal traditions of Eurasia do not show the same remarkable spirit.[5]

This is true even of Islamic law, which at first glance seems so similar to the law of the West. During the initial conquests, Arab Muslims showed little interest in systematically converting others to Islam, and so to the full use of Islamic law.[6] After the first couple of centuries, this changed, of course; in a certain sense some Muslims today do regard Islamic law as a gift that ought to be brought to the entire world, just as Westerners do. But even today, it bears emphasizing that Islamic law does not claim to be law that applies to all human beings in all times and places. Islamic law is fundamentally for Islam, not for all humanity. We can perhaps view Islamic law as the *personal* law of Muslims;[7] or perhaps as the *territorial* law of the *Dar al-Islam*, as Baber Johansen argues.[8] But in either case, the extension of Islamic law through the world is simply a consequence of the spread of Islam itself — it is part of the

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5 The definition of "Western law" is of course open to debate. Readers might reasonably wonder, for example, whether the Byzantine or Soviet traditions should be counted as "Western." Nevertheless, my focus in this Article is on legal traditions with roots in the Latin Christendom of the Middle Ages — traditions like those of England, Germany, France and Iberia. These are also regions that participated in the overseas colonial adventures of the sixteenth through early twentieth centuries. I gladly acknowledge, however, that the problem of defining "Western law" deserves a less casual treatment than I give it here.

6 IRA M. LAPIDUS, A HISTORY OF ISLAMIC SOCIETIES 242-52 (1988); CLAUDE CAHEN, L'ISLAM DES ORIGINES AU DÉBUT DE L'EMPIRE OTTOMAN 54-60 (1995).

7 *See, e.g.*, WAEL B. HALLAQ, A HISTORY OF ISLAMIC LEGAL THEORIES (1997).

8 BABER JOHANSEN, CONTINGENCY IN A SACRED LAW: LEGAL AND ETHICAL NORMS IN THE MUSLIM *FIQH* 219-37 (1999).

history of conversion of some individuals to an Islamic way of life, and of the historic conquest of others. To put it in the technical terms of legal history, it is either a personal law system or a territorial law system, but it is not what we could call a universal law system (one that applies in principle to all human beings everywhere). In this regard, Islamic law is different from what we find in the West. Western law, be it law of free markets or law of human dignity, always purports to be law that applies in principle to all persons everywhere.

Nor, I will risk asserting, are the other great Eurasian legal traditions quite like that of the West. Take the example of Chinese law. Chinese law has certainly spread throughout East Asia, most notably from the Tang Dynasty on into the eighteenth century. Indeed, the world history of receptions is quite incomplete unless we include the spread of Chinese law to places like Japan, Korea and Southeast Asia. Nevertheless, I will venture to maintain that traditional Chinese society had none of the missionary zeal of the West. It is certainly true that parts of the world that were incorporated into the Middle Kingdom were subjected to Chinese law. It is also certainly true that the Chinese expected that anyone who came into contact with Chinese civilization would imitate Chinese practices.[9] But the Chinese did not imagine that it was their task to extend the benefits of Chinese law to nations they had *not* conquered. To the Chinese, parts of the world that had not been directly incorporated under Chinese rule remained by hypothesis barbaric, outside the authority of the Chinese state and therefore outside the circle of the law itself. To exploit the technical language of legal history once again, we can say that traditional Chinese law is at core territorial law (a law that applies to persons under the territorial sway of the Chinese Emperor), not putatively universal law.[10] Similar things can be said about other traditions. Talmudic law and Hindu law, like other systems oriented toward ritual, are personal law systems. (It remains so difficult for non-specialists to get any firm grasp on the Buddhist legal tradition that I leave discussion aside here.)

So what are the sources of the distinctive universalizing character of Western law? There are some common answers to be found in the literature of ancient legal history, but to my mind those answers are unsatisfactory. The answers that I have in mind focus on the legacy of ancient philosophy, and on the doctrines of Roman law. In particular, there are many scholars who like to celebrate Hellenistic philosophy, and especially the philosophy of the Stoics. Martha Nussbaum is the most prominent contemporary admirer

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9 For memorable observations, see F.W. MOTE, IMPERIAL CHINA, 900-1800 (1999), for example at 383.

10 *E.g.*, GEOFFREY MACCORMACK, THE SPIRIT OF TRADITIONAL CHINESE LAW 4 (1996).

of Stoic thought, but she is only one in a very long line of writers to praise the Stoics for their discovery of "the moral community made up by the humanity of all human beings."[11] It is further common to point to the influence of Stoicism on the Roman jurists in the effort to show that there were, as Richard A. Bauman recently put it, "human rights in ancient Rome."[12] *Ulpian: Pioneer of Human Rights* is the title of another such book, by one of our most eminent scholars of Roman law. Ancient jurists, according to this literature, saw "Roman law as a law based on the view that all people are born free and equal and that all possess dignity."[13]

Most especially, when it comes to law, scholars like to point to the Roman *ius gentium*, the "law of peoples." The Roman jurist Gaius, inspiringly, called the *ius gentium* the "law established for all peoples by natural reason,"[14] and lawyers have seized on it as a law of universal values again and again over the subsequent centuries. Jeremy Waldron is the best-known scholar working in America to do so lately.[15]

Now, in a sense all this celebratory writing about Stoicism and Roman law is justified: there is no doubt that we can pick out certain threads in ancient philosophy and law that prefigure modern human rights universalism. Some ancient authors did indeed sometimes express beautiful sentiments about humanity. Nevertheless, I think it is a mistake to make too much of these quotes. Yes, some ancient authors expressed beautiful sentiments — but only some of them, and only sometimes: careful readings of the ancient jurists in particular show that their thoughts were a very mixed bag, and suggest that ancient invocations of philosophy were often banal ethical bromides, not expressions of a desire for deep legal reform.[16] As for the *ius gentium* — which we might most evocatively translate, using an ancient concept that still hangs on in one modern language, as "law for the *goyim*" — the ancient jurists (and their successors) thought about that too in many different ways, not all of them by any means idealistic or universalistic.[17]

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11 Martha Nussbaum, *Patriotism and Cosmopolitanism*, 19 BOSTON REV. (Oct.-Nov. 1994), *available at* http://bostonreview.net/BR19.5/nussbaum.html.

12 RICHARD A. BAUMAN, HUMAN RIGHTS IN ANCIENT ROME (2000).

13 TONY HONORÉ, ULPIAN: PIONEER OF HUMAN RIGHTS 76, 80 (2d ed. 2002) for the Stoic influence on Ulpian.

14 G. INST. 1.1.

15 Jeremy Waldron, *Foreign Law and the Modern* Ius Gentium, 119 HARV. L. REV. 129, 133 (2005).

16 *E.g.*, SERENA QUERZOLI, IL SAPERE DI FIORENTINO: ETICA, NATURA E LOGICA NELLE INSTITUTIONES 88 (1986); HERBERT WAGNER, STUDIEN ZUR ALLGEMEINEN RECHTSLEHRE DES GAIUS 273 (1978).

17 Laurens Winkel, *The Peace Treaties of Westphalia as an Instance of the Reception of*

Most of all, these writings about Stoicism and the *ius gentium* too often display a disappointing lack of social realism. Ancient life for most humans was thoroughly brutal, as hardheaded ancient historians know. It is understandable that modern lawyers should hunt for antecedents for the more high-minded attitudes of the present, and understandable that specialists in Roman law should want to highlight what is most stirring about the Roman texts. Nevertheless, there is a treacly quality to writings that describe the beauties of ancient thought, while finding nothing to say about the hardness of the lot of most ordinary people in antiquity. Even the Stoics themselves sometimes adopted a "strongly realistic concept of positive law," as Troeltsch observed.[18] Modern lawyers have no excuse for not doing the same. Nor, for that matter, is there anything peculiarly Western about beautiful sentiments. Thinkers have thought fine thoughts in every part of the world.

If we want to understand how Western law acquired its distinctive tendency to spread, we have to move beyond celebratory pieties about the history of ancient legal ideas. We have to understand what it is about Western *institutions* that has inspired Western diffusion. We have to aim to think and write a little more like Max Weber, who had a full consciousness of the venality of human behavior, but who was also determined to find explanations for the forms of human idealism. Weber wrote value-neutral history — history that aimed to account for human behavior and institutions without celebration or condemnation, and exactly that is what we need. Ideas are not enough. We need some sense of the political and socioeconomic factors that have driven the idealism and diffusionism of Western law. We need a value-neutral account that can identify distinctive socio-historical forces that drove Western law onto its distinctive path of universalizing development.

Now, in the hunt for the socio-historical sources of Western law, I suggest that legal historians should start where historians of political thought start: with the fundamental fact that the Western legal tradition began with the law of ancient city-states. Western law, in its initial stages, was the product of a Mesopotamian/Mediterranean region dominated in critical periods by city-states; and it developed as law for people who lived within city-state walls. (This does not mean that there was not something that might reasonably be called "law" in non-city-state settings, of course. Rural areas in antiquity were certainly governed by law, in some sense. It means only

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Roman Law, *in* PEACE TREATIES AND INTERNATIONAL LAW: FROM THE LATE MIDDLE AGES TO WORLD WAR ONE 222, 225-29 (Randall Lesaffer ed., 2004).

18 TROELTSCH, *supra* note 4, at 156-65 (quoted language at 163).

that the forms of law that matter most for the development of the Western tradition can be traced to ancient city-states.)

This is, to my knowledge, a distinctive feature of the Western tradition, at least as compared with other traditions of the Eurasian landmass. While city-states are not unknown outside the West, other patterns are more common elsewhere in Eurasia: large-scale territorial kingship (as in China) or systems that unite law in the Western sense with the regulation of ritual (as in Islam and the Hindu tradition).[19] The importance of the city-state character of Mediterranean antiquity is of course common coin among historians of political thought who try to identify what is distinctive about the West. One thinks of Hannah Arendt, for example. It deserves to be common coin among thoughtful comparative legal historians as well.

What difference does it make for comparative legal history that Western law developed in ancient city-states? The first point to be made is that ancient Mediterranean law was organized around a core concept of *citizenship*. This deserves some careful explication. The centrality of citizenship in ancient thought is of course a commonplace. In particular, it is a commonplace that the Stoics, like other Hellenistic philosophers, took it for granted that city-state life was the normal and only desirable form of human existence.[20] There is surely no doubt that the ideal of citizenship and the philosophy of Stoicism were deeply connected.

Nevertheless, it would be a mistake to conclude that ancient citizenship was in practice imbued with Stoic idealism and universalism. In fact, the contrary is the case. To say that ancient Mediterranean law was a law of citizenship is to say that it was an inherently non-universal, exclusive, and highly discriminatory body of privileges and duties. Citizenship in the Greco-Roman world (I will not try to say anything more about Mesopotamia) was, as Claude Nicolet sharply puts it, "exclusive, closed and suspicious."[21] It was a body of privileges and duties to which certain persons were admitted, and other persons most definitely not admitted. The suspiciousness and exclusivity of ancient city-state law deserves to be underlined, since the tendency to wax enthusiastic about "the Athenian vision of true democracy" remains so strong in our culture.[22] Citizenship in Greco-Roman antiquity was generally the

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19 For a careful statement on the difficulty of saying to what extent the city-state form is found in other parts of the world, see Tom B. Jones, *Foreword* to THE CITY-STATE IN FIVE CULTURES, at xv (Robert Griffeth & Carol G. Thomas eds., 1981).

20 TROELTSCH, *supra* note 4, at 157.

21 CLAUDE NICOLET, LE METIER DE CITOYEN DANS LA ROME REPUBLICAINE 40 (1979).

22 Quoted language from STEPHEN BREYER, ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION 29 (2006).

preserve of a narrow elite of rulers, who lived surrounded by metics and inferiors. Only in the most strained sense were ancient cities democracies.

Indeed, it may be best to think of ancient city-states in the way Max Weber did: as polities that approximated the ideal type of *consumer* cities. Weber famously presented ancient "consumer cities" as polities that were almost piratical. They were entities ruled by an exploitative leisure class of aristocrats, who sucked in wealth from the surrounding countryside while limiting full franchise within the city to themselves. The value of Weber's ideal type of the "consumer city" is much debated among ancient economic historians.[23] But whatever doubts economic historians may raise about it, it remains a powerful and revealing way to talk of ancient city-states. In particular, the "consumer city" model deserves its day among legal historians. Weber was drawing largely on legal sources in what he wrote, and, penetrating legal historian that he was, he captured something fundamental about the legal relationship between ancient city and ancient country when he described the cities as parasitic entities, ruling the surrounding countryside in their own interest. Citizenship in these cities was indeed an exclusive and exploitative privilege.

Ancient Mediterranean city-state law was thus sharply different from modern Western law in the sense that it was not universal law: It did not purport to apply to all persons everywhere. Quite the contrary. But despite that, we can think of it as carrying the seeds of later Western law within it. In an important sense, ancient citizenship law was framed around the same question that we are still asking in our own day: it asked who had, and who had not, been admitted to membership, full or partial, in the community of those governed by the law. *Law as a body of rights and duties to which one may be admitted*: this is the core Western notion of law. It is a very distinctive notion, which could only emerge in a world of exclusive city-state communities, dominating the surrounding

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23 For recent literature, see, for example, Roger S. Bagnall, *Evidence and Models for the Economy of Roman Egypt*, *in* THE ANCIENT ECONOMY: EVIDENCE AND MODELS, at 1995 (J.G. Manning & Ian Morris eds., 2005); Paul P.M. Erdkamp, *Beyond the Limits of the 'Consumer City': A Model of the Urban and Rural Economy in the Roman World*, 50 HISTORIA 332 (2001). The arguments of the economic historians run at cross purposes with those of legal historians. To take one example, Bagnall's observation in the chapter cited that there were craftsmen producing for sale in the Roman cities tells us little about the core concepts of the law that governed those cities, and threatens to obscure the fundamental constitutional point that guild-dominated cities of the medieval type are (or so I take it) not to be found in antiquity.

countryside and involved in complex and testy relations with other city-state communities. It is a notion of law that contrasts dramatically with what we find in both territorial and personal law systems. The contrast with the personal law of something like Hindu law or Talmudic law is particularly striking. The latter systems are law for a primordial, preexisting "nation." By contrast, a law based on citizenship creates the community that it defines. There is nothing necessarily primordial about a "citizen" body. When the law is oriented toward citizenship, it is the law that defines who is a member of the community, rather than the reverse.

It is not enough just to say that Western law began as citizenship rather than personal or territorial law, though. To take the full measure of ancient city-state law we must also focus on a critical difference between ancient and modern citizenship. Modern citizenship is a unitary concept. One either is or is not a "citizen" of a given polity. By contrast, ancient citizenship was a bundle of rights — or, perhaps more accurately, a bundle of privileges and duties. It was perfectly possible for outsiders to enjoy partial participation in these privileges and duties.[24] This was important for foreign relations in the Greco-Roman world, which typically involved partial or total extensions of citizenship to the citizens of other cities.[25] Foreign relations in antiquity were largely relations between the elites of different city-states, who created and solidified friendships through patronage and grants of privilege. Some of the most important grants were of dignitary privileges, like *proedria*, the socially important right of precedence to sit in a privileged seat at public performances.[26] Others were economic privileges like *commercium*, the right to engage in commercial relations with Romans that were governed by Roman law.

The case of Rome is of course especially important in this respect. Republican Rome expanded partly by making partial grants of citizenship to inhabitants of other Italian towns — not only *commercium*, but also

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24 The generalization that I offer here demands more careful discussion than I can give it in this Article. Outsiders in the modern world are certainly sometimes permitted to participate in some of the privileges of citizenship — for example, they may be given access to public schooling or public health. Nevertheless, my claim is that even such partially privileged outsiders, in the modern world, are still understood to be outsiders. They are not, as it were, members for a particular purpose. In this respect, antiquity was different: It was possible, as it were, to be admitted only to the outer circles of initiation into citizenship, while being in a meaningful sense an initiate.

25 *See* DAVID J. BEDERMAN, INTERNATIONAL LAW IN ANTIQUITY 127-28, 130-35 (2001).

26 *E.g.*, Ioanna Kralli, *Athens and the Hellenistic Kings (338-261 B.C.): The Language of the Decrees*, 50 CLASSICAL Q. 122 (2000).

conubium, the right (and duty) to marry according to Roman forms.[27] This practice of breaking the law up into discrete extendible privileges contrasts dramatically, once again, with the personal law systems of Islam or Hinduism or Judaism. These systems purport to govern the entire lives of those whose personal law they are. They are not conceived as bundles of privileges that may be extended to others piecemeal. They are all-encompassing and unitary systems of personal law, not friable collections of privileges. There is no way to incorporate outsiders into a ritual system of law like that of Hinduism by making partial grants of anything like "citizenship" to them.

Greco-Roman citizenship law, by contrast, while it was a body of privileges for exclusive elites, was also a body of privileges that could be, and were, extended piecemeal to members of other elites. Indeed, the history of ancient Mediterranean law is largely the history of exactly such a slow extension of citizenship privileges. These sorts of practices particularly characterized the law of the most successful of the ancient city-states, Rome, which famously made a program of liberal extensions of citizenship, both partial and total,[28] culminating in the Constitutio Antoniniana in 212 C.E., which declared all free inhabitants of the Roman world to be Roman citizens.[29] To that extent, the process of the extension of Western law dates very far back into antiquity.

Now, a historian of political thought with a classicizing bent — perhaps a Straussian — might think that what I have said to this point constitutes the whole story. Such a historian might argue that the fundamental universalizing drive of Western law had already been established in the citizenship law of antiquity. Indeed, specialists in Roman law sometimes write as though the Constitutio Antoniniana marked the final triumph of Western universalism. In particular, they have occasionally liked to link the Constitutio Antoniniana, once again, to some of the universalistic teachings of Stoicism.[30] But it is important to emphasize how inadequate any such interpretation of the ancient world is, and not just because the exact import of the Constitutio Antoniniana

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27 *See generally* A.N. SHERWIN-WHITE, THE ROMAN CITIZENSHIP 108-16, 119-33 (2d ed. 1973).

28 P.A. BRUNT, ITALIAN MANPOWER, 225 B.C.-A.D. 14 (1971), for example at 239-44.

29 SHERWIN-WHITE, *supra* note 27, at 386-94; PAOLA DONATI GIACOMINI & GABRIELLA POMA, CITTADINI E NON CITTADINI NEL MONDO ROMANO: GUIDA AI TESTI E AI DOCUMENTI 165-68 (1996).

30 *E.g.*, Mason Hammond, *The Classical Tradition in Political Theory and Experience and Its Survival*, 51 CLASSICAL J. 177 (1956).

is hardly easy to determine.[31] Some of the jurists of the era of the Constitutio Antoniniana did indeed write in ways that reflected high universalistic ideals.[32] Still, even the most idealistic and powerful of these ancient jurists did not transform the world. Although the process of the extension of Western law began in antiquity, in practice it only went just so far. While the privileges and duties of citizenship were already being extended to outsiders in antiquity, they were not being extended to *all* outsiders. They were for the most part being extended to *other free city-dwellers* — to the citizens of other cities. The Constitutio Antoniniana itself, let us not forget, extended Roman citizenship to all *free* persons of the Empire, which is to say fundamentally to persons who were already members of some elite somewhere. Historians disagree about the exact reach of the Constitutio Antoniniana, but nobody claims that it abandoned the inveterate assumption that the world was made up of superiors and inferiors.[33] (Indeed, the Constitutio Antoniniana was promulgated at a time when hierarchical status differences in the Roman Empire were famously deepening and hardening.[34])

In particular, the rights and privileges of citizenship were not ordinarily conceived of as something for pure country-dwellers. This is a point that must be stated carefully. We do not know exactly how far the grant of citizenship in the Constitutio Antoniana reached; and scholars have disagreed over whether it extended to rural populations. Some ancient historians do argue that the countryside was effectively excluded, but others certainly differ. In particular, Sherwin-White has insisted that rural populations did fall under the terms of the decree, since they were sometimes conceived of as living in notional "cities," even when they resided in the open countryside.[35] I will not try to solve the puzzle here: It is certainly quite possible that Constitutio Antoniana did bring Roman law to some country-dwellers. Nevertheless, even on Sherwin-White's reading, it could only have done so by indulging in the fiction that rural groups lived in cities. What matters is that the conceptual

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31 For one particularly skeptical account, see HARMUT WOLFF, DIE CONSTITUTIO ANTONINIANA UND PAPYRUS GISSENSIS 40 I (1976).

32 QUERZOLI, *supra* note 16, at 132-65.

33 *E.g.*, Ernst Schönbauer, *Eine neue wichtige Inschrift zum Problem der Constitutio Antoniniana*, 14 IURA 71, 89-90 (1963).

34 *Id.*, for the growing distinctions between *honestiores* and *humiliores* in this period.

35 SHERWIN-WHITE, *supra* note 27, at 388-90, contests the view of some scholars that rustics were excluded entirely from the operation of the Constitutio. Even he does not suggest, though, that the grant was truly universal in the countryside. In any case, the point remains that membership in a *civitas*, even if only a notional one, set the norm.

world of the Constitutio Antoniana was still a city world; members of society in full standing were still conceived of as members of some kind of city community.

It is here that we come to the socio-historical point that I want to emphasize most in this Article. Law in the other great Eurasian traditions was not just law for notional "citizens," for persons who dwelt in cities or were accorded the status of "citizen." It was law for every subject of the Emperor, or, as the case might be, every member of the "nation." Western law started out with a far narrower and more exclusive scope. Rights and privileges of citizenship were often extended in antiquity, and maybe they had penetrated the countryside to a significant degree by the early third century. But for all that, law remained, at its conceptual core, city law; its fundamental values belonged to the city and not to the countryside. To put the point a bit more forcefully, Western law began as *more* exclusive than non-Western law, rather than less.

Again, the point must be stated with great care. It is obviously not the case that there was no law in the countryside in Greco-Roman Antiquity. Rural communities certainly had some kind of law, even if we know little about it in detail. Moreover, the jurists of the city certainly concerned themselves with the countryside. Most notably, there was a Roman law of real property (though it is always worth remembering that the prototypical form of "property" in Roman law was not real estate, as today, but slaves).[36] But we must remember that the Roman law of the countryside was law for *citizens* who owned property in the countryside. The prejudice against pure country-dwellers, persons with no home or connection to the city, ran deep. As Ramsay MacMullen has shown for the case of Rome, people who lived exclusively in the countryside were regarded with contempt and sometimes fear: rustics were regarded indeed as almost subhuman, as creatures deserving no respect.[37] While members of the urban elites certainly had estates in the countryside, and spent much time there, they remained typically city-dwellers exploiting the countryside. They belonged to the world of Weber's consumer cities: a world of city-dwellers who bled wealth out of the countryside in order to maintain a life of maximal leisure always lived partly in urban settings.

The development that marked the greatest departure in the eventual rise

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36 W.W. BUCKLAND & ARNOLD D. MCNAIR, ROMAN LAW AND COMMON LAW 60 (2d ed. 1952).

37 RAMSAY MACMULLEN, ROMAN SOCIAL RELATIONS, 50 B.C. TO 284 A.D., at 28-35 (1974).

of Western legal imperialism was thus not the Constitutio Antoniniana: extension of privilege went only just so far in antiquity. The critical development was a far more unexpected and dramatic leap that took place during subsequent centuries as Western law began to breach the conceptual walls of the city itself, slowly coming to encompass the rustics. And it is in the movement of law into the countryside that we find the crucial antecedents for the legal missionizing of the world that began in the Middle Ages and continues to this day.

II. THE GREAT NORTHWARD SHIFT AND THE DIFFUSION INTO THE COUNTRYSIDE

Unexpected and dramatic this leap into the countryside was. This may not be clear to modern readers. We have forgotten how deep the fear and disdain for the countryside ran in past centuries. Yet even the ancient Christians called their opponents *pagani* — "worshipers of country gods" — a term of deep contempt for many centuries.[38] Rustics were often viewed as members of a different, and brute, species. This attitude did not vanish even in the Middle Ages, as Paul Freedman notes in his *Images of the Medieval Peasant* — though as Freedman also notes, the idea of rustics as subhuman had to compete with other medieval images as well.[39] How did anyone come to imagine what even a figure like Saint Augustine could not quite imagine as late as the fifth century, when it still seemed the cause of truth and justice pitted the City of God against the Pagans?: How did Westerns come to imagine that a fully human life could be disconnected from city life?

For the scholar trying to explain this momentous change in attitude, two factors stand out. One, of course, is the impact of Christianity. It was in a Christian world that country folk came to be regarded as fully human. There is nothing surprising about that. It is manifest that the drive to accord all human beings the dignity of membership in the common race has largely Christian sources in the Western world. Indeed, the concept of membership in the Christian community was, one could argue, modeled on the concept of membership in a citizen community from the outset. Christianity emerged in the ancient Mediterranean, and, like the law of that world, it was oriented toward extending membership in its community to outsiders. Christianity

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38 Henry Kahane & Renée Kahane, *Christian and Un-Christian Etymologies*, 57 HARV. THEOLOGICAL REV. 33-34 (1964).

39 PAUL FREEDMAN, IMAGES OF THE MEDIEVAL PEASANT (1999).

offered, in the legal terms of antiquity, a form of universal citizenship. Such is the burden of the well-known argument of Troeltsch, who acknowledged the importance of the Stoics, but put special emphasis on the Christian tradition. In that Christian tradition, ideas of the worldly city eventually coalesced with the ideas of the Church Fathers about the City of Heaven.[40] In time, this came to include a kind of membership in the community for country-dwellers in western Europe.

But I want to insist that Christianity was not the only force at work. The movement from city to country was also the product of another distinctive socio-historical feature of Western legal history — what I will call the Great Northward Shift. Western law, as we know it today, is the product of a remarkable geographical shift: the shift of the center of gravity of Western law from the Mediterranean to transalpine Europe. Medieval law, unlike ancient law, was law of the countryside world north of the Alps. In the Middle Ages, to be sure, Western law certainly continued to be cultivated in the decaying city-state world of Italy and the northwestern Mediterranean littoral.[41] But many of the most important and innovative developments in Western law took place in vast stretches of northwestern Europe in which there were few cities of any kind, and none of the ancient Mediterranean type.

Henri Pirenne famously thought that this Great Northward Shift marked the true demise of antiquity, and he famously attributed it to the impact of Islam, which (he believed) cut off northern Europe from the trade world of the Mediterranean.[42] Pirenne, like Weber, was writing economic history, and his thesis, like Weber's consumer city thesis, is controversial among economic historians. But here again, we are speaking of an argument that deserves a place in legal history, even if economic historians reject it. Whether or not Pirenne was right in his interpretation of economic history, he was pointing to a matter of immense (and I think neglected) importance for the formation of Western law. The center of gravity of Western culture did indeed move largely north of the Alps during a period from roughly 700 to 1000 C.E. As a result, much of medieval Western law was ancient Mediterranean city law applied in the wholly alien circumstances of the transalpine countryside. This set the terms for much of the diffusion of Christianity into the countryside, and the Christian tradition and the Great Northward Shift together set the terms for

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40 TROELTSCH, *supra* note 4, at 157.

41 J.H.W.G. LIEBESCHUETZ, THE DECLINE AND FALL OF THE ROMAN CITY (2001); for the contrast with the Eastern Mediterranean, see Kenneth G. Holum, *The Classical City in the Sixth Century: Survival and Transformation*, *in* THE CAMBRIDGE COMPANION TO THE AGE OF JUSTINIAN 87 (M. Maas ed., 2005).

42 HENRI PIRENNE, MAHOMET ET CHARLEMAGNE (Alcan 3d ed. 1937) (1922).

much of the diffusion of Western law to the rest of the globe after the fifteenth century.

Obviously the Great Northward Shift is a topic that raises issues much too vast to be considered in this Article. I will attempt here only to list a few critical post-classical developments that bore on the spread of law into the countryside, all of which reflected in some way the influence of Christianity and the impact of the great geographical shift northwards. I will begin with the spread of crucial church institutions — monasteries and parish churches. After that, I will turn to more seemingly "secular" developments. In particular, I will focus on two developments that reveal how the medieval spread of law into the transalpine countryside set the pattern for the subsequent spread of Western law into the non-Western world. The first is a familiar example of continuity between medieval law and colonial law: the feudal practices of the Iberian *Reconquista*, which were also practices of the *Conquista* in the New World. The second is a less familiar, but perhaps more important, example: the medieval creation of a European "customary" law, which also contributed mightily to the making of later colonialism.

I begin with medieval Christianity, and in particular with the monastic movement. We all know that monasteries colonized the countryside in western Christendom. For the purposes of legal history, there are two aspects of this monastic colonization of the countryside that matter most. First, individual monasteries were vectors for the spread of legal culture, and in more than one way. They brought with them their own "Rules" and penitentials. This was law originally intended for the internal governance of the monasteries themselves, of course. But it is one of the striking features of the Western tradition that this internal law for the governance of the monasteries eventually became part (though of course only part) of the basis for a canon law that governed secular society as well.[43] To the extent that monasteries paid any heed to the care of the souls of their subject countryside populations, they were bringing this law directly to them. Monasteries were also centers of literacy, and of a culture of charters governing real property rights. This meant that they brought a culture of written law with them. Not least, they resolved disputes, just as any countryside lord did.[44] All of this

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43 This raises issues that require much deeper discussion than I can give it here. The spread of law from the monasteries out into the non-monastic world is, I would suggest, one of the key themes in the development of the Western legal tradition, but this is not the place to investigate it.

44 Stephen D. White, *Feuding and Peacemaking in the Touraine Around 1100*, 42 TRADITIO 195 (1986).

meant that any tract of the countryside in the vicinity of a monastery was a tract of the countryside governed by law.

Nor does the importance of monasteries for legal history end there. It is not just that the individual monasteries served as centers of law in the countryside. The existence of larger networks of monasteries also matter for the shaping of a colonizing tradition in Western law. Monastic orders were, as Harold Berman rightly emphasizes, the first translocal corporations. Mother monasteries founded daughter monasteries that took over their monastic rule. The Rule of Benedict is of course a prime example, as are the later examples of the Cluniac and Cistercian movements.[45] These movements are especially interesting to the extent that the daughter houses treated the mother houses as a kind of appellate instance. This kind of mother-daughter relationship offers a model for the creation of a legal tradition designed to extend its rule to ever newer terrain.

The history of the Christian conquest of the countryside extends beyond the monastic movement, though. It also involves, in particular, the building of countryside churches from the central Middle Ages onward. This is a phenomenon that matters for legal history as much as it does for religious history, particularly to the extent that the churches brought with them the doctrine of the last judgment, frequently represented on the tympanum of medieval churches with any serious pretensions, and otherwise widespread in Christian iconography.[46] Indeed, the doctrine of the last judgment is fundamentally important for the social drama I trace. What is remarkable about the doctrine of the last judgment is, after all, not so much that it proclaims that some people are damned. What is remarkable is that it makes *every single Christian* the subject of judgment. It brings every person, even the historically despised of the countryside, within the circle of the law — even if only to damn them. All are to be judged alike by Christ, before whom "neither status nor dignities" carry any weight.[47] For that reason alone, the history of the last judgment is part of the social history of Western law:

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45 HAROLD J. BERMAN, LAW AND REVOLUTION: THE FORMATION OF THE WESTERN LEGAL TRADITION 889 (1985).

46 For a discussion with many further references, see, for example, Don Denny, *The Last Judgment Tympanum at Autun: Its Sources and Meaning*, 57 SPECULUM 532 (1982). For examples, see the survey of W.H. VON DER MÜLBE, DIE DARSTELLUNG DES JÜNGSTEN GERICHTS AN DEN ROMANISCHEN UND GOTISCHEN KIRCHENPORTALEN FRANKREICHS (1911); LINUS BIRCHLER, *Zur Karolingischen Architektur und Malerei*, *in* FRÜHMITTELALTERLICHE KUNST IN DEN ALPENLÄNDERN 225 (1954).

47 VON DER MÜLBE, *supra* note 46, at 78.

Every time we see the last judgment depicted in the tympanum of a European church, we see a document of Western legal history.

III. *RECONQUISTA* AND CUSTOM

The pattern of the spread of monasteries and churches continued, of course, in the conquests of the New World, especially by Iberians. For that reason it makes sense to begin with the creation of those Christian institutions. But the story extends beyond that. As law penetrated the countryside in other, theoretically more secular, ways, further patterns were established that would continue in the colonizing centuries.

In these other, more secular, patterns, we see once again the impact of the Great Northward Shift. The ancient Mediterranean, to reiterate, was a world of city-states. The world north of the Alps was different. Of course, it is true that from the central Middle Ages onward there were powerful and important commercial communes north of the Alps. But as Weber long ago argued, these transalpine communes were never the kinds of consumer cities that had dominated the Mediterranean in antiquity. They were not ruling bands of citizen groups aiming to control the surrounding countryside in order to extract wealth from it. Nor, for that matter, was the legal situation of the cities exactly comparable. Transalpine cities had law, of course, and important law at that. Some cities, like Magdeburg, even exported their law to daughter cities, much as monasteries did.[48] Nevertheless, the European cities were not like the ancient cities. Ancient cities were islands of law in vast seas of lawlessness. Such at least was the implication of the conceptual structure of the law. To be outside the conceptual boundaries of the city, in the ancient Mediterranean, was to be without law. European cities, by contrast, had only one kind of law in a world of many kinds of law; and as a matter or ordinary economic relations, they traded with the countryside without ruling it.

Indeed, most of transalpine Europe was not dominated by cities at all. It was dominated by local magnates — local magnates who resisted, with varying success, the efforts of itinerant monarchs to assert royal authority. Medieval law was largely created, not in the cities, but in this conflict between monarchs and these local magnates.

Both monarchs and local magnates were based in the countryside, and the

48 Gerhard Buchda, *Magdeburger Recht*, *in* 3 HANDWÖRTERBUCH ZUR DEUTSCHEN RECHTSGESCHICHTE 134 *passim* (Adalbert Erler ed., 1984).

medieval law that emerged was overwhelmingly countryside law. Unlike ancient Roman law, it was law that centered on the control and inheritance of real property, and especially of real property rights understood in feudal terms. To be sure, it was law drawn in part from the law of ancient city-states. Indeed, that is exactly what is so striking about Western law: it is Mediterranean city-state law transplanted into the often profoundly different soil of the transalpine countryside. But whatever its sources in ancient law, the basic developmental pressures on European law were not the pressures of antiquity. European law was created in the course of a legal conquest of the countryside, and one that set much of the stage for the eventual European conquest of the rest of the world.

For the sake of brevity, I will focus on two aspects of the European legal conquest of the countryside that set the stage for colonialism. First is the process of feudalization in Iberia; second is the creation of European customary law.

The importance of the process of Iberian feudalization for European imperialism is well known. As historians have long understood, the *Reconquista* of Iberia was achieved largely through the feudal subjugation of the peninsula. Christian warlords were entrusted by Spanish monarchs with the feudal *encomienda* in Iberian territories, and along with it the dominion over their Muslim populations. It is important to emphasize that this *encomienda* was not purely a right of rule. The "dominion" over subjects that these feudatories received obligated them to care for the souls of those subjects — that is, to convert them if possible.[49] It is impossible not to observe that the mix of profit, conquest and spiritual mission we still find in the West was already present in this system of expansion.

At any rate, as historians well know, this *encomienda* system was directly transplanted into the New World from the earliest period of the Spanish conquest, bringing with it all the tensions of the European relationship between king and feudal lords. In this way, the experience of the *Reconquista* served as the template for the *Conquista*.[50] This is all perfectly familiar. The one fact that I would like to emphasize is that the Iberian *encomienda,* like comparable feudal forms, is an institution that confronted the need to sort out

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49 Anthony M. Stevens-Arroyo, *The Inter-Atlantic Paradigm: The Failure of Spanish Medieval Colonization of the Canary and Caribbean Islands*, 35 COMP. STUD. SOC'Y & HIST. 515 (1993); FROM RECONQUEST TO EMPIRE: THE IBERIAN BACKGROUND TO LATIN AMERICAN HISTORY (H.B. Johnson ed., 1970).

50 FROM RECONQUEST TO EMPIRE: THE IBERIAN BACKGROUND TO LATIN AMERICAN HISTORY, *supra* note 49.

the relations of power and law within the countryside.[51] There was nothing quite like it in antiquity, because in antiquity power radiated from the cities. In the end, ancient law was concerned with the welfare and power relations of city-dwellers, not of country-folk.

The *Reconquista* thus established one model for European colonization, and the most familiar one. The same is true of a less familiar, but arguably far more important, model, the emergence of a Western concept of "customary law." "Customary law" is essentially an invention of the central Middle Ages. There is no true concept of "customary law" to be found in the classical Roman sources. To be sure, the Romantic scholars of the nineteenth century believed that Roman jurists had a concept of "customary law." But specialists have generally rejected that claim over the last century, and for good reason.[52] By "customary law," in the later European world, we mean that ensemble of folkways that make up the primary source of law of a given locality. "Custom," as we find it in the classical Roman legal texts, simply does not bear that sense. There are certainly customs of various kinds to be encountered in Roman law, and the rhetoricians sometimes spoke in grand terms of custom. But, as the standard literature on Roman law has concluded, the legal texts betray little or no sense that a locality could properly have its own comprehensive body of customs, deserving respect, and amounting to a source of law in the full sense of the word.[53] Here I must disagree with the interpretation offered in

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51 In a private communication, Lauren Benton argues that I should emphasize that the *encomienda* did not confer real property rights of the kind we are accustomed to seeing in modern law. Like other forms of feudal law, it created a relationship between persons and persons, not between persons and things. Professor Benton believes that this feudal character of the *encomienda* may help explain its eventual demise in the Americas, and I have no reason to doubt her. Nevertheless, I stand by the claim that this feudal legal institution, like others, was fundamentally oriented toward the exploitation of real property in the countryside.

52 For the rejection of the nineteenth-century tradition, notably by Pernice and Schulz, see A. ARTHUR SCHILLER, ROMAN LAW: MECHANISMS OF DEVELOPMENT 562-63 (1978).

53 For the commonplace that custom was not a source of law for the classical Roman jurists, and for comments on the slow shift that began (as Halpérin rightly says) in late antiquity, see FRANZ WIEACKER, RÖMISCHE RECHTSGESCHICHTE: QUELLENKUNDE, RECHTSBILDUNG, JURISPRUDENZ UND RECHTSLITERATUR 499-502 (1988); BURKHARD SCHMIEDEL, CONSUETUDO IM KLASSISCHEN UND NACHKLASSISCHEN RÖMISCHEM RECHT (1966). We do find in some of the inscriptional evidence Roman pledges to respect the "leges ius et consuetudo" of certain localities. *See* LUCIO BOVE, LA CONSUETUDINE NEL DIRITTO ROMANO 52-55 (1971). But the very phrase suggests that custom was understood as simply one of many ways of conceiving of possible sources of law, and, as Wieacker sharply notes, there is no sign that these grants of "privilegi et esezioni" (*id.* at 52) led the Roman jurists to

this volume by Jean-Louis Halpérin.[54] The texts that Halpérin cites do not ratify local systems of customary law. Read carefully, they reflect concepts of dual *citizenship* or of partial grants of privilege to certain favored persons.[55] Classical Roman law was capable of respecting foreign citizens and honoring foreign privileges. But that is not the same thing as respecting and honoring whole systems of foreign customary law.

Customary law, in the full-throated Western sense of the term, dates only to the central Middle Ages. So contemporary medievalists conclude, and I think they are quite right.[56] And here again, it matters immensely, in my view, that we are speaking about countryside law. To be sure, European customary law is not an invention that has to do exclusively with the countryside. Medieval cities had their "consuetudines." Nevertheless, the concept of customary law took its most significant forms in the creation of customary countryside law, both in England and in France, used to

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imagine that Roman law itself could be understood as a body of customary law, as would be the case of later European systems. WIEACKER, *supra*, at 502.

54 Jean-Louis Halpérin, *The Concept of Law: A Western Transplant?*, 10 THEORETICAL INQUIRIES L. 333 (2009).

55 Since the initial publication of the Tabula Banasitana, cited by Halpérin, in *id.* at 340 n.19, scholars have come to doubt the claim that the critical phrase "salvo iure gentis" has anything to do with a recognition of local customary law. *See, e.g.*, SHERWIN-WHITE, *supra* note 27, at 312, 382-83 (Tabula Banasitana about dual citizenship, not custom) and WOLFF, *supra* note 31, at 99-100 (tax privileges at issue). The same is true of ALFREDO MORDECHAI RABELLO, THE JEWS IN THE ROMAN EMPIRE (2000), cited by Halpérin, *supra* note 54, at 340 n.18, which declares, not that Jewish customary law was recognized by the Romans, but that Jews were to be judged "secundum propriae civitatis iura" (at 144) in a system in which they were understood, in classic city-state terms, as "incolae" or "peregrini" (at 142). For more discussion by the same author of the point that Jews were understood as "peregrini alicuius civitatis," see Alfredo Mordechai Rabello, *La situazione giuridica degli ebrei nell'Impero Romano*, *in* GLI EBREI NELL'IMPERO ROMANO 125 (Ariel Lewin ed., 2001). The distinction between respecting foreign citizens and respecting foreign customs may seem subtle, but it reflects very deep differences in the conceptualization of the legal world.

56 Franck Roumy, *Lex consuetudinaria, Jus consuetudinarium. Recherche sur la naissance du concept de droit coutumier aux XIe et XIIe siècles*, 79 REVUE HISTORIQUE DU DROIT FRANÇAIS ET ETRANGER 257 (2001); Robert Jacob, *Les coutumiers du XIIIe siècle ont-ils connu la coutume*, *in* LA COUTUME AU VILLAGE DANS L'EUROPE MEDIEVALE ET MODERNE 102 (M. Mousnier & J. Poumarède eds., 2001); Robert Jacob, *Beaumanoir vs. Révigny: The Two Faces of Customary Law in Philip the Bold's France*, *in* ESSAYS ON THE POETIC AND LEGAL WRITINGS OF PHILIPPE DE RÉMY AND HIS SON PHILIPPE DE BEAUMANOIR OF THIRTEENTH-CENTURY FRANCE 221 (Sarah-Grace Heller & Michelle Reichert eds., 2001).

negotiate the relationship between monarchical power and the powers of the countryside. Moreover, it was in the course of sorting out the relations between monarchical power and local "customary" powers of the medieval countryside that much of the pattern for the later European colonization of the world was established.

In particular, the medieval treatment of local countryside customs was governed by what I would like to call the medieval Grand Bargain. The Grand Bargain was the principal legal means for sorting out the claims to power of the royal center and the local periphery in the *ius commune* world. The terms of the Grand Bargain were basically this: royal governments agreed to honor the substance of local "customary rights," as long as those rights were properly proven. However, royal governments insisted that litigation over those rights take place in royal courts, following royal procedures. The development of French customary law offers a familiar example. The later medieval French monarchy insisted upon its authority to regulate legal affairs in the countryside. However, the monarchy declared that it would not interfere with local customary rights, as long as those rights were properly proven. Proof of the existence of a local customary right could take several forms. A right properly attested by a written charter would be honored in the royal courts. Similarly, the royal courts would honor any right found in written form in a custumal, a *coutumier*. During the Middle Ages, knowledge of local custom was obtained through "*enquêtes par turbe*," inquests made through an assembly of local witnesses. Later on they were created through consultation with local assemblies and lawyers. Such written records were produced voluminously, culminating in the sixteenth century with the production of standard accounts of the customs of the various constituent regions of France.

In theory, this should have preserved the authority of local countryside custom. But as thoughtful European legal historians understand, this system had an ironic consequence: eventually it led to the destruction of local customary law. Local customs were respected — *if* properly proven. It was often difficult to prove them, though, and learned law, with its sources in ancient Mediterranean culture, crept into the interstices of customary law. Even more important perhaps was the fact that royal courts, and royal procedures, were used to settle disputes. Law is not just about substantive rights. It is very much about procedures, which incorporate and instantiate real relations of authority. The introduction of royal jurisdiction into the countryside inevitably meant the decline of the local authority structure.[57]

Now, as I want to insist, the importance of this Grand Bargain of the *ius*

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57 These paragraphs summarize material presented at greater length, and with further

commune system was not confined to the Middle Ages. Like the *encomienda* system, it helped set the pattern for the expansion of European law through the world. This is true of the Hispanic New World, where a version of the *ius commune* was introduced alongside the *encomienda* system, and indeed in the effort to displace the *encomienda* system. Drawing on the Iberian version of the *ius commune* system embodied in the *Siete Partidas*, royal officials in the New World made a concerted effort to respect the local customs of the indigenous population, while requiring that indigenous litigants come into the royal courts: "[T]he crown officially accepted the idea of preserving Indian organization and custom."[58] In that sense, the Indians of the New World were offered nothing other than the familiar Grand Bargain of the medieval European *ius commune*. Yet this had the same ironic consequences in the New World that it had in the Old. Local customary regimes collapsed. This was in part because local rights had to be framed, in European terms, as "property" rights, in ways that deeply distorted local social relations. But it was also because the very business of litigating in royal courts upended local authority structures, as Woodrow Borah and other scholars have shown.[59] Importing Western procedures was a corrosive process in the New World, just as it had been in the Old.

The Hispanic New World is one arena in which we can see the Grand Bargain of the *ius commune* tradition transforming a colonized society, just as it had transformed the European countryside. Another (of many) is British India. The British tried harder than the Spanish to respect local rights in terms that local right-holders could understand. They did not make the callow error of reframing subcontinental rights in the European language of property — at least, they did not make it in as callow a fashion as the Spanish did. Indeed, they invested immense energies in creating an Anglo-Indian law and an Anglo-Muhammadan law that would fully respect local substantive rights, while substituting British procedures for historic Hindu and Mughal procedures. "When the British established their courts in India they were cognizant of substantive law," as Bernard Cohn put it, "but did not think that the procedural law and the courts, as they found them in the late eighteenth century, were adequate."[60]

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citations, in James Q. Whitman, *Why Did the Revolutionary Lawyers Confuse Custom and Reason*, 58 U. CHI. L. REV. 1321 (1991).

58 WOODROW BORAH, JUSTICE BY INSURANCE: THE GENERAL INDIAN COURT IN COLONIAL MEXICO AND THE LEGAL AIDES OF THE HALF-REAL 34 (1983).

59 *Id.* at 37, 38-39 *passim*.

60 BERNARD S. COHN, *Some Notes on Law and Change in North India*, *in* AN ANTHROPOLOGIST AMONG THE HISTORIANS AND OTHER ESSAYS 568 (1987).

The British were indeed committed to preserving the substance of local practices — though to be sure they excepted local customs like *sati*. Yet the consequences were transformative in India, just as they were in the Hispanic New World, and just as they had been in the medieval European countryside. The British tried to distinguish between substantive law and procedural law in their accustomed ways. "Their tours of the country," as Percival Spear described the first British appearances in the Indian countryside, "were intended and probably actually succeeded in providing correctives rather than substitutes for village justice."[61] British officials had no particular intention of displacing local custom. Yet the law of procedure is not just a means for guaranteeing the smooth running of the courts. It depends upon, and reinforces, local relations of authority and deference. What was at stake in Indian villages in particular was the authority of the village headman, the *muqaddam*. That authority could not easily survive the introduction of British procedures. As Spear writes, "[t]he *muqaddam*'s authority depended upon his influence both as the manager of the revenue and as the keeper of the peace in the village. . . . [yet] from 1820 the Territory was divided into districts, each with its collector and steadily increasing apparatus of authority. The result was the multiplication of opportunities for appeal. Village courts became in effect courts of first instance only and no one any longer thought of allowing the *muqaddams* to have the last word."[62] The British may have imagined that they were honoring local custom, but (like the Spanish centuries earlier) they were doing it in a way that was deeply corrosive of local society.

Yet of course we should remember that this happened amidst the sincerest of intentions to respect local tradition, at least much of the time. The British were certainly interested in profit and conquest, as Mattei and Nader say. But that is simply not the whole story of their legal imperialism. Like the Spanish before them, they really were trying to honor local custom. They really did mean to leave the legal substance of local society intact, substituting only their own authority structure. But in so doing, they were only acting as European monarchs had been acting for many centuries in their dealings with the European countryside. They were the products of many centuries of the internal colonization of the countryside in Europe itself.

These are only a couple of leading examples. Many more deserve discussion. For the moment, I wish simply to add that any of the examples

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61 PERCIVAL SPEAR, TWILIGHT OF THE MUGHULS: STUDIES IN LATE MUGHUL DELHI 110 (1973).

62 *Id.*

one chooses will also always show the strong and influential presence of Christian missionaries. This is of course true of Latin America, where the powerful engagement of local missionaries, and of the Salamantine jurists, is a well-known story. It is true of European encounters with East Asia, where Jesuits famously led the way alongside merchants. It is true of British India, and of course it is also true of medieval Europe.

CONCLUSION

What we see in all this — at least, what I hope my readers can see — is a large socio-historical truth. Long before the colonial adventures of the sixteenth century commenced, Western law had been forming as a diffusing tradition. It had been spreading within the West, first from city to city in antiquity, and then, more dramatically, from city to countryside in the Middle Ages. It had centuries of experience of the internal colonization of the European countryside long before the Portuguese and Spanish embarked on their explorations in the Atlantic, and had already been formed to spread.

I hope my readers can see it that way. It is certainly true, though, that the reformers engaged in diffusing Western law cannot. The Westerners at work in the world today see themselves as agents of some universal truth. They certainly do not see themselves as the inheritors of a distinctly Western way of understanding the world. Least of all do most of them see themselves as inheritors of a tradition with largely Christian sources — at least outside the Bush administration.

Scholars have no excuse, though, for not making the effort to penetrate more deeply into the world around them. When we make that effort, I think we can see some of what has made the West the legal colonizer that it is — and the legal colonizer that it was long before British colonialism, and long before modern capitalism. Western law is a city-state tradition at its origin, and for that reason a tradition founded on concepts of citizenship. To conceive of law as law of citizenship, in antiquity, was to conceive of it as the law of a narrow stratum of rulers. The reach of the law in antiquity was quite exclusive. But ancient citizenship, which was a bundle of rights rather than being unitary, could be extended piecemeal to others. Exactly that happened in antiquity, in ways that prefigured, though only dimly, the spread of Western law in subsequent centuries. The rise of Christianity gradually broke down the exclusiveness of ancient elites; and the great shift of the cultural center of gravity of the West north of the Alps brought the law out of the cities and into the countryside. By the central Middle Ages, a pattern of diffusion into the countryside was already creating the sort

of Western law that would begin spreading to the rest of the world in the sixteenth century. The fundamental structures of Western legal imperialism were already in place.

This is of course not a historical tale of either good or evil. The ultimate value of the diffusion of Western law has to be judged in ways that are philosophical, not historical. That is not my business here.