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Rethinking Law and Religion: Toward a Legal Anthropology of Late Antiquity

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"In Western tradition, the theme of "church and state" is the *locus classicus* of thinking about the multiplicity of normative orders."[1]

I. Church, 'State' and 'Legal Pluralism' in the Later Roman Empire

In 397/8 AD a dispute over the possession of church property in the North African town of Membressa was lodged before an Imperial magistrate, the proconsular governor Seranus. The petitioner was a dissident ('donatist') bishop of Membressa, Restitutus, who had approached the Imperial authorities with the support of his primate at Carthage, a (dissident 'donatist') bishop named Primian. The defendant in the property case was Salvius, the former bishop of Membressa – at least he was the former bishop according to Restitutus and Primian, according to Salvius himself he was the current occupant of the see. Salvius was also a dissident ('donatist') bishop, but he was part of a network of like-minded ('donatist') bishops who did not recognise the authority of Primian as primate of the North African ('donatist') Church.[2] Salvius - and hence his congregation – were instead in communion with Primian's rival at Carthage: a (former, at least according to Primian) deacon by the name of Maximian. Any decision as to who had the legal right to the property of the church at Membressa was thus complicated and revolved around the question of who, exactly, was to be judged the lawful bishop of Membressa: Restitutus or Salvius. In order to decide on this property case the Imperial magistrate Seranus, and his legal advisors, had to plough through the decisions of at least two North African church councils (that of the 393 AD 'pro-Maximian' council of Cebarussi and the subsequent 394 AD 'pro-Primian' council of Bagaï),

[1] Galanter, M., "Justice in Many Rooms: Courts, Private Ordering, and Indigenous Law" *Journal of Legal Pluralism* 19 (1981): 1-48: 28.
[2] A situation which, on a lighter note, calls to mind the dialogue that ensues when Brian asks "Are you the Judean People's front" in Monty Python's *The Life of Brian*.

as well as other 'evidence'. At some point during the case the Imperial magistrate Seranus addressed the following words to the litigants who stood before him:

> "According to the law, a court case between bishops ought to be heard by fellow bishops. The bishops themselves should be making these judgements. Why don't you go back to the whole body of your ancients for the purpose of seeking a settlement? Or, as you have it in your own holy writings, turn your backs on your persecutors?"[3]

Despite his evident loss of patience with both sides to the dispute, Seranus issued a final sentence in favour of the bishop Restitutus. This late fourth-century dispute over church property is by no means an isolated case. Since at least the time of the Emperor Aurelian (270-5), Christians had petitioned the imperial authorities to decide internal disputes over the possession of 'church' property.[4] Numerous sources for the mid. fourth-to-sixth centuries refer to similar cases, some also from North Africa - but overall these types of disputes seem to have been judged by Imperial magistrates across the late empire. The 397/8 case from Membressa, however, is one of the few for which we have access to the original courtroom *acta* (records); it is also almost unique in providing us with a first-hand account of how one Imperial magistrate viewed these inter-Christian disputes over property. How, then, should we interpret Seranus' words?

Seranus' first point seems clear enough to understand: according to Roman law, bishops should judge court cases concerning other bishops.[5] In addition, Seranus' admonition to Restitutus and Salvius that they should 'go back to the whole body of your ancients for the purpose of seeking a settlement' suggests that he recognizes the validity of a (distinct) tradition of sub-juridical dispute settlement. Likewise Seranus' taunting remark to the effect

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[3] Augustine, *Contra Cresconius* 4.48.58 (*CSEL* 52: 555-6). Quoted from Shaw, B., *Sacred Violence. Sectarian Hatred and African Christians in the Age of Augustine* (Cambridge: Cambridge University Press, forthcoming).

[4] See Millar, F., "Paul of Samosata, Zenobia and Aurelian: The Church, Local Culture and Political Allegiance Third-Century Syria", *Journal of Roman Studies* 61 (1971): 1-17.

[5] See *Codex Theodosianus* [*CTh*] 16.2.16 (given at Ravenna, Dec. 11 412 to Melitius PP) and *Collectio Avellana* 20 (*ad synodum*, 419) for statements to a similar effect.

that if the bishops were to obey their own holy writings then they would both turn the other cheek, implies his awareness of a distinct 'Christian' attitude to dispute settlement. Thus for Seranus there was a duality of legal orders to choose between – what we might be tempted to term 'church' and 'state'. Yet Seranus also acknowledges a kind of plurality within Roman law itself: the case concerns Christian bishops and thus bishops *should* decide, but because it is a property dispute and the litigants have requested a judgment, the Imperial magistrate is duty-bound to render one.[6] As suggested by the legal sociologist, Marc Galanter, this kind of multi-layered approach to the theme of 'Church and State' is a *locus classicus* within western thought. There are many different dualisms: the two cities of Augustine's *De Civitate Dei*; the two swords of Pope Gelasius; Aquinas' carefully differentiated subordination of 'regnum' to 'sacerdotium' etc. Few political theorists, medieval or early modern, have framed the theory quite as bluntly as a 1911 British textbook on Common law procedure, which opens with the statement: "There are two kinds of law – the law of God and the law of the State. There is no other kind of law."[7] Nonetheless, the fact that modern scholars refer to the 'secularization of state politics' and the 'privatization of religion' with reference to modern liberal democracies, alongside the newly theorized processes of the 'desecularization of politics' and the 'deprivatization of modern religion', is at least partly down to an instinctive (western) sense that religion – and the Christian Church - ought to be distinguishable, in some way, from the modern political sphere.[8] It is the fourth-century AD, the century of Seranus, that seems to lie at the origin of these ideas: "The existence of the church as an authoritative body alongside

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[6] Compare Harte, B., "Defining the Legal Boundaries of Orthodoxy for Public and Private Religion in England" in O'Dair, R. and Lewis,A., *Law and Religion. Current Legal Issues 4* (Oxford: Oxford University Press, 2001), 471 - 495: 487 on present-day members of the Church of England, including clerics, looking to the UK courts to resolve disputes over rival ordinations and church property.

[7] Odgers, W.B., *The Common Law of England* (London: Sweet and Maxwell, 1911): 1, quoted by Roberts, S., "After Government? On Representing Law Without the State", *The Modern Law Review* 68.1 (2005), 1-24: 2. See also Barker,

[8] See further Turner, B. and Kirsch, T.G., "Law and religion in permutation of order: An Introduction" in Kirsch, T.G. and Turner, B., *Permutations of Order. Religion and Law as Contested Sovereignties* (Aldershot: Ashgate, 2009), 1-24.

and in some sense against the state has no parallel in antiquity prior to the fourth century AD and Constantine's adoption of Christianity."[9]

As Robin Osborne has recently stated, there was 'no single voice' of religious authority in Ancient Greece and Rome and "…no separate sphere of 'religious' matters held to be outside the authority of the state". [10] In the celebrated words of the Severan jurist Ulpian – quoted approvingly in the opening passages of Justinian's *Institutes* and *Digest* three hundred years later – "expertise in the law entails understanding matters both divine and human and differentiating between justice and injustice'.[11] Classical Roman jurists including Ulpian, however, seem to have been predominantly interested in developing the particular branch of law that governed relations *between* Roman citizens. This 'private law' (as Ulpian termed it) offered Romans a system of remedies and recompense, through which they could seek to regulate their dealings with each other. Questions concerning a god's ownership of property, for example, might well arise in lawsuits between citizens. During the reign of Domitian a group of Egyptian villagers apparently attempted to defend themselves against a charge of non-payment of taxes using the plea that they were tax-exempt, because their village was 'dedicated to the god'.[12] Regulating legal relations between Roman citizens might also demand taking into account what was owed to the gods in other contexts: for example, according to a third-century commentary on the praetor's *edict*, individuals appointed to priesthoods could be exempted from acting as arbitrators in civil suits, in recognition – states the jurist Paul - of both the honour due to them and to "the majesty of the god for whose rites the priests ought to be free".[13] Nonetheless, from the early fourth century onwards the politico-religious context in which Roman law operated began to change - gradually perhaps,

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[9] Osborne, R., "The Religious Contexts of Ancient Political Thought" in Ryan K. Balot (ed.), *A Companion to Greek and Roman Political Thought* (Chichester/Malden, MA: Wiley-Blackwell, 2009): 118.

[10] Osborne, "The Religious Contexts of Ancient Political Thought": 118. See also Rüpke, J., "Religion in the lex Ursonensis" in Ando, C. and Rüpke, J., eds., *Religion and Law in Classical and Christian Rome* (Stuttgart: Franz Steiner, 2006) 34-46.

[11] Justinian, *Institutes* 1.1pr and *Digest* 1.1.10 (Ulpian,).

[12] *P. Vindob. Worp*. 1.

[13] *Digest* 4.8.32 (Paul).

but nonetheless dramatically, as Christianity was patronised by and effectively took a stake in the Roman Imperial order.

From at least 312/3 Roman Emperors granted property, legal privileges and exemptions from personal and civic *munera* to certain Christian clerics. In some cases at least, these Imperial grants were in response to requests from within the church hierarchy. From the early fourth century, the institutional development of the Christian church was thus guaranteed and supported by the Roman Imperial authorities (to a greater or lesser extent depending on context and situation). A constitution issued by Constantine in 319, however, specified that all such *beneficia* were to benefit Catholic clergy only: the text specifies that it had come to Constantine's attention that 'heretics' were nominating 'Catholics' for public liturgies. Trying to ensure that Imperial privileges and exemptions only benefited 'Catholic' clergy also necessitated legal decisions on who was 'Catholic' and who was not. In its surviving form, an Imperial constitution from 379 flatly states that heretical bishops, presbyters and deacons should be understood as 'counterfeit' priests, in other words as 'fake' clergy.[14] A series of late fourth- and early fifth-century Imperial constitutions spell out the complex intertwining of 'church' and 'state' which followed: 'fake' Christian communities (i.e., heretical groups) were to have 'no ordinances for creating priests [*sacerdotes*]'[15]; nor any authority to create or legally confirm bishops.[16] Legal capacities to gather in voluntary assemblies or to hold lawful councils, along with rights to establish churches, 'by private or public undertakings' and to practice rituals and ceremonies, were all variously restricted in late Roman Imperial constitutions. Behind each of these constitutions, of course, lies innumerable pleas and petitions addressed to the Imperial authorities by Christians.

In general, late Roman clerics seem to have thought of themselves as potentially distinct, yet operating legitimately from within given political and legal structures.[17] One

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[14] *CTh* 16.5.5 (given at Milan, 379).
[15] *CTh* 16.5.12 (given at Constantinople 383); *CTh* 16.5.14 (given at Thessalonica, 388); and *CTh* 16.5.21 (given at Constantinople, 392).
[16] *CTh* 16.5.22, Constantinople 394).
[17] As instructed by *Romans* 13:1-7. See further Hunt, D., "The Church as a Public Institution" in Cameron, A. and Garnsey, P., eds., *The New Cambridge History Vol. 13: The Late Empire, A.D. 337–*

example amongst many comes from a query sent around 405 AD to Innocent I, the bishop of Rome, from Exuperius Bishop of Toulouse: Should baptised Christians be allowed to write petitions to the Emperors asking for an individual to be condemned to death, or for his or her blood to be shed as punishment for a crime? Innocent's response states that:

> Emperors never grant this without a judicial examination [*cognitione*], but always hand over petitions or accusations to judges, so that justice can be done through the case being heard…and while the authority of the laws is exercised over evildoers, the individual who did the writing will be [understood to be] innocent.[18]

At the same time, an increasingly institutionalised Christian church hierarchy was also developing a specifically 'ecclesiastical law' (*ius ecclesiasticum*), elaborated by synodal and conciliar decrees, appeals to 'apostolic tradition' and other means. Distinct sanctions and disciplinary procedures also developed gradually for the 'enforcement' of this ecclesiastical law, such as the imposition of penance and the sanction of excommunication. According to his biographer, the church historian Eusebius, the Emperor Constantine had: "…put his seal on the decrees of bishops made at synods, so that it would not be lawful for the rulers of provinces to annul what they had approved, since the priests of God were superior to any magistrate."[19] But when the church historian Sozomen, writing in Constantinople under the reign of Theodosius II (408-450), looked back to the Constantinian Council of Nicaea, he portrayed 'canon law' as an independent, self-conscious innovation of the Christian bishops themselves.[20]

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425 (Cambridge: Cambridge University Press, 1998): 238-276 and Graumann, T., "Council proceedings and juridical process: the cases of Aquileia (AD 381) and Ephesus (AD 431)" in Cooper, K. and Gregory, J., *Discipline and Diversity. Papers read at the 2005 Summer meeting and the 2006 Winter meeting of the Ecclesiastical History Society* (Woodbridge, Suffolk: The Boydell Press, 2007), 100-13.

[18] Jaffé, P., *Regesta Pontificum Romanorum* (Leipzig: Veit, 1885), I, no.293. The question seems to be about those Christians who actually draft petitions / criminal accusations (i.e., notaries, scribes etc.).

[19] Eusebius, *Vita* IV.27.2 (trans. Cameron and Hall: 163).

[20] Sozomen, *Hist*., 1.23: "Zealous of reforming the life of those who were engaged about the churches, the Synod [of Nicaea] enacted laws which were called canons".

Roman law too developed over time. According to John Crook: "The principal change in the field of law brought about by the Principate was that there existed from then on a final instance and an ultimate source of decision about the law, as about politics and everything else".[21] Petitioners throughout the Roman provinces looked to the emperors for decisions on their individual cases and specific responses to their legal questions (via the 'rescript-system'); thus contributing to, in the words of Fergus Millar, "the formation of a body of rules which were in principle valid throughout the Empire". [22] As Millar also stresses: "…the body of rules thus created was not so much enforced by any apparatus of government as available for use by interested parties making claims or bringing suits, and then by officials, or Emperors, giving rulings in response."[23] As we move later into the third and fourth centuries, however, Roman law tends to be identified almost exclusively with late Roman Emperors and their Imperial magistrates (as well as *iurisperiti*, legal experts, operating as functionaries from within the Imperial bureaucracy): "As the Roman Empire expanded, the state became ever more intrusive in seeking to resolve the disputes of its citizens…the judge under the Empire in the provinces was an extension of state power and a symptom of the expanded role of the state in the lives of its citizens and subjects."[24] This is a trend that appears to culminate in the sixth century emperor Justinian's insistence that he alone is the sole interpreter of the law and the source of both Roman and ecclesiastical jurisprudence; alongside his confirmation of the canons of the church themselves as civil

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[21] Crook, J., *Legal Advocacy in the Roman World* (Ithaca N.Y.: Cornell University Press, 2005): 45.
[22] Millar, F., "Empire and City, Augustus to Julian: Obligations, Excuses and Status", Journal of Roman Studies 73 (1983), 76-96: 78. See also Carrié, J-M., "Developments in Provincial and Local Administration" in Bowman, A.K., Garnsey, P. and Cameron, A., *The Cambridge Ancient History Volume XII, The Crisis of Empire A.D. 193-337* (Cambridge: Cambridge University Press, 2005), 269-312: especially 273-6.
[23] Ibid. Compare Arjava, A., "Die römische Vormundschaft und das Volljährigkeitsalter in Ägypten", *Zeitschrift für Papyrologie und Epigraphik* 126 (1999): 202-4 on the 'penetration' of Roman family law into Egypt.
[24] Harries, J.D., "Creating Legal Space: Settling Disputes in the Roman Empire" in Hezser, C., ed., *Rabbinic Law in its Roman and Near Eastern Context* (Tubingen: Mohr Siebeck, 2003), 63-81: 71. See also Harries, J., *Law and Crime in the Roman World* (Cambridge: Cambridge University Press: 2007, 28-42.

laws.[25] In general, then, later Roman Emperors' 'quasi-monopoly' over government and law is often taken for granted in secondary scholarship.[26]

One of the dominant trends highlighted so far in our analysis of late Roman and 'ecclesiastical' law can be characterised as a variant of a much broader contemporary approach, 'legal centralism': "The view that the justice to which we seek access is a product that is produced – or at least distributed – exclusively by the state, a view which I shall for convenience label "legal centralism" is not an uncommon one amongst legal professionals."[27] Legal centralism tends to focus upon what is most visible in the evidence. And what is most visible in the case of the later Roman Empire is, naturally, the product of the Imperial government (Imperial constitutions and lawcodes), and the imperially-sponsored institutional church (the development of a *ius ecclesiasticum* and the early beginnings of a 'canon law'). 'Top-down' questions, such as whether the principles of late Roman law were 'Christianised' or not, or to what extent the 'ecclesiastical' ('canon') law of the church was independent of the law of the 'state' are important and they have received detailed analysis in a number of

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[25] *Codex Iust* 1.14.12: Justinian to Demosthenes PP (given at Constantinople October 30, 529); *Dig. Const. Deo Auctore*, 6; Iust., *Institutes* pr.; *Iust. Novel* 9pr (April 14, 535 addressed to John, Archbishop and Patriarch of Old Rome) and *Iust, Novel* 131.1 (given March 18 545). Compare *Codex Iust*. 1.14.11 (given April 22, 474). On Roman and Canon law in the age of Justinian see the introductory chapter to *Collectio Tripartita : Justinian on religious and ecclesiastical affairs*, ed.van der Wal, N. and Stolte, B.H., (Groningen: E. Forsten, 1994).

[26] Coriat, J-P., *Le Prince Législateur* (Rome : École française de Rome, 1997) 70: "L'empereur a le quasi monopole du droit. La loi au troisième siècle, ce sont les décisions impériales qui, à l'époque postclassique, seront qualifiées par le terme de lex qui désigne la source principale et presque exclusive du droit." There are some important exceptions: for example Gagos, T. and Van Minnen, P., *Settling a Dispute. Towards a Legal Anthropology of Late Antique Egypt* (Michigan: University of Michigan Press, 1995); Richter, T.S., *Rechtsemantik und forensische Rhetorik : Untersuchungen zu Wortschatz, Stil und Grammatik der Sprache koptischer Rechtsurkunden* (Leipzig: Helmar Wodtke und Katharina Stegbauer, 2002); and Van den Bergh, J., "Legal Pluralism and Roman Law" *The Irish Jurist* 4 (1969), 338-50. Tuori, K., "Legal pluralism and the Roman Empires" in Cairns, J.W. and du Plessis, P.J., *Beyond Dogmatics. Law and Society in the Roman World* (Edinburgh; Edinburgh University Press, 2007): 39-52 also explores the question of legal pluralism, but seems to accept a late Roman 'imperial monopoly over law', posing the question: "If the emperor controlled both government and law, how could regional variations survive?" [47].

[27] Galanter, "Justice in Many Rooms": 1. Compare Just, P., "History, Ideology, and Culture: Current Directions in the Anthropology of Law" *Law and Society Review*, 26.2 (1992), 373-411: 374 who discusses the difference between a "rule-centered paradigm" (focused on law as an aspect of social control and legal procedures as the means of enforcing social rules) and what he terms a 'processual paradigm'.

publications, past and present.[28] However, as Franz and Keeba von Benda-Beckmann have argued in relation to contemporary Western Sumatra, a more complex set of relations is waiting to be explored behind the terms 'state', 'law' and 'religion'. This more complex set of relations, in turn, demands 'a more differentiated analysis', an analysis - developed by contemporary legal anthropologists and legal sociologists – that rejects a legal centralist perspective and seeks instead to understand legal processes as social and cultural processes. [29]

II. Towards an Anthropological Approach to Legal Practice:

What we might term a rule-based theory of law has dominated the perspective of most Late Roman historians - whether consciously or unconsciously - particularly with reference to an Imperial or 'state' monopoly over government and law.[30] The later Roman period is often characterised, for instance, as 'the Age of Codification', with reference to the late third-century compilations of the *Codex Gregorianus* and the *Codex Hermogenianus*, as

[28] Biondi, B., *Il Diritto Romano Cristiano,* 3 vols (Milan: Guiffrè, 1952-1954); further literature cited in Hunt, E.D., "Imperial Law or Councils of the Church? Theodosius I and the Imposition of Doctrinal Unity", in Cooper, K. and Gregory, J., *Discipline and Diversity. Papers read at the 2005 Summer meeting and the 2006 Winter meeting of the Ecclesiastical History Society* (Woodbridge, Suffolk: The Boydell Press, 2007), 57-68.

[29] Benda-Beckmann and Benda-Beckmann, "Beyond the Law-Religion divide": 227. See also Collier, J.F., "Legal Processes" *Annual Review of Anthropolog* (1975), 121-44:121. This is different from a traditional 'conventionalist' understanding of law (for example, Hume, *Treatise on Human Nature*, 1740: 3.2.2(22)) and also from the 'living law' theory developed by Eugen Ehrlich (1862-1922), on which see now Hertogh, M., ed., *Living Law. Reconsidering Eugen Ehrlich* (Oxford and Portland Oregon: Hart Publishing, 2009).
What I am here labelling a 'legal anthropological approach' is also distinct from Tamanaha's recent attempt to combine a 'conventionalist approach' with what he terms a 'non-essentialist legal pluralism': "Law is whatever people in a social arena conventionally recognize as law through their social practices" (107); "*Law is whatever people treat through their social practices as 'law' (or recht, or droit, etc.)*." (108, authors italics) Tamanaha, B.Z., *A General Jurisprudence of Law and Society*, (Oxford: Oxford University Press, 2001).

[30] Note that this is not the case for 'post-Roman' / early medieval historians working on law and legal order: for example, Davies, W. and Fouracre, P., *The Settlement of Disputes in Early Medieval Europe* (Cambridge: Cambridge University Press, 1986); Wormald, P., *Legal Culture in the Early Medieval West (*London, Hambledon Press, 1998); Rosenwein, B., *Negotiating Space. Power, Restraint and Privileges of Immunity in Early Medieval Europe* (Manchester: Manchester University Press, 1999); Kosto, A.J., *Making Agreements in Medieval Catalonia. Power, Order and the Written Word, 1000-1200* (Cambridge: Cambridge University Press: 2001); Brown, W., *Unjust Seizure: Conflict and Authority in an Early Medieval Society* (Ithaca, Cornell University Press, 2001); Brown, W. and Gorecki, P.,, eds., *Conflict in Medieval Europe: Changing Perspectives on Culture and Society* (Aldershot: Ashgate Publishing, 2004); Karras, R.M., Kaye, J. and Matter, E.A., eds., *Law and the Illicit in Medieval Europe* (Pennsylvania: Univeristy of Pennsylvania Press, 2008); Rio, A., *Legal Practice and the Written Word* (Cambridge: Cambridge University Press, 2009).

well as the *Codex Theodosianus* (AD 438) and the *Codex Iustinianus* (second edition AD 534).[31] Developing a legal anthropological approach, however, entails foregrounding processes, rather than written codes or institutions. From a legal anthropological perspective: "Attention is no longer concentrated on officials, but emphasis is given to the actions of parties to disputes and their perceptions of action."[32] As Freeman and Napier argue: "The importance of this to rule-based theories of law, such as Hart's [in *The Concept of Law*] cannot be overlooked."[33] In other words, if we set to one side a 'rule-based' theory of law that puts legal codes, legal institutions and the state *at the core* of all social order, the relationship between law and religion in the Later Roman Empire has the potential to look quite different.

First, a legal anthropological approach encourages us to rethink how we analyse legal and institutional complexity. As Franz von Benda-Beckmann explains:

> "Since the early 1970's, much [legal anthropological] research addressed legal and institutional complexity under the concept of 'legal pluralism', so much so that 'legal pluralism' became a kind of trademark for legal anthropology. Starting with the study of the plurality of procedures and decision-making institutions in disputing processes, the state and its law came within the purview of legal anthropologists. This interest in

[31] The literature is vast and includes Voss, W. E., *Recht und Rhetorik in den Kaisergesetzen der Spätantike* (Frankfurt: Lowenklau, 1982); Harries, J.D., "Roman Law Codes and the Roman Legal Tradition" in Cairns, J. and du Plessis, P., eds., *Beyond Dogmatics: Law and Society in the Roman World* (Edinburgh: Edinburgh University Press, 2007), 85-104; Lee, A.D., "Decoding Late Roman Law", *Journal of Roman Studies* 92 (2002), 185-193; Vessey, M., "Sacred Letters of the Law: The Emperor's Hand in Late Roman (Literary) History" *Antiquité Tardive* 11 (2003), 345-58; Crogiez-Pétrequin, S., Jaillette, P., and Huck, O. eds., *Le Code Théodosien : diversité des approches et nouvelles perspectives* (Rome: CEFR 12, 2009) and Aubert, J.-J., and Blanchard, P., eds., *Droit, religion et société dans le Code Théodosien* (Geneva: Université de Neuchâtel and Droz, 2009).

[32] Freemann, M. and Napier, D., "Introduction: Law and Anthropology" in Freeman, M. and Napier, D., eds., *Law and Anthropology*. Current Legal Issues Volume 12 (Oxford: Oxford University Press, 2009), 1-12: 7.

[33] Freeman and Napier, "Introduction: Law and Anthropology": 7, fn. 60. Roberts, "After Government? On Representing Law Without the State": 10, situates Hart's *Concept of Law* firmly within a legal centralist tradition in the sense that it foregrounds rules and law as normative order: "In this respect, any claim that Hart encourages us to think about law as something other than the law of a centralized polity would be misleading. The *Concept of Law* is best read as a swan song, one great, late attempt to perfect a long dominant way of looking at law, rather than the radical departure it is sometimes presented as. In short, while 'primary rules' may promise a fresh start, the device of the secondary rule, smuggling back institutions of 'recognition', 'change' and 'adjudication' into the picture reasserts the link between law and government. So, far from being liberating, this is really just an elegant way of theorising state law."

> dualism or pluralism was later extended to state law and institutions outside the domain of dispute management and increasingly covers all possible domains of social life and organization."[34]

If all possible domains of social life and organization are open to analysis in terms of legal pluralism, then, as Benda-Beckmann continues, the crucial question becomes "…whether normative and institutional orders providing an organizational framework for political, social, and economic relations and transactions could be called law, independent from their recognition as law by the legal order of the state".[35] In other words, if law is no longer imagined as "the exclusive artefact of the nation state" then how exactly are we to understand what law *is*?[36] How is 'legal behaviour' to be distinguished from behaviour that is non-legal or 'other than' legal - whether this question arises with respect to Trobiander islanders, the Cheyenne tribe, early modern America, medieval Saga Iceland or indeed the Roman Empire?[37] E. Adamson Hoebels' famous conclusion that the law "consists of social norms,

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[34] Benda-Beckmann, von, F., "Riding the Centaur? Reflections on the identities of legal anthropology" in Freeman, M. and Napier, D., eds., *Law and Anthropology*. Current Legal Issues Volume 12 (Oxford: Oxford University Press, 2009), 13-46:16 with specific reference to the work of Laura Nader and Sally Falk Moore. Sharafi, M., "Justice in many rooms since Galanter: de-romanticizing legal pluralism through the cultural defense", *Law and Contemporary Problems*, 71 (2008), 139-146: 142 identifies a 'new legal pluralism', "…born out of the shift from seeing legal pluralism as a colonial or post-colonial phenomenon in the nonwestern world, to one that exists equally in industrialized, largely western contexts." Research has only recently begun on analysing international and 'transnational' law in relation to 'global' religious movements, see for example Schiller, N.G., "There is no power except for God: Locality, Global Christianity and Immigrant Transnational Incorporation" in Kirsch, T.G. and Turner, B., *Permutations of Order. Religion and Law as Contested Sovereignties* (Aldershot: Ashgate, 2009), 125-148.

[35] Benda-Beckmann, "Riding the Centaur?": 29. See also Benda-Beckmann von, F., *Rechtspluralismus in Malawi* (Munich: Weltforum Verlag, 1970); Griffiths, J., "What is Legal Pluralism?" *Journal of Legal Pluralism and unofficial law* 24 (1986), 1-55; Merry, S.E., "Legal pluralism", *Law and Society Review* 22 (1988), 869-96; and the 2006 special issue of the *Journal of Legal Pluralism and Unofficial Law*, entitled *The Dynamics of Plural Legal Orders*. All of this work is focused on modern and/or contemporary contexts.

[36] Quotation from Riles, A., "Cultural conflicts", "*Law and Contemporary Problems* 3 (2008), 1-17.

[37] Trobiander islanders: Malinowski, B., *Crime and Custom in Savage Society* (London: Routledge and Kegan Paul, 1926); the Cheyenne: Llewellyn, K. and Hoebel, E.A., *The Cheyenne Way* (Oklahoma: University of Oklahoma Press: 1941); early modern America: Tomlins, C., ed., *The Many Legalities of Early America* (Chapel Hill, N.C: University of North Carolina Press, 2001); and Saga Iceland: Miller, W.I., *Bloodtaking and Peacemaking. Feud, law and society in Saga Iceland* (Chicago: University of Chicago Press, 1990).

plus" does not seem overly useful.[38] Any search for a general definition of 'law', however, risks masking what is really at stake in terms of developing a 'legal anthropological' approach, rather than starting from a 'legal centralist' perspective.

The potential value of a legal anthropological approach to the historian can be seen in the following description of Marc Galanter's research (Galanter was a leading proponent of the 'law and society' movement in the 1970's and 1980's and a contributor to the Journal *Legal Pluralism and Unofficial Law*):

> "Above all else, Galanter has a thoroughly social view of law… [the] social realm, in Galanter's vision, is chock full of a plurality of interacting, overlapping, active regulatory systems of every kind-from religious systems, to corporations, to sports leagues, to the family. Like the official legal system, these are socially created and coordinated regulatory systems produced by individuals acting upon shared ideas and beliefs, with particular projects in specific contexts. They have effects and consequences and implications of all kinds for official state legal systems, as well as for the social arena generally." [39]

Galanter's 'thoroughly social view of law' has certainly attracted criticism and is not without its own historical antecedents.[40] Nonetheless, approaching law as an aspect of 'ongoing social life' can help us to build up an analytical framework that is capable of encompassing the incredible breadth and diversity of late Roman legal practice on the ground.

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[38] Hoebel, E.A., *The Law of Primitive Man* (Cambridge, Mass: Harvard University Press, 1954): 504, quoted from Freeman and Napier, "Introduction: Law and Anthropology": 5.

[39] Tamanaha, B., "A holistic vision of the socio-legal terrain", *Law and Contemporary Problems* 71 (2008), 89-97: 90. On 'law and society' scholarship see *Law and Society Review* (founded in 1966, under the auspices of the Law and Society Association) and Sarat, A., ed., *The Blackwell Companion to Law and Society* (Oxford: Wiley-Blackwell, 2004).

[40] For an overview of the current debate see Benda-Beckmann, F., "Who's Afraid of Legal Pluralism?" *Journal of Legal Pluralism and unofficial law* 47 (2002): 37-82, with counter-attack by Roberts, "After Government? On Representing Law Without the State", and reply by Benda-Beckmann von, F and Benda-Beckmann von, K., "The dynamics of change and continuity in plural legal orders" *Journal of Legal Pluralism and Unofficial law*, 53-54 (2006), 1-44. See also the essays in Freeman and Napier, *Law and Anthropology*.

It needs to be stressed from the outset that a legal anthropological approach should not neglect evidence for legalist ideologies or claims to sovereignty in any given context. The fifth-century AD Christian writer Orosius, for example, positioned himself within a well-established discourse when he claimed that the 'barbarism' of the Goths made them incapable of obeying laws.[41] An appreciation of the inherent 'theatricality' of formal legal processes, including show trials and staged corporal punishments, was an integral part of Roman civic ('civilized') life.[42] Provincial governors and higher Imperial magistrates – as well as Emperors themselves - exercised the right to inflict capital punishment (the *ius gladii* or 'right of the sword'), as the late fourth-century bishop Epiphanius of Salamis explains:

> "Or suppose that one was only a private citizen and saw someone with a governor's authority to punish criminals draw his sword against sorcerers and blasphemers, or the impious, and after seeing people punished supposed that all are authorised to punish such guilt and chose to mimic the same behaviour and kill people himself under the pretence of condemning malefactors. But he would be punished himself, since he had no such authority from the emperor to do such things…"[43]

The exercise of 'public' authority, for communal benefit, also extended to the use of torture against (certain) individuals during judicial processes. This public coercive jurisdiction should, however, be understood within the broader context of what Kate Cooper has termed "the threatening vitality of private power", as well as the pervasive dependence of the

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[41] Orosius, *Hist*., 7.43. Compare Justinian, *Novel* 21 on the transformation of the Armenians from barbarians to civilized via Justinian's law-making.
[42] See Coleman, K.M., "Fatal charades: Roman executions staged as mythological enactments" *Journal of Roman Studies*, 80 (1990), 44-73.
[43] Epiphanius of Salamis, *Panarion*, ed. Karl Holl and Jürgen Dummer, trans. Frank Williams, Vol. II: 104 (discussing the *Cathari*).

Imperial authorities on 'private' cooperation.[44] As Brélaz argues with specific reference to the Roman provinces of Anatolia (first to third centuries AD):

> "Law and order are, together with taxation, the main attributes of sovereignty and the most visible demonstrations of the power of an authority. Furthermore, public order is an essential factor of political stability for an Empire."[45]

Taxation and the Roman army can thus be seen, in certain senses, as 'unifying' forces under the Roman empire, both in ideological and practical terms.[46] In other words, from the Republic through to the Empire and beyond, Romans certainly appreciated the concept of law as a 'technology of power' (even if they did not expressly refer to it as such). On the ground, however, legal ideology needs to be contextualised as one particular technology amongst many.[47]

A legal anthropological approach also needs to take the prescriptive, enabling, aspects of 'formal' law into account. Again as Galanter stated, law can be used as a "…cookbook

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[44] Cooper, K., "Closely Watched Households: Visibility, Exposure and Private Power in the Roman Domus", *Past and Present* 197 (2007): 3-33: 22.

[45] Brélaz, C., "Maintaining Order and Exercising Justice in the Roman Provinces of Asia Minor", in Forsén,B. and Salmeri, G., eds., *The Province Strikes Back: Imperial Dynamics in the Eastern Mediterranean*. (Helsinki: Papers and Monographs of the Finnish Institute at Athens 13, 2008), 45-64: 45.

[46] Army: Galsterer, H., "Roman law in the Provinces" in M.H. Crawford (ed.), *L'impero romano e le strutture economiche e sociali delle province* (Como: Biblioteca di Athenaeum 4, 1986), 13-27: 26; Demougeot, E., "Restrictions à l'expansion du droit de cité dans la seconde moitié du ive siècle", *Ktema* 6 (1981), 381-93; Palmer, B., "The imperial presence: Government and army" in Bagnall, R.S., ed., *Egypt in the Byzantine World 300-700* (Cambridge: Cambridge University Press, 2007), 244-70. Taxation: Hobson, D.W., "The impact of law on village life in Roman Egypt" in Halpern, B. and Hobson, D. W. *Law, Politics and Society in the Ancient Mediterranean World* (Sheffield: Sheffield Academic Press, 1993), 193-219: 197; Eck, W., "Provincial Administration and Finance" in Bowman, A.K., Garnsey, P. and Rathbone, D., *The Cambridge Ancient History 2nd ed. Volume XI, The High Empire A.D. 70-192* (Cambridge: Cambridge University Press, 2000), 266-292: 282; Carrié, J-M., "Developments in Provincial and Local Administration" in Bowman, A.K., Garnsey, P. and Cameron, A., *The Cambridge Ancient History 2nd ed. Volume XII, The Crisis of Empire A.D. 193-337* (Cambridge: Cambridge University Press, 2005), 269-312: 275-6.

[47] See Cuomo, S., *Technology and Culture in Greek and Roman Antiquity* (Cambridge. Cambridge University Press, 2007): 113, discussing the expertise of land surveyors in boundary disputes: "It was not taken at all for granted that the resolution of a dispute required technical expertise. A case had to be made, and was made strongly by the practitioners themselves, that surveyors were better than lay people at identifying markers, reading maps and measuring areas, and that they were better than the general public, and at least comparable with the repositories of legal authority, in terms of their moral fibre and trustworthiness."

from which we can learn to bring about desired results – disposing of property, forming a partnership, securing a subsidy."[48] John Chrysostom ("golden-mouthed"), who was consecrated Patriarch of Constantinople in 398, certainly expected the inhabitants of Antioch to understand this point. In a homily given during the weeks of Lent 397 A.D., preached in the wake of violent riots during which statues of the Emperor had been destroyed, Chrysostom takes the following opportunity to instruct his Antiochene congregation in the laws of men and God:

> "Kings bring in laws, and not all perhaps are profitable; for they are men and cannot be competent to discover what is useful, like God. Nevertheless we obey them. Whether we marry, or make wills, or are about to purchase slaves, or houses, or fields, or to do any other act, we do these things not according to our own mind, but according to the laws which they ordain; and we are not entirely at liberty to dispose of the things which concern ourselves according to our own minds; but in many cases we are subject to their will; and should we do anything that is contrary to their judgement, it becomes invalid and useless. So then tell me, are we to pay so much respect to the laws of men, and trample under foot the law of God ?"[49]

Developing a 'thoroughly social view of law' in late antiquity should not, in sum, neglect 'normative' law (what Continental scholars refer to as *Recht*, *droit*, *diritto* etc. but for which there is no exact Anglophone equivalent). Normativity is itself an aspect of social practice. Taking a 'thoroughly social view of law' does require, however, rethinking what we – as historians - mean by the term 'legal practice'. The importance of how we understand legal practice can perhaps best demonstrated by a (broadly-defined) comparison between a centralist and a legal anthropological approach.

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[48] Galanter, "Justice in Many Rooms": 12.

[49] John Chrysostom, *Homily XVI on the Statues*, 4 (trans. NPNF). On the historical context of the riots see Browning, R., 'The Riot of A.D. 387 in Antioch: the Role of the Theatrical Claques in the Later Roman Empire', *Journal of Roman Studies* 42 (1952), 13-20.

From a centralist starting point an interest in legal practice inevitably involves some kind of questioning as to how far the law-in-the-books, or indeed 'customary law', relates to law-in-action.[50] Exploring legal practice thus becomes an exercise in what has been termed 'gap analysis': does the law on the ground match the official/formal law as promulgated or at least as understood in the books? If not, how big are the gaps and why might they exist? As the legal historian Hendrik Hartog argues:

> "…gap analysis builds from an unquestioning commitment to the positivist assumption that a law, by definition, is an act of state commanding the obedience of a constituency. Given that commitment, legal sociologists then proceed to show the 'failure' of the state to achieve actual obedience."[51]

Hence, for example, Roman historians tend to ask to what extent Roman law - whether we identify it primarily with the classical academic law of the jurists (as with Mitteis' *Reichsrecht*) or with the (postclassical) law of the Emperors - was 'applied' in practice. Or we ask to what extent the substantive principles of Roman law were followed on the ground; in other words, we go to the legal texts, then we look at law in practice and then we try to account for the inevitable gaps.[52] The same positivist assumption can also lead to "… a

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[50] The term 'customary law' should here be understood as operating from within a formal legal system, for example as 'unwritten law' opposed to 'written law': see Schulze, R.,, "'Gewohnheitsrecht' und 'Rechtsgewohnheiten' im Mittelalter – Einführung", in Dilcher, G., Schulze, R., eds., *Gewohnheitsrecht und Rechtsgewohnheiten im Mittelalter* (Berlin: C.H. Beck, 1992), 9-21:13-14 and also Conte, E., "Roman law vs. custom in a changing society: Italy in the Twelfth and Thirteenth Centuries" in Andersen, P. and Münster-Swendsen, M., *Custom. The Development and use of a Legal Concept in the Middle Ages* (Copenhagen: DJOF Publishing, 2009), 33-49: 44. From a more anthropological perspective: Moore, S.F., *Social Facts and Fabrications: "Customary" Law on Kilimanjaro* (Cambridge: Cambridge University Press, 1986) and Moore, S.F., "Treating Law as Knowledge: Telling Colonial Officers What to Say to Africans about Running Their Own Native Courts," *Law & Society Review*, Vol. 26.1 (1992).

[51] Hartog, H., "Pigs and Positivism" Wisconsin Law Review (1985), 899–935: 925, fn.94.

[52] This was the methodology that I (instinctively) followed in Humfress, C., "Law and Legal Practice" in Maas, M., ed., *The Cambridge Companion to the Age of Justinian* (Cambridge, Cambridge University Press 2005), 161-184 and Humfress, C., "Civil Law and Social Life" in Lenski, N., ed., *The Cambridge Companion to the Age of Constantine*, (Cambridge, Cambridge University Press, 2006), 205-225. Compare Arjava, A, "Law and life in the sixth-century Near East", *Acta Byzantina Fennica*

tendency to visualize the 'law in action' as a deviant or debased version of the higher law, [namely] the 'law on the books'…"[53] And it is perhaps not too much of a stretch to link this 'legal centralist' methodology to the development of the concept of *Vulgarrecht*, in each of its many incarnations, as applied to both the Roman Empire and to the post-Roman successor kingdoms.[54] A 'legal anthropological' approach, on the other hand - where we try to understand legal processes as social processes - does not neglect or ignore the 'law-in-the-books' (whether Imperial codes, juristic writings etc.), but it does necessitate contextualising that 'formal' law in terms of a much broader socio-cultural understanding of legal practice.

The major reorientation required in order to apply a 'legal anthropological' approach to historical evidence is clearly demonstrated by Hendrik Hartog in a 1985 essay, imaginatively entitled "Pigs and Positivism". In this now classic essay Hartog explores the legality of keeping pigs on the streets of New York in the early nineteenth century, focusing first upon the 'law-in-the books'. The 'law-in-the-books' begins with an 1817 municipal statute criminalizing pig keeping, repealed in 1818. Then we have a court case, 'People v. Harriet', decided in January 1819 by a grand jury, set up by the Mayor of New York as judge of the U.S. quarter sessions court: the defendant (Harriet) was convicted of "keeping and permitting to run hogs at large in the city of New York". Harriet was thus found guilty of a common law misdemeanour, but was only fined one dollar and costs - a nominal punishment. No appeal was taken. [55] Then in April 1821 a detailed statute was passed by the state legislature at the request of the New York municipal council, outlawing pig keeping on the streets and donating the 'criminalized pigs' to local poorhouses.[56] This statute was successfully challenged in a superior court in 1831, on the grounds that confiscating the pigs and donating them to the poorhouse was unconstitutional, because "it took property without

n.s. 2 2003-04): 7-17 and Stolte, B., "The Social Function of Law" in Haldon, J. (ed.) *A Social History of Byzantium* (Oxford: Oxford University Press, 2009): 76-91.

[53] Galanter, "Justice in Many Rooms": 5.

[54] On *Vulgarrecht* see Liebs, D., "Roman Vulgar Law in Late Antiquity" in Sirks, A.J.B. (ed.) *Aspects of Law in Late Antiquity* (Oxford: All Souls College, 2008), 35-53. I am currently working on a paper on this topic, in relation to the early and late Roman empires.

[55] Hartog, "Pigs and Positivism": 903 -919

[56] Hartog, "Pigs and Positivism": 925-8.

compensation".[57] In 1832 the New York municipal council reinstituted a 'public pound' system for the confiscated pigs. What exactly, we might ask, was the law relating to keeping pigs on the streets of New York in the years after People v. Harriet? Hartog rightly argues:

> "As should be apparent, the question does not admit a neutral, objective, singular answer, once we being to think of pig keeping as an arena of conflict, rather than as an unfolding text. How one characterized the law was an act of aggression, a way of claiming rights or of asserting authority. And any attempt by us to answer the question retrospectively inevitably will end with numbers of competing answers".[58]

Hartog is not here simply highlighting the 'indeterminacy' of the legal sources or the failure of law enforcement: he is arguing for a fundamental shift in our historical perspective away from a legal centralist starting point.[59] Hartog then asks us to imagine a pig-keeper sitting in her lawyer's office in 1831, asking for advice on whether she can 'legally' continue to keep her pigs on the streets:

> "She is, to use Holmes' language, someone who fears 'the command of the public force' and who wants 'to know under what circumstances and how far' she 'will run the risk of coming against what is so much stronger than' she is… All she cares about are the 'material consequences' that the law may subject her to if she continues in her occupation. From her lawyer she needs information about what the courts and other public decision-makers 'will do in fact' if they discover her pigs in the streets. That is what she means by 'the law'."[60]

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[57] Hartog, "Pigs and Positivism": 929.
[58] Hartog, "Pigs and Positivism": 930.
[59] For example, instead of understanding late Roman anti-heresy law as "an unfolding text" we should approach it as an "arena of conflict", in which various participants sought and used Imperial law as "a way of claiming rights or asserting authority".
[60] Hartog, "Pigs and Positivism": 925, referring to Oliver Wendell Holmes, Jr., "The Path of the Law" in *Collected Legal Papers* 167 (1921). On Holmes' 'legal positivism' (and his rejection of

Her lawyer, continues Hartog, could advise her that pig-keeping on the streets may result in a criminal prosecution for maintaining a public nuisance, although in the only published prosecution the defendant was fined just one dollar and costs."[61] The lawyer might also note the existence of the municipal ordinance of 1831, but should also point out that pig owners who had recently had their pigs confiscated from the streets were subsequently reimbursed – with one pig owner even successfully suing the municipal authorities for damages. In any case, the lawyer could conclude, the risk of governmental action was dependant on where exactly the pig-owner lived within New York etc. As Hartog notes: "Just to solve what seemed to be an archaic and extraordinary narrow and sharply defined legal problem, the lawyer would need information of a variety and detail not unlike that used by the modern food and drug or securities lawyer. [62] Even if we adopt a legal centralist perspective 'the law' does not offer one coherent answer. The applicability of this point in terms of the Roman Empire should not need labouring: even in the major cities with law schools such as Beirut, Rome, Constantinople, *iurisperiti* and *nomikoi* (legal experts or legal 'professionals') did not 'have information of a variety and detail not unlike that used by the modern food and drug securities lawyer' – even if we assume that they aspired to such a type of knowledge. In other words, we need to try to ask, in any given historical context, what sources of formal law were available to whom and when, taking specific technological and socio-economic 'horizons of the possible' into account.[63]

Once again, however, Hartog is interested in more than just a question of access to 'formal' sources of law, or legal expertise. Returning to what I have termed a 'legal

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Austin's'sovereign-based' command theory of law) see Sebok, A.J., *Legal Positivism in American Jurisprudence* (Cambridge, Cambridge University Press, 1998), 65-75.

[61] Hartog, "Pigs and Positivism", 931.

[62] Ibid.

[63] Arguing against the idea that the Late Roman West was 'jurisprudentially backward': Liebs,D., *Die Jurisprudenz im spätantiken Italien (260-640 n.Chr.),* (Berlin: Duncker and Humboldt, 1987); Liebs, D. 'Römische Jurisprudenz in Africa im 4. Jh. n. chr', *ZRG* 106 (1989), 201-217; and Liebs,D. *Römische Jurisprudenz in Gallien (2 bis 8 Jahrhundert)*, (Berlin: Duncker and Humboldt, 2002). For the Eastern Empire see now Kantor, G., "Knowledge of Law in Roman Asia Minor" in Haensch, R., ed., *Selbstdarstellung und Kommunikation: Die Veröffentlichung staatlicher Urkunden auf Stein und Bronze in der römischen Welt* (Munich: C.H. Beck, 2009), 249-265.

anthropological' perspective, instead of imagining a New York pig-keeper who is only motivated by the material consequences of pig-keeping we could reasonably imagine a pig-keeper with an active and developed sense of belonging to a pig-keeping community (perhaps even a pig-keeping association or trade organisation). This sense of belonging to a pig-keeping community (whether formally constituted or not) may well influence the way that our pig-keeper chooses to interpret her lawyer's advice: to our pig-keeper, pig-keeping on the streets of New York was licit and if the formal law said otherwise then that was something to be resisted. Hartog is not suggesting any kind of relativistic postmodernism here: individuals could not make 'the law' into anything they chose. The point is rather that for us, as historians, understanding the legality or illegality of pig-keeping on the streets of New York necessitates asking questions about the different ways in which individuals or groups of individuals may feel obligated towards each other, towards a city (in this case New York), or indeed towards a 'state' (in this case the U.S). Hartog concludes that:

> "The Holmesian ['legal centralist'] vision of lawyer and client starts from a premise that law is an external, objective social fact – a complex, perhaps incoherent social fact – but still one outside of the control of the lawyer and the client. The law to Holmes was a maze through which the lawyer guided the client in order to help her achieve given ends (like getting to the other side). To the pig keepers, however, the law was a domain of conflict in whose construction they participated. At the heart of the Holmesian lawyer's vision is a kind of passivity towards public power. It is the client who inevitably will have to accommodate herself to 'that which is so much stronger than [s]he is.' To the pig-keepers, however, the law was both an external force imposing itself on them, and also, and at the same time, a structure within which they resisted and worked to control their traditional social practices."[64]

In more general terms, then, Hartog's methodology involves trying to reconstruct the

[64] Hartog, "Pigs and Positivism": 932.

potentially conflicting and competing visions of legal order held by any given individual, group and/or network etc. at any specific time and place.[65]

If we now return to our 397/8 dispute over church property in the North African city of Membressa we might reasonably conclude that Restitutus and Salvius thought of Roman law both as 'an external force imposing itself on them' and as 'a structure within which they resisted and worked to control their traditional social practises'. This fact only becomes apparent, however, if we contextualise the 397/8 case as one event within a much longer dispute process.[66] Before we turn to this particular process, the backstory should be noted: Salvius of Membressa had been one of the twelve consecrators of Maximian (Primian's rival for the metropolitan seat at Carthage); every one of these twelve consecrators were prosecuted in turn, in a series of court actions brought against them by Primian or those acting on his behalf.[67] The 397/8 case was thus part of a much wider strategy of action. We know from Augustine, moreover, that the 397/8 case before the Proconsul Seranus was not the first legal attempt by Restitutus to claim possession of the ('donatist') church basilica at Membressa.[68] Within a couple of months of his ordination at Membressa, Restitutus had filed a petition to that effect with the civil authorities in Carthage and early in 395 his plea for a possessory order came before the then Proconsul, Flavius Herodes. Restitutus' case was pleaded in court by an advocate; thus implying a certain level of access to forensic expertise (and perhaps financial backing from Primian and/or those within his communion?). The advocate, having quoted from the decree issued by the (pro-Primian) bishops at the Council of Bagaï, accused Salvius, the incumbent bishop, of being guilty of 'the theft of a bishop's name'. As we have already seen, this charge echoes language found within Imperial 'anti-heresy' constitutions, collected within book sixteen of the *Theodosian Code*. The governor's final sentence in 395 –

[65] I am currently working on a petition from 186 A.D. (*P. Oxy* II. 237, A.D. 186) that lends itself to exactly this type of analysis - providing an opportunity to rethink the broader question of the 'reception' of Roman law in the provinces under the early empire.
[66] I what follows I am working from Shaw's painstaking reconstruction of the relevant events in chapter three of his forthcoming "Sacred Violence" (see fn. 3 above).
[67] As noted by Shaw, *Sacred Violence:* quoted from typescript.
[68] Augustine, *Enarratio in Psalmum* 57.15, 'sermo ad plebem' (*CC* 39, 103).

like that in 397/8 -was in favour of Restitutus: "…all churches whose ownership has been legally vindicated from certain sacrilegious persons shall be restored to the most holy bishops." How Restitutus and his advocate 'characterized the law' was thus certainly, in Hartog's words, 'an act of aggression, a way of claiming rights or of asserting authority'. Salvius, however, refused to recognise the legality of Flavius Herodes' order and continued to occupy himself with the business of being the bishop of Membressa, including enjoying the possession of the church basilica. Why Salvius continued as bishop of Membressa in spite of the 395 judgement is revealed by a request that Restitutus made to the Proconsul Seranus after the second 397/8 legal case: Restitutus asked Seranus for the "right to recruit people from the neighbouring town of Abitina in order to assist in enforcing the judicial order". As Brent Shaw states: "The reason for the failure of earlier orders against Salvius now becomes clear: the great majority of Christians in Membressa liked and supported him." The obligations and sense of justice that bound the Christian community of Membressa to Salvius were stronger than those that bound them to either Restitutus or the Imperial magistrate Seranus. Shaw's own - anthropologically informed - narration of the subsequent events at Membressa is especially revealing in this context:

> "The mob coming from the nearby town of Abitina…overcame [Salvius'] local defenders. Salvius was arrested. The invaders did not take him before a court where the issue between the two sides might have been heard. Instead, the victorious Abitinians tied a necklace of dead dogs around his neck and paraded him through the streets of Membressa, while they danced around the old man and jeered at him. Their celebratory dance steps were accompanied by 'shameful words' – obscene ritualistic chants of a sort meant to destroy Salvius' reputation. The singing of other songs added both to the sense of victory of the supporters of Primian and Restitutus and to the humiliation of the defeated Salvius. While this violent mini-drama succeeded in driving Salvius from his basilica, it also showed the limits of force in changing hearts and minds. The people of Membressa remained steadfast in their loyalty to their

> bishop. Rather than give in to the dictates of force, they built Salvius a new basilica to replace the one that he had lost. And so the struggle was continued at [a] local level well into the next decade. The small town of Membressa would now have at least three Christian bishops, all consumed with hatred for each other."

Shaw is predominately interested here in what he terms the "structuring of violence"; from our perspective, it is an important reminder that private violence itself was an integral part of dispute processes and 'legal' ordering.[69]

Since at least Maine, Mitteis and Schönbauer, Roman historians have in fact – to very differing degrees and purposes - acknowledged the existence of different kinds of law and lawlessness under the Roman Empire (especially with reference to the 'reception of Roman law in the provinces).[70] Some have framed this as a question of Imperial motivation, especially with reference to the 'romanization' of the provinces under the early empire:

> "Our problem is then: was Rome at all interested in producing a single juridical framework for the whole Empire, or at least for all Roman citizens living in any part of the Empire? Did they want Superinius Aquila of Cologne and Aurelius Bonosus of Carthage to live under the same system of laws?"[71]

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[69] It should be noted that Shaw is working here with 'facts' reported to us by Augustine (a North African 'Catholic' bishop); whereas Shaw's reconstruction of the 395 and 397/8 cases is based on Augustine's quotations from official court *acta*.

[70] Maine, H.S., *Ancient Law* (1882); Mitteis, L., *Reichsrecht und Volksrecht in den östlichen Provinzen des römischen Kaiserreichs, mit Beiträgen zur Kenntniss des griechischen Rechts und der spätrömischen Rechtsentwicklung* (1891); Schönbauer, E., "Reichsrecht gegen Volksrecht? Studien über die Bedeutung der Constitutio Antoniniana für die römische Rechtsentwicklung", *ZSS* 51 (1931) and Schönbauer, E., "Reichsrecht, Volksrecht und Provinzialrecht", *ZSS* 57 (1937). See further Nörr, D., *Imperium und Polis in der hohen Prinzipatzeit* (Munich: PUBLISHER, 1996).

[71] Galsterer, H., "Roman law in the Provinces": 23. See also Galsterer H., "Statthalter und Stadt im Gerichtswesen der westlichen Provinzen" in W. Eck (ed.), *Lokale Autonomie und römische Ordnungsmacht in den kaiserzeitlichen Provinzen vom 1. bis 3. Jahrhundert* (Munich: REF, 1999), 243-256 and Stolte, B.H., "The impact of Roman law in Egypt and the Near East in the third century AD: The documentary papyri. Some considerations in the margin of the Euphrates papyri (P.Euphr.)" in de Blois, L., *Administration, Prosopography and Appointment Policies in the Roman Empire* (Amsterdam: J.C. Gieben, 2001) 167-179.

Other scholars have (equally correctly) underscored the fact that Roman law could never plausibly have extended to every corner of what was effectively an "under-policed world".[72] Virtually all of the scholarship that I have read so far, however, tends to be based upon what Lauren Benton refers to as a 'stacked legal systems or spheres' model: a model that imagines a number of 'ordered, nested legal spheres or systems, with state law "…capping the plural legal order through its ability to establish a monopoly on violence."[73] In her 2002 monograph, *Law and Colonial Cultures: Legal Regimes in World History 1400-1900*, Benton argues that this model of 'stacked legal systems or spheres' is flawed because individuals on the ground engage in 'rampant boundary crossing' across legal systems or spheres:

> "Legal ideas and practices, legal protections of material interests, and the roles of legal personnel (specialized or not) fail to obey the lines separating one legal system or sphere from another. Legal actors, too, appeal regularly to multiple legal authorities and perceive themselves as members of more than one legal community. The image of ordered, nested legal systems clashes with wide-ranging legal practices and perceptions."[74]

Benton's insight can be explored, for example, with reference to the first-century 'Babatha archive': a collection of papyri, found in the Nahal Hever cave in the Judaean desert, consisting primarily of legal family documents including contracts of loan, marriage contracts and deeds of sale and gift - variously written in Jewish, Greek, Aramaic and Nabatean Aramaic languages. Babatha's archive (and the accompanying archive of Salome Komaise) has generated a great deal of scholarly discussion concerning what type of law might have

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[72] Tomlin, R.S.O (1998) "The Curse Tablets" in Cunliffe, B. (ed.) *The Temple of Sulis Minerva at Bath, ii: The Finds from the Sacred Spring* (Oxford: 1998), 59-280: 70

[73] Benton, L., *Law and Colonial Cultures: Legal Regimes in World History 1400-1900* (Cambridge: Cambridge University Press, 2002): 8. See also Benton, L., "Empires of Exception: History, Law, and the Problem of Imperial Sovereignty," *Quaderni di Relazioni Internazionali* (2007): 54-67.

[74] Benton, *Law and Colonial Cultures*: 8.

governed the legal situations envisioned in these papyri: Rabbinic, Hellenistic, Roman?[75] The question of the legal identity of the Babatha archive has also been linked to questions concerning the 'identity' of Babatha herself: was she more Jewish, Hellenistic or Roman? Comparatively little work, however, has been done on how Babatha might have attempted to strategically range across different types of law and legal institutions in order to achieve an outcome favourable to her interests. A 2005 essay by Satlow, focusing on marriage payments and succession strategies in these Judaean desert documents, begins to explore this alternative perspective:

> "…I have tried to avoid explaining the papyri in the light of Rabbinic or "Hellenistic" law or practice. I have done this not because I believe, a priori, that such comparisons are methodologically unsound; indeed in this particular case the rabbinic material nicely illustrates and confirms some of the suggestions offered here. Rather, my goal has not been to see how "Jewish" or "Hellenistic" Babatha and her friends were, but to try to understand a family at work, negotiating the mundane and treacherous terrain of money and familial relationships."[76]

Likewise, Elizabeth Meyer and Hannah Cotton have both drawn attention to the fact that:

> "Babatha was a woman who fled to the Nahal Hever cave with no fewer than three Greek translations of the Roman formula of the *actio tutelae* in her leather pouch, so it is easy to believe that she was investigating the legal possibilities of the Roman legal

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[75] See, for example, Cotton, H., "Jewish Jurisdiction under Roman Rule: Prolegomena" in Labahn, M. and Zangenberg, J., eds, *Zwischen den Reichen: Neues Testament und Römische Herrschaft*. (Tübingen: Mohr Siebeck, 2002): 5-20; Cotton, H.M. and Eck, W., "Roman Officials in Judaea and Arabia and Civil Jurisdiction" in Katzoff, R. and Schaps, D.M., *Law in the documents of the Judaean desert* (Leiden, Boston: Brill, 2005), 23-44; and Modrzejewski, J.M., "What is Hellenistic Law? The Documents of the Judaean Desert in the Light of the Papyri from Egypt" in Katzoff, R. and Schaps, D.M., *Law in the documents of the Judaean desert* (Leiden, Boston: Brill, 2005), 7-21.

[76] Satlow, M.L., "Marriage payments and succession strategies in the documents from the Judaean desert" in Katzoff, R. and Schaps, D.M., *Law in the documents of the Judaean desert* (Leiden, Boston: Brill, 2005), 51-65: 65.

system in Arabia for the likes of herself, and trying to exploit the opportunities it offered to the best of her abilities."[77]

Babatha's use of both Rabbinic and Roman law thus becomes evidence for (her access to) a kind of 'multi-legal' knowledge or at least a 'multi-legal' awareness - through which she attempted to achieve certain specific goals. [78] Franz von Benda-Beckmann makes a similar argument, informed by ethnographical fieldwork in contemporary Western Sumatra:

"…legal anthropologists were forced to contextualize, [to] see how different categories of actors were influenced by, and made use of, different legal bodies in different contexts of interaction. In order to do this systematically, they had to disssociate categories of actors from the categories of law to which the actors 'belonged' by normative construction, that is, the farmer from his/her customary law; the bureaucrat from his state law; the religious functionary from his religious law. Only then could they see that farmers used, or were influenced by, state law; bureaucrats by traditional law etc. Empirical research further showed that the relations between the elements in a plural legal whole could be different; people could distinguish legal subsystems and choose between them, or accumulate them, or create new combined legal forms and institutions, while other actors, in other contexts, would act differently."[79]

We cannot assume, however, that the choices made by individual actors are necessarily part of fully informed decision-making processes; decision-making processes, like circumstances,

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[77] Meyer, E.A., "Diplomatics, Law and Romanisation in the Documents from the Judaean Desert" in Cairns, J.W. and du Plessis, P.J., *Beyond Dogmatics. Law and Society in the Roman World* (Edinburgh; Edinburgh UP, 2007), 53-82: 62-3.

[78] On 'multi-legal' awareness compare, for example, Pirie, F., "Legal complexity on the Tibetan Plateau", *Journal of Legal Pluralism and Unofficial Law* 53/54 (2006): 77-99. Tibetan Pastoralists are "...fiercely protective of the autonomy of their cultural patch when it comes to managing internal affairs and conflicts – and defer voluntarily to the Chinese authorities in matters of criminal violence".

[79] Benda-Beckmann, "Riding the Centaur?": 32. For a modern comparison see Riles, A., "Cultural conflicts", "*Law and contemporary problems* 3 (2008), 273-308: 287, discussing the U.S. 'Jarvison case' in which a [female] petitioner pleaded that Navajo marriage rules and mutually-exclusive federal marriage rules were applicable to her case, despite the fact that they seem mutually exclusive.

can be volatile.[80]

Individual actors are dependant upon their location within specific socio-economic groups or networks at any given time; they also have different levels of access to information about remedies, rights and what Galanter terms 'exit alternatives'.[81] We cannot presume that choices as to law, legal systems or venues for dispute settlement were somehow unlimited.[82] For example, some – perhaps most or even all - local landowners operated tightly knit systems of 'private ordering' on their estates.[83] In broader terms, gender could act as both a constraint and an advantage in Roman legal dispute processes in a number of different ways.[84] Socio-legal status – or the lack of it, was also determine choice-making, most obviously in the case of slaves and other 'unfree' persons. Social status was constantly on display in social contexts through dress and other visible markings: "In order for rank to achieve its proper deference in daily affairs, Romans had to be able to make their social position readily known."[85] Patronage obligations and networks must also have played a major role throughout the social hierarchy, along with the expectation that socio-political status and patronage connections would be properly respected within the 'formal' Roman legal system itself. In one of his sermons Valerian, bishop of Cimelium (the Roman capital of the province of the maritime Alps) c.455 A.D., asks his congregation to imagine a proud man taking his seat with his fellow citizens in a law court, eager to give his opinion:

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[80] A point stressed by Ido Shahar in personal conversations and in his (forthcoming) ethnographic work on Islamic lawcourts in present-day Eastern and Western Jerusalem.

[81] Galanter, "Justice in Many Rooms", 16.

[82] As noted by Wickham, C., *Courts and Conflict in Twelfth-Century Tuscany* (Oxford and New York: OUP, 2003): 300, in relation to twelfth-century Tuscany: "In any given area of Tuscany the choice of courts or other venues of settlement was not unlimited. When alternatives were available, however, they were certainly used strategically."

[83] According to Augustine, for example, some late Roman landowners in North Africa forcibly baptized their tenants into the (so-called) Donatist Church. Wickham, C., *Framing the Middle Ages* (Oxford: Oxford University Press, 2005): 246 cites evidence for private 'estate prisons' in Byzantine Egypt – a practice that Justinian attempted to restrict.

[84] Compare Hirsch, Susan F., *Pronouncing and Persevering: Gender and the Discourses of Disputing in an African Islamic Court* (Chicago: University of Chicago Press, 1998), which analyses "…how Swahili Muslims use the discourse of Islamic law, and other discourses, to resolve marital conflict… treat[ing] each discourse as a frame of reference that structures the expression of the conflict." [83].

[85] Saller, R., "Status and Patronage" in Bowman, A.K., Garnsey, P. and Rathbone, D., *The Cambridge Ancient History 2nd ed. Volume XI, The High Empire A.D. 70-192* (Cambridge: Cambridge Uuniversity Press, 2000), 817-854: 821.

> "I easily imagine the contests springing from the explosions of words, when one man urges leniency and the other feigns that he favours justice – not so much to preserve his integrity, but to wait to see which way some person of superior rank inclines. He pretends to have some different opinion in order to disagree with the contention of the first. He deems nothing right in the deliberations except what he alone has thought up. He thinks nothing just, except that of which he has convinced himself. He is eager to monopolise the speaking, and to be the only one praised by all. What is worse, there will be someone to favour him in this respect."[86]

Valerian does not condemn the fact that opinions are given, but rather the fact that the 'proud man' does not play by the rules of the game – at least as this bishop would like them to be played. Power is understood as wholly relational. It is perhaps telling that when the fifth-century comedy, *Querolus* ('the complainer') imagines a non-Roman community, living along the banks of the river Loire, it describes that community in the following terms: "There, men live according to the *ius gentium*; there, there is no trickery; there, the capital sentences are brought out from under the oak tree and are written on bones; there, even the peasants debate and the private citizens judge; there, everything is allowed."[87]

Two final points are worth stressing in relation to how legal anthropology helps to frame legal practice: first, a 'legal anthropological approach' reminds us of the fragmentary and contingent historical processes by which 'formal' or 'official' legal systems are themselves constructed. As Sally Falk Moore has argued:

> "The piecemeal quality of intentional legal intervention… is due to its construction as a response to particular circumstances at particular moments… Making the bits and

[86] Valerian of Cimelium, *Homily* 14 (on James 4.6): 6.
[87] Jacquemard-le Saos, C., *Querolus (Aulularia)* (Paris: Budé, 1994) section 30, spoken by a dramatic character identified as a lar (in this context, a Roman household deity).

> pieces 'systematic' is the after-the-fact work of professional specialists, or the before-the-fact work of political ideologues in complex societies."[88]

In terms of late Roman law, much of our legal source material only survives within specially commissioned Imperial *Codes*: we view this evidence 'systematically' because of the 'after-the fact work' of the Theodosian and Justinianic legal commissioners. Second, a legal anthropological approach reminds us that dispute processing and measures of enforcement were effectively spread throughout Late Roman society; they were not solely the monopoly of the coercive jurisdiction of the emperors and their bureaucrats, magistrates and pro-magistrates.[89] This last point can be developed by attempting to take into account the various types of dispute process which were potentially available in the fourth and fifth centuries – and then linking these types of dispute processes to networks of individuals and aspects of social organisation (including 'religious' contexts), as part of a much broader socio-cultural landscape.

III. Late Roman Forms of Dispute Processing and Social Organization:

> "Even if we restricted our interest to the impact of Roman law, we would have to recognize that its nature and extent depended on the choices of the members of different local communities (whether litigants, lawyers or judges) as to how to approach law, and what law (if any) to use… These were cultural choices, whether conscious or unconscious, made inside locally specific realities; the social processes that generated them must be studied before anything else. There was everywhere, furthermore, a constant dialectic between local practices and organized legal

[88] Moore, S.F., *Law as Process: An Anthropological Approach*. (Berlin-Hamburg-Münster: LIT, 2000 2nd ed.): 9.

[89] Merry, S., *Getting Justice and Getting Even: Legal Consciousness Among Working-class Americans* (Chicago: University of Chicago Press, 1990) shows how rule-systems and their measures of enforcement are effectively spread throughout U.S. society. See also Merry, S.M., "Legal Pluralism." *Law & Society Review* 22 (1988):869-96.

knowledge: each affected the other. What we need to study in order to understand this dialectic is how people approached courts and arbitrations, with what expectations, and which strategies they used to get their way."[90]

'Table A' on pages 39-40 below is an attempt to categorize different 'types' of dispute processes that appear in the fourth- and fifth-century source material. I shall limit myself to a number of specific points. The first category includes what we might term the 'non-legal' (or perhaps the 'extra-legal' with reference to the judicial cursing tablets?).[91] 'Private' violence, however, could also work in conjunction with the sanctioned coercive violence exercised by 'public' officials. For example, an individual might attempt to enforce a property claim by violently seizing possession as a prelude to lodging a court case asserting rightful ownership (as opposed to seeking out a legal remedy for possession, then attempting to use private violence to enforce it).

The second category, "Dispute processing via techniques of social control" has alternatively been characterised as 'order without law'. Numerous recent studies in social anthropology, microeconomic theory and law suggest that most disputes are settled with little or no recourse to formal law or legal administration. In a 1991 monograph, for example, Robert Ellickson showed how contemporary boundary and cattle trespass disputes in Shasta County, California were settled in the context of long-established and continuing social relationships and groupings, highlighting the role of 'strategic' gossip, the threat of violence etc.[92] According to Ellickson, the legal-centralist tradition tends to overlook the existence of these 'non-legal' systems of social control. A letter written in 439 A.D. by a group of villagers in the Arsinoite nome in Egypt provides one example of this second type of dispute

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[90] Wickham, *Courts and Conflict in Twelfth-Century Tuscany*: 4.

[91] See now Roger Tomlin, "Prayers for justice in East and West: recent finds and publications" in Gordon, R.L., and Simón, F. M., eds., *Magical practice in the Latin West* (Leiden and Boston: Brill, 2010).

[92] Ellickson, R. C., *Order without Law. How neighbors settle their disputes* (Cambridge Mass.: Harvard University Press, 1991). See also Galanter, "Justice in Many Rooms" under the sub-section entitled "The Law in the Shadow of Indigenous Ordering".

processing: the villagers write to a neighbouring village in order to warn them that if any one of them tries to draw water from a nearby well they will be 'crushed' (i.e., beaten up), and will have no complaint as they had been warned(!).[93] Local custom, understood in the sense of "a normatively clothed set of abstractions from practice", also operates within this second category (and equally has a place in categories three through to six too).[94]

I have termed the third type of dispute processing "negotiation involving 'extra-legal' bargaining". Negotiated dispute processes could take place within a specific local context: for example, a dispute might be negotiated within a particular community, perhaps with the intervention or backing of a powerful local landowner, patron or Christian bishop or village head. Or they could also take place across more geographically widespread (elite) social networks. Negotiations might hang on 'issues of disputed fact' and/or they might involve appeals to specific concepts of property, contract, trust, inheritance etc. "Roman", "Jewish" or "Hellenistic" concepts of property, contract, trust, inheritance etc. are not simply 'legal' concepts; they function as part of a broader socio-cultural repertoire.[95] The same point applies to mediation and arbitration processes. Finally, we can note that verbal agreements could be written down informally or 'notarised' and then kept in family archives and/or lodged in official registers etc. Some notaries seem to have had some degree of conceptual legal knowledge (again, dependent on specific place etc.) and there is some evidence for the development of standard-type *formulae* for notarising certain acts such as contracts, wills etc.

According to an imperial rescript issued in 293 A.D the consent of private persons could not make someone a *iudex*: a judge in the sense of an individual who exercised a 'public' power on behalf of the community.[96] In Roman law, formal arbitration (see the fifth category in the table) was thus distinct from litigation – although the divide could quickly

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[93] *P. Haun* III.58.
[94] Quotation from Hamnett, I., *Social Anthropology and Law* (London: Academic Press, 1977): 7.
[95] See Fögen, M.T.,*Römische Rechtsgeschichten. Über Ursprung und Evolution eines sozialen Systems* (Göttingen: Vandenhoeck und Ruprecht Verlag, 2002).
[96] *Codex Iust.* 3.13.3 (Diocletian and Maximian and the Caesars to Alexander, given Aug. 27, 293).

become blurred under various different scenarios.[97] The mere threat of litigation, moreover, could be effective: as a fifth-century AD rhetorical manual states in the midst of a highly technical discussion concerning forensic (courtroom) speech: "I recognise, however, that nothing is of more interest to those threatened with a trial than to avoid a trial".[98] The sixth type of dispute processing, then, is formal litigation: its venues included the Imperial bureaucratic courts, as well as hearings before municipal authorities and certain other jurisdictions. In terms of municipal legal jurisdiction, we know that some form of municipal level hearings still existed in North Africa and probably elsewhere, but this is an understudied area of scholarship.[99]

Various special legal jurisdictions were formally (even if tacitly) recognised in late Roman legal sources - all these jurisdictions were subject to numerous, changing, restrictions and qualifications, but each potentially formed a more or less separately defined sphere within itself. As Peter Bang has argued: "The ancient professional associations…constituted small parallel societies, with evidence for internal regulation of disputes.[100]The newly discovered (Syriac) regulations for an association of artisans, possibly Late Sasanian and from the middle Euphrates, adds to an otherwise sparse set of sources for this type of 'parallel society'.[101] Soldiers within the Roman army were generally under the jurisdiction of their military commanders – as were, possibly, certain local communities in Italy, Gaul and North Africa

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[97] See Harries, "Creating legal space" and also Harries, J., "Resolving disputes: the frontiers of law in late antiquity" in *Law, Society and Authority in Late Antiquity*, ed. Ralph Mathisen (Oxford: Oxford University Press, 2001), 68-82.

[98] [Pseudo-]Augustine, *De Rhetorica*: section 10. Mnookin, R.H. and Kornhauser, L. "Bargaining in the shadow of the law: the case of divorce" *The Yale law Journal*, 88 (1979), 950-97 discuss how formal legal processes (including the threat of formal legal processes etc.) can confer a 'bargaining endowment' on litigants.

[99] On municipal jurisdiction see Camodeca, G., "La prassi giuidica municipale. Il problema dell'effectività del diritto romano" in Capogrossi Colognesi, L. and Gabba, E., *Gli Statuti Municipali* (Pavia: IUSS Press, 2006), 515-550. Feissel, D., "Les actes de l'État imperial dans l'épigraphie tardive (324-610): prolégomènes à un inventaire" in Haensch, R., ed., *Selbstdarstellung und Kommunikation: Die Veröffentlichung staatlicher Urkunden auf Stein und Bronze in der römischen Welt* (Munich: C.H. Beck, 2009), 97-128: 99-101 doubts that municipal level hearings continued into the later empire.

[100] Bang, P.B., *The Roman Bazaar. A Comparative Study of Trade and Markets in a Tributary Empire* (Cambridge, Cambridge University Press, 2008): 262-4.

[101] Brock, S., "Regulations for an association of artisans from the Late Sasanian or early Arab period" in Rousseau, P. and Papoutsakis, M., eds., *Transformations of Late Antiquity. Essays for Peter Brown* (Aldershot: Ashgate, 2009), 51- 62. The references to episcopal jurisdiction throughout this document are fascinating.

made up of individuals who had received land grants in exchange for military service.[102] The ability to conduct semi-autonomous dispute processes also offered "…an opportunity to define and articulate community norms" and this seems to be particularly relevant in the case of the late Roman Christian hierarchy.[103] Thus, for example, we find a number of resolutions from fourth and fifth century church councils seeking to institutionalize a specifically ecclesiastical internal 'appeals structure' – with individual clerics in turn attempting to 'work the system'.[104]

On the page any model will tend to look static, but in practice every one of these 'types of dispute-processing' was dependant on particular contexts of time, space and socio-political relations. We cannot understand any one of the categories within our table as necessarily self-contained. Nor can we simply assume the centrality of 'formal / official' law and legal institutions in any given late Roman dispute process.

IV. Choice-making and Strategy:

> "In each arena actors make more or less constrained choices. They may avoid any use of law, opting for non-legal means. They may opt for one law and exclude others; they may also use more than one law. They may sharply distinguish legal systems, or efface their boundaries, or develop hybrid forms. Most of the time, people just go along in their daily routines without reflecting on [the] law that has shaped these routines, their social relationships and attitude…The specific relevance or irrelevance of law usually crops up only when people have to deal with problematic situations, with disputes and

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[102] See Soraci, R., "Rapporti fra potere civile e potere militare nelle legislazione processuale tardoantica " in Crifò, G. and Giglio, S., eds. *Atti dell' Accademia Romanistica Costantiniana XI Convegno* (Naples: Edizioni scientifiche italiane, 1996):198-244 and Mathisen, R., "Provinciales, Gentiles and Marriages between Romans and Barbarians in the Late Roman Empire", *Journal of Roman Studies* 99 (2009), 140-155: 151.

[103] Quotation from Collier, "Legal Processes": 134. See also Moore, *Law as Process*: 30.

[104] Examples in the following section: "Choice making and Strategy". On the complicated question of Jewish legal jurisdiction see Linder, A., "The legal status of Jews in the Roman Empire" in Katz, S.T., (ed.) *The Cambridge History of Judaism IV: The Late Roman-Rabbinic Period* (Cambridge: Cambridge University Press: 2006).

in processes (such as that of making new law) that aim at changing routines and the law structuring them."[105]

As already argued, a 'legal anthropological' approach focuses our attention on individual actors and their actions - with a multiplicity of authorities and normative orders offering the possibility of choice-making and strategy, to certain individuals and groups at any given point in time. This kind of approach necessitates asking how particular social actors, operating within specific contexts, attempted to negotiate their way through the options that were (or that they saw as being) available to them. In any single dispute, this could involve operating – whether consciously or not – between a number of socio-legal processes and networks, possibly moving between 'self-help', negotiated settlement, mediation, arbitration and processes of formal litigation within any given dispute process. When late Roman historians think in terms of individual actors negotiating legal processes, it is more usual to stress the limitations and problems of access to justice, including 'corrupt' abuses by *potentiores* (a dominant theme in the sources).[106] These are important topics, nonetheless as Lauren Benton argues with regard to the Portuguese, Spanish and Ottomon empires:

> "In all these settings, law was not a casual arena for conflict but one that focused the strategic efforts of administrators, local elites, cultural intermediaries, and perhaps others whose actions are more difficult to read in the historical record. All of these social actors fought for particular outcomes but also perceived clearly the importance of law for marking community boundaries and structuring access to property, and the congruence of these functions."[107]

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[105] Benda-Beckmann and Benda-Beckmann, "The dynamics of change and continuity": 24.
[106] See Kelly, C., *Ruling the Roman Empire* (Cambridge Mass.: Harvard University Press, 2006), especially 138-185.
[107] Benton, *Law and Colonial Cultures*: 125.

Our starting point, then, is an attempt to reconstruct a particular actor's perspective, given their individual 'horizon of the possible' (who they were, where they were and what networks they negotiated–- as well as their access to different types of legal 'knowledge').[108] For example, using detailed papyrological evidence from Egypt, Joelle Beaucamp has demonstrated that elite members of society in Justinianic Egypt were more likely to invoke substantive Roman law principles, relying upon Imperial constitutions, throughout their legal dealings (i.e., across the 'dispute-processing' spectrum). She concludes that: "closeness to Imperial law was therefore connected to social conditions".[109] In other words, the Byzantine Egyptian elite may have had better access to Imperial law, in the sense of better access to legal expertise, but they also had sociological reasons for aligning themselves with texts of law promulgated by the Emperors.

The theme of choice-making and strategy can be explored using the example of 'forum shopping'. By the time of the late Empire, a complex set of teehnical procedural rules had developed whereby some individuals, such as members of city guilds in Rome and Constantinople or tenants of Imperial lands, could appeal to a 'privileged' legal jurisdiction (see Table A, 6.3). Within Roman law elaborate rules existed for determining the competent court in any given dispute and these included a procedural defence known as *praescriptio fori*: this defence could be pleaded at the beginning of a courtroom process in order to 'bar' the jurisdiction of a specific court, whether in relation to the substantive matter under dispute or the person of the defendant. Whilst this procedural defence might seem rather arcane to us, there is detailed evidence for its use in practice. The activity of pleading *praescriptio fori* in order to switch a case from one bureaucratic court was apparently quite popular: in 440AD the Emperors wrote to remind their legal officials that curials (city councillors), members of provincial office staffs, persons belonging to guilds outside Rome or Constantinople, or anyone guilty of extortion, were all barred from using this procedural defence before the

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[108] Compare Wickham, *Courts and Conflict in Twelfth-Century Tuscany* and Chamberlain, M., *Knowledge and social practice in medieval Damascus: 1190-1350* (Cambridge: University Press, 1994).
[109] Beaucamp, J., "Byzantine Egypt and imperial law" in Bagnall, R.S. (ed.), *Egypt in the Byzantine World 300-700* (Cambridge: Cambridge University Press, 2007): 271-87: 286.

provincial governors or the praetorian prefects.[110] The constitution also notes, however, that if a litigant was in the army or 'was protected by some special Imperial rescript' then the plea had to be heard. This technical procedural defence was also available to Christian clerics in particular circumstances; Late Roman North Africa provides particularly rich documentation for forum shopping in ecclesiastical contexts.

Forum shopping can also be analysed in a looser, non-technical, sense. This more general sense of the term could apply, for example, to situations where a litigant redefined the nature or monetary value of a case in order to lodge it before a particular individual or jurisdiction; for example, a constitution issued at Milan in 395 refers to litigants hiding 'minor cases' under 'the disguise of a criminal action' in order to be able to lodge them before a certain judge. The monetary value given to a case could also affect the 'competent' bureaucratic venue: for example, valuing a case as more or less than a certain sum could switch it from the jurisdiction of a *defensor civitatis* (an imperially-appointed 'city' magistrate) to that of a provincial governor and vice-versa.[111] This looser sense of forum shopping can also include transferring a single case from one type of process to another: as already noted, the range of procedures invoked in any given dispute could be multiple.[112]

An Imperial constitution issued at Constantinople in 392, addressed to the Praetorian Prefect Tatianus, hints at a rather different 'choice-making' activity: the Imperial authorities had received complaints from certain Jews that persons 'whom they have cast out by their own decision' have been restored [to their Jewish community] by the authority of Imperial *iudices* (magistrates). According to the perspective of the complainants, those who were cast out had thus achieved an 'undeserved reconciliation' through their appeal to the Imperial authorities.[113] Christian clerics also attempted to 'forum shop' between church councils and Imperial magistrates.[114]

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[110] *Codex Iust*. 3.23.2, given at Constantinople and addressed to Cyrus P.P.
[111] On the *defensor civitatis* see Frakes, R. M., *Contra Potentium Iniurias: the Defensor Civitatis and Late Roman Justice* (Munich: C.H. Beck, 2001).
[112] See for example Justinian, *Novel* 93 addressed to John P.P, with reference to the senator Hesychius.
[113] *CTh*. 16.8.8 (addressed to Tatianus P.P, given at Constantinople on April 17, 392).
[114] Gregory of Naziansus, *Eps*. 184-5 (Defarri) details one example amongst many.

Various scenarios involving legal strategizing are also played out in the narratives of late antique 'holy men'. For example, in chapters 40-49 of the *Life of Alexander Akiometos* (probably written down in the late fifth/early sixth century), a sub-deacon named Malchus complains about the arrival of a wandering 'holy man' in Antioch; people now take their disputes to the holy man and, Malchus moans, 'my authority in the court was the one source of revenue that I had'. Malchus seeks permission from his bishop to drive Alexander out of the city, but in the meantime has the holy man beaten up. The people of the city protest to the bishop and the bishop in turn petitions the military commander to exile Alexander to Chalcis in Syria. The commander agrees, but somehow Alexander then finds himself being tried for heresy before an Imperial magistrate. In this narrative, legal or 'quasi-legal' authority is attributed to the holy man, the sub-deacon, the bishop, the military commander and the Imperial magistrate. More importantly, what the narrative highlights is the strategic choice-making activity of Malchus (and to a lesser extent the people of Antioch) as they negotiated between the various options on the ground.

Taken collectively, these examples demonstrate that it was apparently standard practice for litigants to try to make the 'formal' system of Roman law and Empire work for them; more generally, they showcase 'rampant boundary crossing' in action.

V. Conclusion:

Understanding law as social process highlights the fact that different systems of rules and methods, and structures for enforcing those rules, were dispersed at different levels throughout central government *and* social institutions in the fourth and fifth centuries A.D. The laws of the Emperors, like the 'canon law' of the Church, should thus be understood as part of ongoing socio-legal processes - they were not what governed those processes, nor even what drove them, *per se*. What we find in the ecclesiastical and legal sources alike are a variety of individuals and groups attempting to 'work' legal disputes, across a range of different normative orders and dispute processes. In terms of late Roman and early medieval

history, a more 'thoroughly social view of law' thus encourages us to think about continuities in legal practices, as well as changes, across the late Roman /early medieval divide.

Re-thinking legal practice in the context of religion and law might also offer us a broader conclusion. According to John Comaroff and Jean Comaroff we are currently living in an age of 'legal theology' or 'theo-legality': a twenty-first century mutation of Carl Schmitt's political theology, in which we shift from a world where politics reigned over law and economy, to a world in which law reigns supreme:

> "Many religions, of course, not least those that bear the capitalized adjectives 'Great' or 'World' have long had a juridical scaffolding. What appears different nowadays is the degree to which they are resorting to lawfare to extend their *imperium* and to displace liberal reason, albeit by liberal means."[115]

Comaroff and Comaroff argue that this is why the development of a [new] critical legal anthropology is so crucial to 'contemporary social theory at large': a methodology that is "…unafraid to take on Big Issues, even as it continues to interrogate small things…".[116] We might be tempted to suggest that 'lawfare', as Comaroff and Comaroff term it, was *always* a structural feature of the 'religious' history of the West. This, however, is not the conclusion to my study. Instead, I would like to end with a plea that we need to develop new methodologies to rethink 'religion' and 'law' with reference to our past, as much as to our present.

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[115] Comaroff, J. and Comaroff, J., "Reflections on the Anthropology of Law, Governance and Sovereignty" in Benda-Beckmann, von, F., Benda-Beckmann, von, K., and Eckert, J., *Rules of Law and Laws of Ruling: On the Governance of Law* (Aldershot: Ashgate, 2009), 31 - 60: 47.
[116] Comaroff and Comaroff, "Reflections on the Anthropology of Law": 56.

Table A: 'Types' of Dispute Processes (4th-5th centuries AD):

1. 'Private' violence and other forms of self-help.	Physical violence exercised by private individuals; includes appeals to the 'supernatural' (as in the Late Roman 'cursing' tablets)?
2. Dispute processing via techniques of social control.	Includes shaming and other appeals/threats to social status and reputation; reconciliation 'rituals'; 'status' contests etc.. This type of dispute processing operates via a 'plurality of interacting, overlapping, active regulatory systems of every kind': religious communities; patronage networks; corporate bodies; the household etc. In the papyri and other sources, verbal negotiations to maintain social order are often framed as taking place between individuals; but individuals almost always act as part of social network(s). [c.f., the concepts of *volksrecht*; "local law"; "living law"; "non-state law"; "unofficial law"; "indigenous law"; "native law"; "tribal law"; "semi-autonomous social fields" etc.]
3. Negotiation involving 'extra-legal' bargaining	Takes place without any explicit appeal to the institutional structures of 'formal'/'state' law, but invokes references to that formal/'state' law (e.g. the "Roman" / "Jewish" / "Hellenistic" concepts of property, contract, trust, inheritance are not just 'legal' but are part of a broader cultural repertoire).
4. Mediation	As 'negotiation' above, but with a third party acting to achieve a resolution that the parties to the dispute are happy with. Mediation could involve 'extra-legal' appeals to substantive ('formal') law, or it could rely on norms of social behaviour more or less explicitly defined by a 'group' / 'network etc.
5. Arbitration	The parties to the dispute agree to abide to a third party decision. Under the Roman empire, if an arbitration procedure was effected via a formal *compromissum* (an agreement by stipulation or oath) then the arbitration *process* was governed by Roman law and the disputing parties could – under certain conditions – look to a Roman magistrate for help with enforcement. An arbitrator did not have to judge according to substantive Roman legal principles - unless, in the case of a formal *compromissum*, the parties had explicitly agreed to do this. The parties could not normally appeal an arbitrators' ruling, but a civil action could still follow (after the payment of any stipulated penalty etc.). An arbitrator could be sought out by the parties themselves, or could be appointed on request by an Imperial magistrate.
6. Litigation / legal 'hearings', recognized as such under later Roman law	Including: (1) Hearings before the Emperor and before Imperial magistrates (who could delegate their jurisdiction in certain circumstances); (2) Hearings before municipal authorities (duovirs, city councils, *curator civitatis* etc.).
	(3) Hearings conducted under 'special jurisdiction' such as:

	a) The courts of the 'Palatine' bureaus: e.g., court officials and *agentes in rebus* under the jurisdiction of the *magister officiorum*. b) Courts dealing with fiscal cases: officials under the jurisdiction of the *comes sacrarum largitionum* and fiscal matters in general handled by a set of 'extraordinary' courts. c) The court of the *rationalis rei privatae*, which heard disputes involving tenants of Imperial lands (with appeal to the *comes rerum privatarum).* d) City guilds in Rome, Constantinople; and other professional associations had certain jurisdictional privileges in terms of settling their own disputes. f) Military: soldiers were generally under the jurisdiction of military commanders, with some exceptions. g) Christian clerics: Piecemeal grants of *privilegium fori*, but Christian clergy also worked out procedural rules for ordering their own 'special jurisdiction'. For example, the piecemeal development of an internal 'appeal' structure, as defined in conciliar canons: i) Single bishops to hear (civil) cases with presbyters, deacons and other minor clerics under their jurisdiction. ii) A set number of bishops to hear (civil) cases involving a fellow bishop. iii) Bishops in synods and councils to hear ('religious'?) cases involving clerics –this extends to 'light delicts' but not criminal accusations (cf, *CTh* 16.2.23, 376). iv) Metropolitan bishops; the bishop of Rome; the Patriarch of Constantinople each claim 'special jurisdiction' at various times in various contexts. h) Jewish 'legal' jurisdiction? (4) Hearings within the context of the *domus* (before a *paterfamilias* / patron etc.).