Is There a Legal Cycle?

Among the ruling ideas of the present age is the conception that society is not a static or fixed type, but that it is dynamic, continually evolving toward some higher form, whether this be thought of as increasing dominance over and application of external environment, or as smoother adjustment among human beings in their various relationships. As Korkunov has well said,¹ a hundred years ago this notion of a developing society and law was foreign to the thought of the times, so that the school of Natural Law, with its emphasis upon reason and stability, kept the field in legal thinking. It remained for Savigny and Hegel, with their conceptions of racial and metaphysical evolution, to undermine the older schools.² But until the fruition of their work, the old conception of a natural legal order prevailed. And in other allied fields of thought, particularly in the religious, the conception of an ideal and perfect past was the dominant one; the world was growing worse because of racial decadence; only a few individuals, not a large number, could be extricated from it; it was hopeless to try to improve or reform external conditions in the world; asceticism and world-denial, messianism and chiliasm, these were the doctrines in which the current religious thought of the time found expression.³ The maintenance of the social status quo was the end of law, of religion, and of the state.

The far-reaching and stupendous transformations wrought by the conception of evolution, combined with the marvelous discoveries and applications in science, led to the formulation of the widely held current belief that the race was upon the verge of a vaster undiscovered realm of knowledge and human attainments. The aeons through which the human race in lower stages of existence had passed were believed to be only preparations for the present period.

of existence, which had suddenly found the key with which to unlock the mysteries and secrets of past ages. That which was old had served its day and completed its mission; the present could not use it, as it had other needs and moreover was wiser than the past. Undoubtedly this Weltanschauung has been of inestimable benefit to our common law for bringing about necessary changes in both the adjective and substantive law; much as the dominance of the English analytical school of jurisprudence under Mill, Bentham and Austin cleared English law in the nineteenth century of archaisms and abuses of the past; and as the appeal to reason, on the part of the jurists of the jus naturale in the golden days of juristic speculation in Rome, brought about reforms in the law as it had been inherited. But, as Spencer has told us, change has not always meant progress, nor has progress meant change in every instance. Are we today in our legal reforms more advanced than our ancestors? Many of our reforms have undoubtedly led to progress in a relative sense, from one age to another—if we adopt the criterion of a smoother adaptation between human beings in their legal relationships. But how far have these reforms been such in an absolute sense, as progress for the race for all time? Even if the belief in progress, so confidently entertained today, should prove to be an illusion with reference to progress in an absolute sense, it has nevertheless been instrumental and beneficial in securing needed legal reforms in the relative sense, from one age to another. As William James has told us, an erroneous religious or ethical belief has nevertheless often created noble religious characters, and thus brought to the race greater liberty in conscience and thought, even though as a belief it was inconsistent and contradictory in logic or historical interpretation.

A comparison of current legal progress and reform in Anglo-American law with similar developments in the Roman law throughout its long history as the law of the civilized world may be of interest in an attempt to answer the question whether our common law has progressed in an absolute sense or whether we are repeating a legal cycle only. There should be no occasion for alarm if the latter viewpoint were reached, for it might be equally comforting to legal reformers to know that the common law may eventually, or perhaps inevitably, reach the goal of law reform on a cycle theory.

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5 I am indebted to Dean Pound and his course on Roman and civil law for many of these observations on Roman law.
as it is at present confidently believed it will obtain a similar result through the efficacy of human effort, on an evolutionary hypothesis.

When in 1846 Field in New York inaugurated his reforms in code procedure by reducing all actions at law to one civil suit and abolishing the distinction between actions at law and suits in equity, undoubtedly progress was achieved in a relative sense as far as our American common law was concerned. Although the courts trained in common law pleading reacted at first unfavorably toward these innovations, later they adopted a more liberal attitude, so that certainly so far as better administration of justice was concerned, a forward step was taken with reference to pleading and practice. But the Roman law centuries before had undergone a similar development in obliterating the distinction between the legis actiones and the procedure before the praetor peregrinus, in providing that the courts of the jus civile, or common law as we would dominate it, should apply the forms of procedure and substantive law of the praetor. For the five actions of legis actio sacramento, per pignoris capionem, per manus injectionem, per judicis postulationem and per condictionem were equally full of pitfalls for the litigant as the subtle common law actions of trespass quare clausum fregit, trespass vi et armis, de bonis asportatis, trover, assumpsit, etc. Because of these defects, through rational criticism and the better administration of justice, the legis actiones gave way to the Formulary and Libellary procedures, just as the old common-law actions were abolished by the codes of procedure of modern times and a more equitable procedure established. And furthermore, as the praetor peregrinus first arose to hear disputes between foreigners, to whom the jus civile did not apply, but only the jus gentium or law common to all peoples, enabling him to administer defenses unknown to the jus civile or common law; so later we find the praetor urbanus, the law judge, who dealt with disputes between Romans, taking over the more equitable rules of substantive and adjective law applied by the other judicial officer. So gradually "law and equity," or jus civile and jus gentium, become merged in the two systems. A similar process of development is observable in the English common law, with the
rise of the chancellor—*praetor peregrinus* in Roman law—who applied doctrines of equity and church law to relieve against the hardships of the common law; and in the present we find the process culminating in permitting equitable defenses at law and, in some states, abolishing the distinction between actions at law and suits in equity, or in providing for a unit rule of administration in the Federal courts. The analogous development in the two systems is concededly striking. Perhaps English law would have hastened this development had the Roman law been favorably received by Englishmen in the sixteenth century with its general revival upon the Continent. But hostility to all things Roman occasioned by the Protestant revolution, combined with the belief of Englishmen that the common law was the perfection of wisdom, prevented the invasion of the revived Roman law.\(^8\)

In other branches of procedural law there is a similar analogous development observable in the two systems. Declaratory relief, now widely agitated and already being enacted into legislation, was in use among the Romans. If an individual claimed to be entitled to an easement or servitude in a particular piece of property, he could bring the *actio confessoria* without waiting, as would be the case in the common law, for a trespass or obstruction of the right of way; and on the other hand, the party who denied the right might in the first instance, before a violation of his right had occurred, bring the *actio negatoria*, and secure a judicial adjudication of the matter.\(^9\) So also in the assignment of choses in action, long denied in the English and American common law, an analogous development is traceable in the Roman law. Originally in both systems the notion was that a contractual obligation or a right of action could not be assigned or transferred. Gradually, the Roman law permitted the assignor (*cedans*) to appoint by mandate the assignee (*cessionarius*) to sue as attorney for him, subject to revocation until suit had been brought and issue reached, known as

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\(^8\) An excellent discussion of the process of development in the Roman Law is given in brief compass by Czyhlarz, *Institutionen des römischen Rechts*, §§ 159-165; see also Maine, Early History of Institutions, lect. IX.

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lis contestatio. Later the praetor permitted the assignee to sue in his own name, and finally by the doctrine of cessio legis, comparable to our constructive trust, permitted suit by the assignee even though no formal assignment of the claim had been made. It is needless to comment at length upon the practically identical manner in which the common law reached similar results.¹⁰

Again, in the doctrine of set-off and counterclaim, now well established in our law but only after a long struggle, the Roman law many centuries earlier had already worked out these practical solutions. At first compensatio, or set-off, was allowed by the praetor only in actions bonae fidei, where the highest good faith was involved; as where a deposit had been made and there arose a claim against the depositor from the same source or transaction. Here it was said that good faith demanded that the depositor should not recover more than was equitably and justly owing him. Set-off was permitted at first in actions ex eadem causa, or where the claim arose out of the same transaction. In stricti juris transactions, or actions at law, it was next permitted by an exceptio doli, a defense especially set up, and if proved the plaintiff being nonsuited; later the plaintiff was allowed to recover the difference instead of being entirely defeated. Finally, compensatio ipso jure, or automatic cancellation of the two claims between creditor and debtor, was allowed as a matter of course.¹¹ In the common law, because of the fiction that the judges did not make law but only found it, these changes came largely because of statute; but substantially the same modifications were eventually brought about.

Likewise in bringing an action against the estate of a deceased obligor, except where as in penalties and personal relationships the cause of action perished with the person, we find a similar development in both fields of law. In Roman law the heir by universal succession stepped into the economic status of his ancestor and was made liable for all his debts. In the later law the heir was not compelled to enter the estate because the debts might exceed the assets; so was given a certain period of deliberating, known as beneficium abstinendi, whether or not he would enter. In this interim the estate was treated as a juristic person itself, hereditas jacens, much as our law today regards the decedent’s estate,

¹⁰ For the Roman law, see Salkowski, Institutionen, § 164.
¹¹ This development is well stated by Salkowski, Institutionen, § 160.
with the exception that in our law title to the realty is automatically
in the heir, while the other property is entitled in the court itself.
Then if the heir in the Roman law decided to enter, he might make
an inventory of the assets and be held liable to the creditors or
legatees only to that extent; again similar to our law of administra-
ing decedents' estates.\textsuperscript{12}

In some fields of procedural law, the English common law did
not possess, for a long time, features which the Roman law had
worked out centuries earlier. For it was not until the time of
James the First that statutes of limitation outlawing stale claims
were first inaugurated. But long before this time in the Roman law
such statutes were in use practically analogous to our own of the
present time. There were certain rather lengthy periods of time in
case of \textit{usuacpio} or adverse possession, depending upon whether
the contesting parties were within the jurisdiction or not.\textsuperscript{13} And
there were shorter periods of time for bringing other actions, with
rules for suspension of the statute from continuing to run, because
of civil war or absence from the jurisdiction, and rules to pre-
vent the statute from beginning to run, as in cases of disability of
the parties.\textsuperscript{14} Moreover, the Roman praetor, like the English chan-
celloar, modified these provisions of the strict law, as when he laid
down the rule that a fraudulent concealment of the cause of action
or breach would suspend the statute from running, or that mere
breach of the obligation was not controlling if not brought home
to the knowledge of the aggrieved party. It would be a matter of
too great speculation to say why the common law did not earlier
than 1600 provide for periods of limitation of actions, but perhaps
it was due to the influence of the creditor class, or to some notion
that a debt or obligation having been validly incurred and its bene-
fits received, should not be barred from the courts. Again, it may
have been due to the influence of the Church and the canon law in
giving rise to the conception that it was inequitable to deprive par-
ties from securing satisfaction of causes of action in the courts,
coupled with the fact that the mass of litigation was not what it
is today. The real truth may be found somewhere in these direc-

\textsuperscript{12} For the Roman law, one is referred to Czyhlarz, \textit{Lehrbuch der Institu-
tionen des römischen Rechts}, §§ 124, 125, 126.

\textsuperscript{13} Institutes, II, 6, pr. and 1-13.

\textsuperscript{14} Dernburg, \textit{Pandekten}, I, § 78; Digest, III, 2, 8; XXI, 1, 55; XXXVIII,
15, 2, pr.; XLIV, 3, 1.
tions, possibly originating in causes similar to those among the Romans themselves.

As in the common law, the Roman law likewise developed throughout its long career a considerable number of fictions especially in procedure, by which the praetor was enabled to give a remedy when the *jus civile*, or common law as Anglo-Americans would think of it, was inadequate to give relief. Sir Henry Maine has told us that the purpose of fictions is to secure change of the existing law so that it may still appear to be unchanged, in order to enable the legal order to function under new needs. In the Roman law the praetor invented a large number of these fictitious actions, alleging matters which were not strictly true according to the *jus civile*, but which in equity and good conscience should be true in order that justice be done. So a party claiming an estate under a *bonorum possessio* was permitted to sue as heir; or to protect his adverse possession against strangers, the aggrieved party might allege that the period of adverse possession had already run; or where a foreigner desired to bring an action to recover stolen property, he was permitted to allege that he was a citizen so as to be allowed to prosecute the suit. In the common law the fictitious actions of ejectment, trover, and assump-sit, and allegations in a transitory action, are too well-known as historical curiosities to require enlargement here, except to mention that some fictions today have survived, as that the courts do not make law and that stockholders of a corporation are, for purposes of diverse citizenship of the corporation, presumed to be citizens of the same state with the corporation. It cannot be denied that there is at certain stages in the development of a legal system a need for some method of expanding the existing law which is met in the use of fictions; when the sanction of law is thought to be divine revelation or immemorial custom and social practice, the process of deliberate expansion and innovation must be obscured in the service of the greater social interest of inculcating and perpetuating habits of obedience and respect for law and its received or traditional sanctions. Fictions are the earliest method; then follows equity, and finally both of these culminate in legislative enactment, thus creating a juristically new premise or starting

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15 Ancient Law, ch. 2, and note D.
16 For Roman fictions, see Gaius, IV, 34-37; for common-law fictions, 3 Blackstone's Commentaries, 43, 45, 153, 203.
point. Both Roman and common law went through these processes.

While these examples from procedural developments in the two systems of law do not exhaust the possibilities of further comparison, perhaps sufficient has been said to make obvious the fact that a certain cycle of development is not to be gainsaid. Can the same be predicated regarding the substantive law in the two leading world systems of law? Here again only a limited number of instances can be discussed.

A striking analogous development is to be seen in the creation of the marriage status, the position of the wife under coverture, and the termination of that relationship by legal means other than death of either party. In the period when the ancestral religion was dominant, the religious ceremony of marriage was known as *confarreatio*, a sacrament by which the wife passed into the *manus*, or subjection of her husband and to the worship of his ancestral deities, a position of much honor and dignity for the wife. This elaborate ceremony was completely under priestly control, and by it the wife passed out forever from under the *potestas* or authority of her own paternal household and was thereafter prohibited from worshiping the gods of her father's ancestors. The wife had never had legal personality under the *potestas* of her father; she likewise had none under the *manus* of her husband; he alone possessed any standing before the law. A similar development of marriage as a religious sacrament, taken over from the canon law, is observable in the common law, when religious authority was dominant and played a greater role than it does today; but this process of development is so well-known to Anglo-American lawyers and judges that further elucidation of it is unnecessary. While we thus observe a cycle of development in this connection, the process is yet more analogous and striking when we note that the Roman law gradually developed another type of marriage, not of a religious or sacramental nature, which corresponds to our common-law marriage. For the plebeians the type of marriage which arose in Roman law was known as *usu*, analogous to *usuâpio*, or adverse possession, by which the husband became entitled to exercise control over his wife, as if she were in *manu*, if a year had elapsed.

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17 If one desires to pursue the subject further invaluable aid may be secured from Roscoe Pound, Readings on the Roman and Civil Law.
18 Gaius, I, 112; Coulanges, Ancient City, bk. 2, ch. 7.
without her being absent three nights in succession. Here, as in our common-law marriage, no religious ceremony was necessary; by living together as husband and wife and so holding themselves out to all the world, the law annexed to this relationship the legal result of a status.\(^1\)

In dissolving the marriage status we find for long time in both the Roman and common law few divorces and then only gradually because of most serious marital offenses. Slowly in the Roman law, with the spread of the *jus gentium*, or principles of justice and right common to all peoples, another type of marriage arose known as the marriage *jure gentium*, based purely upon the consent of the parties without subjection of the wife to the husband, a relationship which could be dissolved by mutual consent in the presence of a certain number of witnesses. There was no religious element present here, likely because by this time Rome had discarded the old authoritative ancestral religion and had adopted Oriental cults or had become largely irreligious.\(^2\) Whether Rome's eventual downfall before the barbarian invaders can be attributed partly to this freedom of divorce and the resulting laxity of morals, is a question for moralists and prophets, but that such was the belief of contemporaries cannot be denied. Is there an analogous development of marriage to be seen in the American law of the present, with its attendant consequences of simplicity of dissolution? Certainly so far as our legal thinking is concerned, marriage today has ceased to be a sacrament or religious union of any sort; it has become a civil contract in addition to being a status. And in divorce proceedings in a large number of jurisdictions the status may be terminated legally as easily as if it were solely a contract; although certain causes are given for which the statute permits the dissolution of the relationship, yet in reality in many cases the allegation of these causes is only a pretext. That the American law, in the absence of a religious revival of great influence, will eventually openly reach the result which obtained in the later Roman law of the *jus gentium*, is freely predicted by social reformers and sociologists; and, seemingly in the attempt to check this movement, we find social programs or legislative measures seeking to place

\(^1\) Another similar type of marriage was *coemptio* or fictitious sale, but as this was also without religious ceremony, discussion of it has been thought unnecessary. Gaius, I, 113-115.

\(^2\) Some Roman law scholars attribute to other causes the breakdown of the old religious type of marriage. See my article, Recognition of New Interests in the Law of Torts, 10 California Law Review, 461.
greater restrictions not only upon divorce, but also upon entering the marriage relationship itself.\textsuperscript{21} Inasmuch as there are present in our social and legal environment today many elements identical with those in the later Roman Empire which gave rise to greater freedom of divorce, undoubtedly there is some merit in the prediction that eventually our common law will seek a similar solution of this problem; and on a cycle theory of legal development, this is what would inevitably occur.\textsuperscript{22} But however that may be, or how the moral issue between greater freedom of divorce and further restrictions on it should be decided, it cannot be denied that the enlargement of the wife's legal rights and duties has followed closely the development of the Roman law in this direction. From a period of absolute subjection to her husband, involving absence of legal personality, to a position of comparative legal and political equality with her husband the two systems have had a corresponding development.

The modern lien theory of the mortgage in American law is the culmination of a long development in the common law which finds its counterpart in the law of Rome. In the latter system the early law began with the case of the \textit{fiducia} where the mortgage passed both title and possession to the mortgagee. As this type of pledge became inconvenient for purposes of trade and commerce, the later law developed the \textit{pignus} where juristic possession and custody were transferred, the pledgor retaining title. Finally, the \textit{hypotheca} resulted where neither title nor possession was transferred, but the mortgagor retained both and the mortgagee received a mere lien.\textsuperscript{23} The common-law mortgage undeniably passed through a similar development, with the exception that the present English mortgage has not yet become strictly an \textit{hypotheca} as it was understood in the Roman law, although, beginning with New York, many American jurisdictions have completed the process of development in practically every respect.\textsuperscript{24}

In the law of suretyship another striking comparison is to be observed. In the early Roman law the creditor might pursue the

\textsuperscript{21} The present movement to secure a uniform marriage and divorce law by Federal constitutional amendment is indicative of this tendency. The object of eugenic laws points in this direction. Peterson v. Widule (1914) 157 Wis. 641, 147 N. W. 966, 52 L. R. A. (N. S.) 778.

\textsuperscript{22} Rauschenbusch, Christianity and the Social Crisis, ch. 7.

\textsuperscript{23} For the development of the Roman law of pledge, see Karlowa, \textit{Römische Rechtsgeschichte}, II, §§ 52, 149; Roby, Roman Private Law, II, 98-102, 102-115.

\textsuperscript{24} Lloyd, Mortgages.
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Sureties the moment the debt became due, without first attempting to recover the sum from the principal debtor. Hadrian later provided that the surety might compel the creditor to sue him only for his proportionate amount in the event there were other solvent sureties, this right being known as the *beneficium divisionis*. Finally, Justinian provided that by notice from the surety the creditor could be compelled first to attempt collection of the debt from the principal debtor, this being the *beneficium ordinis*. While in the common law the general rule is that the creditor may sue the surety at once without waiting to exhaust his remedy against the principal obligor, yet under the doctrine of Pain v. Packard the surety may, as in the Roman law, compel the creditor first to sue the principal debtor; and statutes in many states have adopted a similar rule. Moreover, equity in our Anglo-American law has followed the Roman law in permitting the surety, under certain circumstances, to compel his co-surety to advance his share of the debt, rather than be compelled to pay the entire amount himself, perhaps involving great hardship, and to seek contribution from the co-surety, as is the general rule at law. Whatever variances in detail between the two systems in this particular field of obligations, their substantial identity must be admitted.

Assignments for the benefit of creditors and proceedings in bankruptcy are not modern in all respects; these cannot be exclusively regarded as achievements of our present civilization. In the Roman law the insolvent debtor could make a voluntary surrender of his property to his creditors, known as *cessio bonorum*, similar to our assignment for benefit of creditors. The debtor in the Roman law received certain advantages from this voluntary act. He escaped *infamia* or loss of civic honor, which involved inability to hold office, to vote, and to apply to the prætor for relief. He also avoided execution against his person by *manus injectio*. Lastly, the debtor acquired the *beneficium competentiae*, or the right to have his future acquired property sufficient in amount to assure him a living, exempt from his antecedent debts, being thus somewhat similar to our discharge in bankruptcy. While our present bankrupt laws may have modified these provisions in some directions—whether wisely or not may be questioned by some—the fundamental features

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25 Novels, IV, 1; Institutes, III, 20.  
27 Stearns on Suretyship (3d. ed.) 175-76; Ohio Gen. Code, § 5833.  
29 Salkowski, Institutionen, § 88.
are substantially identical with those of the Roman law. It must not be forgotten, moreover, that in the common law there was a time when discharges in bankruptcy as well as statutes of limitation were unknown, the idea perhaps being that it was a fraud upon creditors as well as an insult to the honor of an able-bodied man to wipe out the debt which he had lawfully contracted and from which he had received benefit.

In contracts for the benefit of third persons, it is remarkable that both the Roman and common law showed the same hesitancy in permitting such third parties to sue on the obligation. In only one situation did the Roman law permit such suit, and this was in the case of a pledge where the pledgee sold the property to a third party exacting from him his promise to permit the pledgor to redeem.\(^3\) There were, of course, methods by which the third party beneficiary acquired the results of the contract without being permitted to maintain an action; as where the promises exacted from the promisor a \textit{stipulatio} in the alternative or jointly to himself and the beneficiary; or imposed a penalty upon the promisor in case the benefit were not conferred; or lastly, where the promisee himself was interested in having the benefit conferred by way of discharging an obligation of his own;\(^2\) somewhat similar to the principle in Lawrence v. Fox.\(^2\) Now the common law as administered in England has not yet permitted the third party to sue on the obligation, thus making no advance on the Roman law; while, on the other hand, as the law is applied in American jurisdictions the general rule seems to be to allow recovery under certain circumstances. Substantially, therefore, one might say that the two systems of law—omitting extensions of the principle in the civil law—have passed through a similar cycle of development in these fields.\(^3\)

Enlargement of the nature and standard of duress has passed through an identical development in the two systems of law. The Roman law began with an objective standard—that of a reasonable man—and asked whether the wrongful threat—fear of life or limb—would have overcome the will of the standard or reasonable man, not

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\(^{30}\) The debtor would have an \textit{actio pigneraticia} against the creditor or pledgee that he give a mandate to the debtor for an \textit{actio ex vendito} against the purchaser. Or the debtor might vindicate the property or bring an \textit{actio in factum} against the purchaser. Digest, XIII, 7, 13, pr.

\(^{31}\) Institutes, III, 19, 4, 19-20.

\(^{32}\) (1859) 20 N. Y. 268, 2 Abbott's Dec. 343.

\(^{33}\) For the history of this doctrine in American and English law, see Seaver v. Ransom (1918) 224 N. Y. 233, 120 N. E. 639, 2 A. L. R. 639; also note, 4 Cornell Law Quarterly, 53; 7 ibid., 355.
whether the will of this particular, aggrieved individual had been overcome. Gradually, the standard became subjective, and the peril or threat was broadened not merely to include threat of harm to one's person, but also to one's business and to one's near relatives. The common law in its early history likewise defined duress to be the overcoming of the will of a reasonably firm man, through fear of life, limb or imprisonment, but recently has been slowly changing to a subjective standard as well as gradually extending the kind of peril, practically adopting the position of the later Roman law.

If, then, a Roman jurisconsult should appear among us today, there is no question that he would feel in many fields thoroughly familiar with the various legal doctrines and institutions of the common law. He would perhaps find other analogous features besides those already mentioned. In our method of seeking a standard of legal liability for the owner of real property to trespassers, licensees and invitees by predicking liability upon the principle of benefits received, the jurisconsult would see the doctrine of contractual culpa of real contracts in the Roman law, where a higher degree of care was imposed on the party receiving the benefit of the transaction, and a lesser degree if he did not. On this same principle he would have little difficulty in applying similar reasoning to our law of bailments. In our doctrines of absolute liability, apart from fault, imposed in our workmen's compensation laws, he would likely see the old conception of natural liability or of a status. He would perhaps be greatly perplexed at our technical rules of evidence and involved modes of trial, but would likely be thoroughly at home before commissions made up of laymen, where these rules need not be followed. On the whole, so far as the basic structure of the legal system was concerned, our jurisconsult would feel perfectly at home, and either wonder why the race had not progressed in advance of his time, or feel reassured that the best type of progress was to maintain the law of Rome itself, based, as he believed it to be, upon natural reason and justice. Human nature being practically a non-variable from generation to generation, methods of

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84 The change as to the standard of duress in the Roman law is traceable in the following passages: Code, II, 4, 13; Digest, IV, 2, 6, and IV, 2, 5; Code, II, 18, 12; German Civil Code, § 123.

85 For the common law, see 1 Blackstone's Commentaries, 130; 2 Coke, Institutes, 483; U. S. v. Huckabee (1871) 83 U. S. (16 Wall.) 414, 21 L. Ed. 457; Galusha v. Sherman (1899) 105 Wis. 263, 81 N. W. 495.

86 Wachter, Pandektien, II, § 184; Salkowski, Institutionen, § 126.

reasoning working upon human experience had evolved practically identical solutions for many of the relationships of mankind. Therefore, our jurisconsult would reason further that it would be futile and useless to attempt radical change of the existing legal order, for there were certain natural, predetermined legal principles and institutions. And in taking this position the Romanist would not be very far afield from the viewpoint of Stammler today that there is a natural law but with a varying content. Certainly, it must be admitted that historical study of the Roman law is an antidote to stability, leading us to believe that no system of law has reached finality at any given moment, at least not until a certain period in the history of the race itself, when juristic thinking has reached the zenith of its powers and civilization is highly developed. Perhaps modern philosophical and scientific thought has not progressed much beyond the Greek thinkers; had the latter been empiricists with the apparatus available which we today have invented, the race might have much earlier attained its present control over nature.

While, therefore, this comparison between the Roman and common law demonstrates that the two systems have evolved through a similar cycle of development, showing but little progress in the absolute sense so far as the common law is concerned, nevertheless it cannot be denied that we today are attempting through law the attainment of certain objects which the Roman law did not undertake. Whether these attempts are new in the sense of the history of the race itself may be arguable. Reference is made to the extension of the sphere of law into international relations and between part sovereign states, on the one hand; and on the other, the injection into the legal order, with the object of conserving social resources and protecting the economically dependent, of a spirit of humanitarian idealism. With neither subject did the Roman law concern itself to any considerable degree; as long as Rome ruled the world noarbiter between states was necessary; and a social order based upon slavery did not need to concern itself with the

39 Rogers, A History of Philosophy, 156. The codification of the Roman law by Justinian, attempting to bring certainty and predictability into the law of the later Empire, finds to some extent its modern counterpart in Anglo-American jurisdictions in movements to secure uniform law or a restatement of the law's doctrines and principles.
economically dependent, although gradually some provision was made for the legal protection of the slaves.\textsuperscript{40} 

If, therefore, experiments in international administration, including technical commissions, arbitration tribunals, and a permanent international court of justice, are at least in practice and realization in advance of our Roman ancestors; and if, likewise, the same can be said of such humanitarian legislation as workmen’s compensation, shorter working hours, and a minimum wage, the question still remains whether these are absolute advances for the race for all time, or merely an attempt to restore or reinstate a past social and legal order. For in European civilization, when the universal church gained temporal supremacy, we observe a powerful organization which was able to compel obedience to it through spiritual and secular laws; while, particularly in England, we note attempts made to control the lot of the economically dependent either through the courts, in fixing wages and hours of employment, or directly by Parliament by means of paternalistic legislation.\textsuperscript{41} It may well be, then, that today we are attempting to reinstate the social control of the past, but substituting legal methods instead of religious and authoritative paternalism. Certainly, it has been shown that in many fields of law today we are reviving the category of a status or relation, taken from feudalism, in order to control gigantic businesses and powerful labor unions, and thus protecting the social welfare.

The survey thus undertaken reveals but little advance over the past legal order, so far as its basic principles are concerned. It is true that racially enormous progress has been made in controlling external nature through a better understanding of its laws, but in the field of social and legal relationships it cannot be denied that we have repeated largely a cycle of certain legal doctrines and institutions worked out by the experience of the past;\textsuperscript{42} that it is really a cycle is more clearly shown by the fact that the Anglo-American law did not consciously, at least so far as our sources indicate, borrow from the other.\textsuperscript{43}

\textsuperscript{40} Gaius, I, 52-54; Buckland, The Roman Law of Slavery (1908) ch. 5.
\textsuperscript{41} Sayre, Criminal Conspiracy, 35 Harvard Law Review, 175; Statute of Laborers, 25 Edward III (1351); Acts of Elizabeth, c. 4 (1562); 36 George III, c. 111 (1795); Learned Hand, Due Process of Law and the Eight Hour Day, 21 Harvard Law Review, 495.
\textsuperscript{43} Perhaps the early American law, as administered by Story and Kent, did borrow to some extent from the Roman and civil law. See Robinson, American Recognition of the Roman or Civil Law, 9 Illinois Law Review, 400.
From this deduction, certain conclusions may be drawn. First, as long as a social order is based upon private property, it is useless to attempt to change in a radical way certain of the legal doctrines and institutions which have survived as best fitted to serve the needs of private property; and one value of the Roman law at least is to show us what those enduring institutions and doctrines may be, and whether or not finality in a particular field has been reached. Again, it shows us that within certain prescribed limits, the law reformer may retain his faith in the efficacy of conscious effort to secure progress. Perhaps, then, greater comfort should be taken by those who advocate uniform laws or seek to restate the laws through the medium of a juristic center or academy of legal science. Furthermore, the survey should be of little comfort to exponents of juridical pessimism or determinism, whether it is alleged that law is made by the dominant class or is the outworking of certain inevitable physical laws; for many of the doctrines and institutions which have survived have been based more upon rationalistic speculation than upon social convenience or utility. Hence, for this reason perhaps, Hegelianism with its eternal progress of ideas, or Stammler’s view of a natural law with a varying content, is more of a key to the interpretation of the legal order than is generally realized.

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45 Croce, Historical Materialism and the Economics of Karl Marx, ch. 2; Berolzheimer, The World's Legal Philosophies, 351-374.
46 Philosophy of Right (trans. by Dyde) 343-344.