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Edited by
George Cardona, Henry M. Hoenigswald
and Alfred Senn

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Une dernière conclusion touche à l'étymologie de **peku-*. Si la présente démonstration est jugée recevable, elle ruine le rapprochement traditionnel avec **pek(t)-* "tondre". Il est évident que **peku*, terme de valeur économique ne dénommant aucun animal, ne peut rien avoir de commun avec des termes dérivés de **pek(t)-* qui sont propres à la technique de la tonte et du peignage de la laine: gr. *pékō* 'peigner, carder', *pókos* 'toison', *pektéō* 'tondre', *pékos* n. 'toison', *poktzō* 'tondre la laine', *ktels* 'peigne'; lat. *pectō* 'peigner, carder' *pecten* 'peigne', *pexus* 'velu, cotonneux'; arm. *asr* 'laine'. Entre ces formes et **peku* il n'y a rien d'autre qu'une ressemblance.[15] Le rapprochement doit être abandonné, et **peku-*, vestige du plus ancien vocabulaire indo-européen, semble irréductible à aucune racine connue.

Notes

[1] Nous réservons les formes baltiques, qu'on suspecte d'être empruntées au germanique ou à quelque autre langue de l'ouest.

[2] Le rapprochement peut être fait avec des textes comme *RV.* X 85.42 (Poultney, *The Bronze Tables of Iguvium* 255), mais alors il est beaucoup moins significatif, s'appliquant à tous les vivants indistinctement.

[3] Lüders, *SBAW.* 1917, 368; dans le même sens pour l'italique, Sittig *KZ.*52 (1924) 210; pour l'avestique, Gershevitch, *The Avestan Hymn to Mithra*, 1959 182.

[4] M. Bloomfield, On some disguised forms of Sanskrit *paçu* 'cattle', *IF.* 25, p. 185.

[5] Fastes, V, 277 sq.

[6] *De lingua latina* V 92. Mais il n'y a rien a retenir des speculations étymologiques de V 97 (*pecus* derive de *pascō* et de *pes*, etc. . . .).

[7] Ainsi J. B. Hofmann *Lat. etym. Wb. s.v. peculium* donne correctement 'zu eigen' comme sens premier, d'apres un article de Pokrowski, *Symbolae Rozwadowski* 1 (1927) 223, tout en appréciant inexactement le rapport avec *pecu*.

[8] Toutes les citations et références utiles sont réunies par H. Palander, *Die althochdeutschen Tiernamen* (1899) 13-15.

[9] Pokorny, *Idg. etym. Wb. 797 s.v. pek-*, cite W. Wissmann, *Die ältesten Postverbalia* 79 pour une explication de *faihon* par *faihu*. N'ayant pas vu ce livre, je ne sais si les raisons qu'il donne s'accordent avec les miennes.

[10] Ainsi, J. de Vries, *Altnord. etym. Wb.* 114.

[11] *Le développement du vocabulaire féodel en France pendant le Haut-Moyen-Age*, (Paris, 1957) 41 sq.

[12] Sur ce mot et sur les problèmes des désignations analogues, nous renovoyons à *BSL* 45 (1949) 91 sq., en reprenant ici quelques données utiles pour notre démonstration.

[13] Baxter-Johnson, *Mediaeval latin word-list* 64.

[14] Cf. Koehler-Baumgartner, *Lexicon*, 561 a et 844 b.

[15] Je regrette d'avoir autrefois reproduit ce rapprochement par concession à l'opinion commune (*Origines* 50–1).

Studies in Indo-European Legal Language, Institutions, and Mythology

Calvert Watkins

> Sprachforschung, der ich anhänge und von der ich ausgehe, hat mich nie in der weise befriedigen können, dass ich nicht immer gern von den wörtern zu den sachen gelangt wäre; ich wollte nicht blos häuser bauen, sondern auch darin wohnen.—Jakob Grimm

We are fortunate in possessing an enormous body of legal texts in most of the earlier Indo-European languages, ranging from India to Ireland, from Scandinavia to the Mediterranean and Anatolia. These legal texts sometimes are among the earliest extended documents attested in these languages, as in Rome or Ireland; but nearly everywhere they share the common stylistic feature of reflecting earlier, more archaic linguistic usage than contemporary texts from other areas of discourse than the law. That in some cases we are dealing with what is technically termed pseudo-archaism (as in Cicero's *De legibus*) is not relevant here; the archaism is in either case real enough.[1]

The conservatism of legal language in the various Indo-European linguistic traditions (modern as well as ancient) has been long recognized, and scarcely needs comment. Given the singular importance of verbal formulae, the fiction of the immutability of the law, and ultimately the necessary continuity of a legal tradition, this innate conservatism of legal linguistic usage is readily explained, and indeed fully justified.

Yet the implications of this conservatism for the historical linguist have hardly begun to be realized or appreciated. The comparison and contrast between legal and nonlegal linguistic usage in a given language affords a superb field for the application of the techniques of internal reconstruction, which is the foundation of linguistic history.

There is a further aspect of the problem. The linguist studying legal language must here as elsewhere be concerned with content as well as form; with 'legal meaning', and by extension, with a whole cultural subsystem. It is to be expected that an understanding of this special cultural context may frequently provide the key to the proper linguistic interpretation of a given form; we shall have an instance below in the first item to be discussed, Latin *ūsurpāre*.

There is still another case to be illustrated by the second of our examples, Latin *noxiam sarcīre*, which is more serious in its implications. The linguist

may well succeed in reconstructing a legal technical term—the form together with the particular cultural context which gives it meaning—from the evidence of more than one cognate language. At this point he must realize that he has reconstructed for the common language not only an etymon, but a part of the structure of nonmaterial culture of the speakers of that language. Given linguistic evidence in the Indo-European languages for common etyma in form and function for a given social or legal institution—and an obvious example is the system of kinship terms—it is a necessary fact that social or legal institution existed in the society of speakers of Common Indo-European. To deny this is to deny to the reconstructed language the status of a vehicle of human communication.

This implication may then be recast in its proper historical context: the linguist who makes such a reconstruction, by the techniques of the comparative method, from the data of legal language in the various Indo-European languages, has thereby furnished incontrovertible formal evidence for the common Indo-European origin not merely of a given vocable, but of salient features of the different historical legal systems themselves. The linguist at this point finds himself in a wholly new domain: that of comparative law in the genetic sense.

That there should be a close analogy between the comparative method in language and in the law follows from the identity of the problem in each. Any linguistic comparatist will state that there are basically three possible explanations for similarity between languages: borrowing or diffusion, common inheritance, and independent creation due either to universality or to chance. Within the field of jurisprudence, let us cite the words of the great romanist and comparatist Leopold Wenger:[2] 'Und doch muss sich jede Rechtsvergleichung, wenn sie Gleichheit oder Ähnlichkeit verschiedener Rechte festzustellen in der Lage ist, über die Gründe solcher Erscheinung Rechenschaft zu geben versuchen. Drei Hauptmöglichkeiten werden da zu erwägen sein: *Rezeption, gemeinsame Herkunft, unabhängig gleichartige Rechtsbildung.*'

Comparative law in the genetic sense has fallen rather into the background, after a considerable florescence in the nineteenth and early twentieth centuries; genetic comparison and the search for Indo-European antiquities gave way to a more broadly based, but purely typological comparison, which is the common acceptation today of the term 'comparative law'. Yet the linguist can make a significant contribution to the genetic comparison of legal institutions, beyond that of providing the sort of evidence just discussed.

Any historical approach to customary law, indeed any attempt to write the history of institutions, must as in the case of the history of languages operate with the basic concept of an ordered structure undergoing change. It is in the domain of language change that the only proper application of the comparative method has been developed, that which is grounded on structuralism in its highest sense: the search for recurrent similarities not in isolated features, but in the relations which integrate a set of features.

It is this approach to the history of institutions which the linguist can contribute now. The use of the comparative method was virtually coeval in Indo-European linguistics and the study of Indo-European antiquities; witness the work of Jakob Grimm, or later Adalbert Kuhn. But the refinements and renewal of the method in linguistics did not extend to the study of antiquities, and it is this which explains in large part the frequently unsatisfactory, at times ludicrous[3] results of the latter. It remains to be seen whether the more modern techniques can prove effective in such a domain as comparative law; the example of comparative mythology would suggest so. Thus the third study in our series, on a distinctive feature approach to the law of theft, is frankly speculative. It is offered primarily to stimulate discussion, not as a finished piece, and the occasion of this conference seemed an appropriate vehicle.

The fourth and final study is only tangentially connected with legal language or institutions. Rather it attempts to suggest an equation in the domain of Indo-European comparative mythology, on the basis of a principle of social symbolism; specifically that a Hellenic and a Vedic deity, Hermes and Pūṣan, together represent a transposition into mythology and religion of the notion of exchange and reciprocity. We will have several occasions below to refer to the classic work of Marcel Mauss; our final study is yet another testimony, however humble, to the fecundity of his contribution to anthropology and sociology.

I. usurpare

Latin *ūsurpāre* and derivatives, principally *ūsurpātiō*, have in the literary language the primary meaning of 'take into use, make use of, use' (Lewis and Short, *s.v.*). In this sense the verb is attested as early as Plautus; cf. Cist. 505 *inter novam rem verbum usurpabo vetus* 'in the midst of a new affair I will use an old proverb.' By the time of the empire, *ūsurpāre* comes to be almost a synonym of *ūtor*, over which it had the advantage of being active, not deponent, and taking an accusative, not an ablative object.

Ernout and Meillet, *Dict. étym. de la langue latine*[4] s. v. *ūtor*, recognized that this use of *ūsurpāre* in literary Latin must be secondary, and represent a semantic transfer or generalization from an originally specific and technical acceptation. They suggest that the original meaning was in all likelihood connected with the legal institution of marriage: 'Terme de droit, qui peut-être s'est employé d'abord de celui qui prenait une femme (rapere) sans passer par des noces légitimes; cf. Gell. 3.2.12 sqq.' This view was accepted by Hofmann, and appears almost verbatim in his edition of Walde's *Lateinisches etym. Wörterbuch*. The formal analysis which this presupposes is set forth by Vendryes in a study of *ā*-verbs in Latin, *MSL* 16.300 (1910): a compound **ūsu-rapāre* (with regular syncope of the *a*), where the second member is to *rapere* as *oc-cupāre* (*ob-cap-*) is to *capere*. From the formal point of view, such an analysis is irreproachable in Latin morphology, whether we assume original *ūsu* + *rapāre* or (more likely) a denominative in *-āre* from a compound noun *ūsu-rap-*. Indeed as early as 1885, Bréal and

Bailly in their *Dict. étym. lat.*, s.v. *ūtor*, derive *ūsurpāre* from a noun **ūsurapos*.

Yet it is from the semantic side that we may have serious doubts about this derivation. For the relation between the two members of the compound is by no means clear. On the analogy of *ius dicere* → *iudex*, *signa ferre* → *signifer*, etc., the productive type of compound with verbal rection in Latin, we should expect *ūsurp-* to be a transformation of **ūsum rapere*. Yet it is hard to imagine what the meaning of such an expression would be; it makes no sense in Latin. For this reason, historians of Roman law have suggested an underlying **usui rapere* 'seize for one's use'.[4] But in Latin where the underlying sentence is other than verb + object, a nominalization does not yield a true compound, but a collocation, as in *ūsūcapiō* (*ūsū capere*).

If the interpretation 'prendre une femme sans passer par des noces légitimes' were in fact justified, surely we should expect the woman to be the object of the verb, rather than *usus*. Such an expression does exist in Latin; *virginem rapere* is the technical term for the ancient and legally recognized Indo-European institution of marriage by abduction, *Raubehe*.[5] Cf. Livy 1.9.10 (describing the rape of the Sabines) *signoque dato iuventus Romana ad rapiendas virgines discurrit*. We have a literary reminiscence in Catullus' use of the phrase in the wedding song 61.3–4: *qui rapis teneram ad virum/virginem*.

Elsewhere in Indo-European, we have the identical 'demoniacal' marriage-rite (*rākṣasa vivāha*) of Hindu law Manu III 24:

> *hatvā chittvā ca bhittvā ca krośantīm rudatīm gṛhāt prasahya kanyāharaṇan rākṣaso vidhir ucyate*
> 'The forcible abduction of a maiden from her home, while she cries out and weeps, after (her kinsmen) have been slain or wounded and (their houses) broken open, is called the *rākṣasa* rite' (tr. Bühler).

Note the technical term for making 'outcry' *krośati*, as to a thief caught in flagrante delicto; for further discussion see section three below.

In Irish law we have the 'union of abduction', *lánamus foxail*, listed in Cáin Lánamna §§ 4, 34, the tract on marriage-law.[6] Though this text does not give a detailed description, we have ample documentation of the practice in the Old Irish sagas.

Finally in Hittite law we have what may be called the 'wolf-marriage'. As set forth in the Hittite Code, no action lies for murder arising out of an attempted abduction, and the situation is covered by the doubtless shouted formula *zik-wa* URBARRA-*aš kištat* 'you have become a wolf'. I § 37:[7]

> *takku* SAL-*nan kuiški pittinuzzi n[u . . . . šard]ieš appan anda*[8] *pānzi, takku* 3 LÚMEŠ *našma* 2 LÚMEŠ *akkanzi, šarnikzil* NU.GAL *zik-wa* URBARRA-*aš kištat*
> 'If someone abducts a woman a[nd . . . . help]ers go after them, if 3 or 2 men die, there is no compensation; "you have become a wolf".'

Yet nothing either in literary, historical, or legal Latin texts suggests that the institution of marriage by abduction has anything to do with the action denoted by *ūsurpāre*. Nor is a derivation from *rapere* in the least supported by the text of Aulus Gellius to which Ernout and Meillet refer, as will appear below.

We have, however, full information on the precise legal meaning of *ūsurpāre* in connection with marriage. The texts are explicit, and one may be permitted to wonder why no mention of this information appears in the linguistic literature. Let us examine the first member of the compound *ūsurpāre*: in a compound legal technical term we expect at least one of the components to be likewise a technical term, and the answer is afforded by an archaic sense of the word *ūsus* in legal Latin. It designates the simplest of the three oldest forms of legal marriage in Rome, by which the wife came *in manum viri*, under the power of her husband: continuous cohabitation for a year. The locus classicus is Gaius, *Inst.* I §§ 109–111:[9]

> 109. Sed in potestate quidem et masculi et feminae esse solent; in manum autem feminae tantum conveniunt. 110. Olim itaque tribus modis in manum conveniebant: usu, farreo, coemptione.
> 111. Usu in manum conveniebat quae anno continuo nupta perseverabat; quia enim veluti annua possessione usucapiebatur, in familiam viri transiebat filiaeque locum optinebat. Itaque lege duodecim tabularum cautum est ut, si qua nollet eo modo in manum mariti convenire, ea quotannis trinoctio abesset atque eo modo [usum][10] cuiusque anni interrumperet. sed hoc totum ius partim legibus sublatum est, partim ipsa desuetudine oblitteratum est.
>
> '109. Now, while both males and females are found in *potestas*, only females can come under *manus*.
> 110. Of old, women passed into *manus* in three ways, by *usus*, *confarreatio*, and *coemptio*.
> 111. A woman used to pass into *manus* by *usus* if she cohabited with her husband for a year without interruption, being as it were acquired by a usucapion of one year and so passing into her husband's family and ranking as a daughter. Hence it was provided by the Twelve Tables that any woman wishing not to come under her husband's *manus* in this way should stay away from him for three nights in each year and thus interrupt the usus of each year. But the whole of this institution has been in part abolished by statutes and in part obliterated by simple disuse' (tr. de Zulueta).

It is precisely to this institution, the *usurpatio trinoctii*, that the passage of Aulus Gellius (3.2.12) cited by Ernout and Meillet refers. It is worthwhile examining the whole text:

> quoque Mucium iureconsultum dicere solitum legi non esse usurpatam mulierem, quae, cum Kalendis Ianuariis apud virum matrimonii causa esse coepisset, ante diem IV. Kalendas Ianuarias sequentes usurpatum

isset: non enim posse impleri trinoctium, quod abesse a viro usurpandi causa ex duodecim tabulis deberet, quoniam tertiae noctis posterioris sex horae alterius anni essent, qui inciperet ex Kalendis.

'I have read that Quintus Mucius, the jurist, also used to say that a woman did not become her own mistress who, after entering upon marriage relations with a man on the Kalends of January, left him, for the purpose of emancipating herself, on the fourth day before the Kalends of the following January; for the period of three nights, during which the *Twelve Tables* provided that a woman must be separated from her husband for the purpose of gaining her independence, could not be completed, since the last six hours of the third night belonged to the next year, which began on the first of January' (tr. J. C. Rolfe).

One should note in this passage the consistent intransitivity of the verb *ūsurpāre*, which is more ancient than the use of the word in Plautus.

It is important to comprehend the legal notion of *manus*, the position of the wife in the ancient Roman family, and the nature of *ūsus*; for therein lies the solution to the etymology of *ūsurpāre*. We can do no better than to cite the words of the great Sir Henry Maine, to whom that etymology was evident in 1875:[11]

'From very early times it would appear to have been possible to contract a legal marriage by merely establishing the existence of conjugal society. But the effect on the wife of continuous conjugal society was, in Old Roman law, precisely the same as the effect on a man of continuous servile occupation in a Roman household. The institution called Usucapion, or (in modern times) Prescription, the acquisition of ownership by continuous possession, lay at the root of the ancient Roman law, whether of persons or of things; and, in the first case, the woman became the daughter of the chief of the house; in the last case the man became his slave. The legal result was only not the same in the two cases because the shades of power had now been discriminated, and paternal authority had become different from the lordship of the master over the slave. In order, however, that acquisition by Usucapion might be consummated, the possession must be continuous; there was no Usucapion when the possession had been interrupted—where, to use the technical phrase (which has had a rather distinguished history), there had been *usurpation*, the BREAKING[12] of *usus* or enjoyment. It was possible, therefore, for the wife, by absenting herself for a definite period from her husband's domicile, to protect herself from his acquisition of paternal power over her person and property. The exact duration of the absence necessary to defeat the Usucapion—three days and three nights—is provided for in the ancient Roman Code, the Twelve Tables.'

This implicit recognition of the etymology of *ūsurpāre* is in fact far older than Maine; it was recognized by the Roman jurists themselves. Compare the passage from Gaius cited above, and especially Paulus in the Digest

41.3.2, who shows a remarkable understanding of the true history of the word: *usurpatio est usucapionis interruptio; oratores autem usurpationem frequentem usum vocant* 'usurpation is the interruption of usucapion; but the orators call frequent use usurpation.' We have here not only a definition, but an etymological gloss, of a type well known in Roman law, and common to the Irish legal commentators as well. Most of these etymologies are admittedly fanciful, though linguistically interesting as metalanguage; but a few are fundamentally correct, such as Papinian's *adulterium . . . propter partum ex altero conceptum* (Digest 48.5.6.1). So it is in the case of usu*rpatio* < usu*capionis inter*ruptio. It should be evident that the correct analysis is *ūsurpāre* < **ūsu-rup-āre*. The second member of the underlying nominal compound *ūsu-rup-* is the hitherto unattested root noun to Lat. *rumpere*: literally, 'breaking *ūsus*'.

Usurpatio thus in its oldest attested meaning in Latin, prior to the time of the Laws of the XII Tables, is the breaking of *usus*: the suspension of the orderly acquisition of ownership, by the interruption of continuous possession. We have all the elements of a structural system in ancient prehistoric Roman law, with a remarkably exact, homologous linguistic expression. Continuous possession as a subjective possibility, 'faculté de se servir',[13] is *ūsus*; the objective, effective acquisition of ownership thereby is *ūsūcapiō* < *ūsū capere* 'take by *ūsus*'; but the effective suspension of the acquisition of ownership thereby is *ūsurpātiō* < *ūsu-rup-* 'breaking *ūsus*'.

I would suggest that it is the passage from intransitivity to transitivity which primes the classical meaning of *ūsurpāre* as 'use'. At the outset we had an intransitive verb *ūsurpāre* in the meaning 'break *ūsus*' and specifically 'interrupt the legal period of one continuous year necessary for acquiring *manus* over a woman', as attested in Gellius. The word *ūsus* in this compound I assume to be the technical term for the simplest form of marriage. From this was formed the noun *ūsurpātiō* 'interruption of *ūsus*', and an adjectival derivative *ūsurpātus* 'whose *ūsus* has been interrupted'—quite possibly femininum tantum. But an originally only adjectival phrase *mulier usurpata est* is formally ambiguous, adjective + copula or perfect passive: cf. Kuryłowicz, *Inflectional categories* 56ff. It can at any time be derived from a **mulierem usurpare* by reversing the apparent passive transformation, whence *aliquid usurpare*.

Alternatively, one can also imagine that from an original action or agent noun **ūsur(u)p-s*, or perhaps a feminine **ūsur(u)p-a* 'she who breaks *ūsus*, was formed a purely nominal but quasi-passive derivative *ūsurpāta* 'she whose *ūsus* has been broken' (somewhat parallel to the semantic relations of English *divorcée*), and that the verb *ūsurpāre* is itself a back-formation from the adjective in *-ātus*.

That the verb becomes a virtual synonym of *ūtor* is probably to be accounted for as a simple 'misuse', conditioned by phonetic and vague semantic resemblance (cf. Eng. *hypothecate* improperly for *hypothesize*[14]), outside of the specific legal context to which it was originally restricted. For the meaning 'seize for one's own use' it is possible that there existed a folk

etymological connection with *rapere*, as Cowgill suggests to me (*per litt.* 21 VI 1966), though I have not been able to find any textual support, and that meaning of *ūsurpāre* is in any case relatively late (Imperial) in Latin. More plausible would seem to me to explain it by the factor of sound symbolism; a final labial stop or nasal is extremely characteristic of words meaning 'take, seize, hold' or the like in a variety of languages. Cf. Lat. *rap-iō*, *cap-iō*, *carp-ō*, Gk. harpázo, Skt. *grabh-*, Russ. *xap-at'*, Hitt. *ep-zi*, OIr. *gaib-id*, or Eng. *grab*, *cop*, *clasp*, *nab*, and for the principle, Jakobson, *IJSLP* 1-2.274(1959). It is worth noting that this principle is evident in Indo-European itself, *teste* such root forms as **ep-*, *rep-*, **kap-*, **ghabh-*, **grebh-*; and **klep-* 'steal (in secret, v. *infra*)' is doubtless formed on the **kel-* of Lat. *cēlāre*, *occulere* plus a suffix *-ep-* of the same symbolic origin.

II. aut noxiam sarcire aut noxae dedere

One of the most characteristic features of Roman law, present during all of the preclassical and classical period, was the institution known generally to Romanists as the *actio noxalis*, or noxal action. For its classical form, we may cite Gaius, *Inst.* IV 75:

> Ex maleficio filiorum familias servorumque, veluti si furtum fecerint aut iniuriam commiserint, noxales actiones proditae sunt, uti liceret patri dominove aut litis aestimationem sufferre aut noxae dedere. 'Wrongdoing by sons or slaves, as where they have been guilty of theft or outrage, has given rise to noxal actions, the nature of which is that the father or master is allowed either to bear the damages awarded or to surrender the offender' (tr. de Zulueta).

As de Zulueta points out in his commentary *ad loc.* (pp. 271–3), the original technical term for the restitution of the damage done was *noxiam sarcire*; Gaius' *litis aestimationem sufferre* is the result of an innovation in procedure. We have the ancient formula *aut noxiam sarcire aut noxae dedere* (whence the title of this paper) in a slightly modernized form in Ulpian, *Digest* 9.1.1: *aut noxam*[15] *sarcire aut in noxam dedere.*

The legal system underlying the noxal action, and its historical development, has been discussed and analyzed at great length by the Belgian jurist F. de Visscher, in his monumental work *Le régime romain de la noxalité* (1947). The original situation is one where theft or damage committed by an animal or by an individual *in potestate*, in other words someone with no legal capacity of his own (slave, son, doubtless originally wife) requires the offender to be handed over by the master to the victim (noxal surrender, *noxae deditio*). The master can, however, avoid this by offering restitution for the damage done (*noxiam sarcire*). Speaking of the law of the XII Tables, de Visscher states: 'à la victime il reconnait le droit d'exiger la *deditio*, au maître une faculté de rachat, dont l'efficacité est assurée par l'effet libératoire de l'offre de paiement.'

In the historical development of noxality, de Visscher recognizes three stages (p. 20). The first, which recurs in numerous societies around the world, consists of noxal surrender of the offender pure and simple. The

second, qualified quite rightly as a 'legal system', combines the institution of noxal surrender with the master's right of compensatory restitution. The third, that of classical Roman law, presents the developed system of regular legal actions (*actiones noxales*) superimposed on the earlier second system as an optional alternative. This last need not concern us here.

De Visscher argues that the first stage, that of noxal surrender alone, is still attested in Roman tradition in international or intertribal polities; he gives a detailed juridical analysis of the affair of the Furculae Caudinae and the *deditio* of the consuls Veturius and Postumius (Livy IX 1–12). But the solemn religious character of the international *deditio* and its specifically expiatory function is evident from the role of the *fetiales*; cf. the archaic formula in Livy IX 10.9. This would lead us to suspect that the international *deditio* was something more than an equivalent in macrocosm of the relations between families. The same is suggested by the spontaneous nature of the *deditio*, especially in the affair of the Furculae Caudinae: the Samnites neither demanded nor accepted the *deditio*; nor had they been offended or injured by the consuls. The Fetial formula has *noxam nocuerunt*, but the *noxa* itself was not to the Samnites. When we further note that between families, noxal surrender is always of an animal or an individual who is not *sui iuris*—for which there is no real equivalent on the tribal level—one is strongly inclined to conclude that de Visscher's first and second stages of *deditio* or noxal surrender in fact represent different and coexistent institutions, rather than a historical development of the same institution. As will appear, the comparative evidence likewise favors such a view.

It is clear that the second stage, the "legal system" requiring noxal surrender of the offending animal or individual *in potestate* to the victim of the offense, but which may be averted or 'bought off' by the restitution of the damages, was already in full force before the time of the XII Tables. The texts are explicit. They are collected in Bruns, *Fontes*[8], and have been commented in detail by de Visscher; it is therefore not necessary to cite more than a single characteristic passage.

We have in XII 2a *si servus furtum faxit noxiamve no[x]it*, (preserved in the *Digest*), and it is extremely plausible that the isolated *sarcito* quoted by Festus (p. 330 L) belonged in the same article; for the syntax compare *si im occisit, iure caesus esto.* Festus states that *sarcito in XII Ser. Sulpicius sit significare 'damnum solvito, praestato'.* Whether we are to understand *damnum solvito* as a gloss on *noxiam sarcito*, or on a presumably intransitive *sarcito* alone, is uncertain; but we can observe in the language of the jurists that *noxia* is equivalent to and gradually replaced by *damnum.*

In any case we have clearly attested in Latin an antithetical pair *noxiam nocēre/noxiam sarcīre.* The way to its analysis is shown by the classical *Essai sur le don* of M. Mauss, the implications of which for Indo-European studies have been so clearly drawn by Benveniste in his article 'Don et échange dans le vocabulaire indo-européen'.[16] We may do no better than to quote Benveniste's introduction:

> C'est le grand mérite de Marcel Mauss, dans son mémoire désormais

classique sur le Don, d'avoir mis en lumière la relation fonctionnelle entre le don et l'échange et défini par là un ensemble de phénomènes religieux, économiques et juridiques propres aux sociétés archaiques. Il a montré que le don n'est qu'un élément d'un système de prestations réciproques à la fois libres et contraignantes, la liberté du don obligeant le donataire à un contre-don, ce qui engendre un va-et-vient continu de dons offerts et de dons compensatoires. Là est le principe d'un *échange* qui, généralisé non seulement entre les individus, mais entre les groupes et les classes, provoque une circulation de richesses à travers la société entière. Le jeu en est déterminé par des règles, qui se fixent en institutions de tous ordres. Un vaste réseau de rites, de fêtes, de contrats, de rivalités organise les modalités de ces transactions.

In a society founded on the notion of exchange and reciprocity, an offense (*noxa*), either to gods or men, requires a counterprestation. It is *sarcire* which denotes precisely the counterprestation which reestablishes the balance, which completes the circle of 'donner, recevoir, rendre'. As Mauss has stated about the Indians of the Pacific Northwest (p. 203 n.3): 'L'expiation consiste précisément à donner un potlatch ou au moins un don. C'est là, dans toutes ces sociétés, un principe de droit et de rituel extrèmement important. Une distribution de richesses joue le rôle d'une amende, d'une propitiation vis-à-vis des esprits et d'un rétablissement de la communion avec les hommes.' The fundamental meaning of *sarcire* is its legal and social meaning, that of making restitution or reparation: 'making whole', but specifically thereby restoring the social unity and equilibrium disturbed by an offense. It is this sense alone which is anchored in the sociological fact of exchange and reciprocity as the fundamental structural principle. All the other acceptations of *sarcire* in Latin, whether of repairing ('making whole') shoes, walls, or whatnot, represent a secularized, desocialized, and entirely secondary transfer. This conclusion is offered by what is surely the oldest use of the verb in Latin: the archaic formulas *sane sarcteque* and *sarcta tecta*. We may note the alliteration and asyndeton, as well as the earlier phonetic form of classical *sartus*. Both are found in Festus and Paulus, pp. 428–9 Lindsay: ⟨*sa*⟩*rte in augu*⟨*ralibus pro inte*⟩*gro ponitur*: ⟨"*sane sarctequ*⟩*e audire vi*-⟨. . . *ob quam causa*⟩*m opera pu*⟨*blica, quae locantur, ut i*⟩*ntegra praes*⟨*tentur, sarcta tecta v*⟩*ocantur. et*⟨*enim sarcire est integr*⟩*a facere.* See also Charisius (Keil 1.220), ultimately from the same source but who gives the fuller version of the formula: *hinc 'sarcta tecta uti sint' opera publica [publice] locantur, et ut Porphyrio ex Verrio et Festo 'in auguralibus' inquit 'libris ita est, sane sarcteque. . .'*. In the solemn dedication of a new building there is of course no question of 'repairs': the meaning is 'may they be whole'.

De Visscher has shown in the work already cited that in legal usage *noxa* = *delictum*, and specifically 'l'état durable de responsabilité résultant de la commission du délit' (p. 544).[17] On the other hand, *noxia* = *damnum*, 'le dommage sujet à réparation' (p. 562 n. III); it is properly an adjectival derivative in *-io-*, 'that of the *noxa*'. The confrontation with *noxia* permits

us also to be more precise about the value of *damnum*, in the direction indicated by Benveniste (note 16 above). It is basically parallel with the root **alg^{w}h-* of *alphánō*, which as Benveniste has shown, is not simple 'get', but 'get in exchange'; *alphḗ* is the 'valeur d'échange'.[18] Latin *damnum* is not simply 'damage' in the physical sense of destruction of property, etc.; it is specifically 'damage entailing liability (for restitution or reparation)', and as such clearly retains the notion of reciprocity, of exchange implicit in the root **dap-*.

The etymological connection of Lat. *sarcīre* with Hitt. *šarnikzi* (with nasal infix) 'makes restitution' goes back to A. Juret, *RHA* 2.251 (1934). The equation has been universally accepted by Hittite scholars, Latinists, and Indo-Europeanists alike;[19] alone among Latin etymologists, Ernout and Meillet make no mention of the Hittite verb in their discussion of *sarcio*, probably because of their erroneous view that 'le sens primitif était sans doute "recoudre" '.

I do not propose to question this etymology, but rather to demonstrate it once and for all from the conclusive evidence of legal texts in the two languages. For Hitt. *šarnikzi* is, like Lat. *sarcīre*, the expression for 'making restitution' PRECISELY IN THE LEGAL SYSTEM OF NOXALITY.

The institution of noxality is clearly documented for Hittite society, in a fashion wholly parallel to Rome, in the Hittite Code. The article in question (I § 95) is found in the Old Hittite version A, and thus goes as far back in Hittite legal tradition as we have documentation; cf. note 5 above. For a detailed discussion one may be referred to the important study 'Zur Noxalhaftung im hethitischen Recht' by H. Petschow, *ZA* N.F.21.237–50 [1963] and the references therein. (The author does not note the critical parallel with Latin.) The texts are as follows, in the readings of A where available:

I § 95

takku ŠR-*aš* É-*ir taizzi šakuwassar-pat pāi tayazilaš*[20] 6 GÍN KUBABBAR *pāi* ŠR-*ša* KAxKAK-*ŠU ištamanuš-šuš kukkuriškizzi n-an appa išḫi-šši pianzi takku mekki taizzi mekki-še išḫiyanzi takku tepu taizzi tepušše išḫianzi takku BEL-ŠU tezzi šer-šit-wa*[21] *šarnikmi nu šarnikzi takku mimmai-ma nu* ŠR-*an-pat šuizzi*

'If a slave robs a house he gives back in full. He gives 6 shekels of silver as compensation for theft, and he [the victim] cuts off the slave's nose and ears, and they give him back to his master. If he steals much, they bind much on him; if he steals little, they bind little on him.[22] If his master says "I shall make restitution for him", he makes restitution; but if he refuses, then he surrenders the slave.'

I § 99

takku ŠR-*aš* É-*ir lukkizzi išhaš-šiš-a šer-šit šarnikzi . . . takku natta-ma šarnikzi nu apūn-pat šuizzi*

'If a slave sets a house on fire and his master makes restitution for him . . . but if he does not make restitution, then he surrenders him'.

The parallel with the Roman system is thus complete, and the two verbs occupy identical positions in the structure:

$$nocēre \left| \begin{matrix} sarcīre \\ dēdere \end{matrix} \right. = taizzi \left| \begin{matrix} šarnikzi \\ šuizzi \end{matrix} \right.$$

Hittite *šarnikzi* is likewise used for requiting an offense to the sphere of the divine, as appears from the Plague Prayers of Mursilis:[23] I rs. 19–20: *ammuk-ma šumaš ANA* DINGIR.MEŠ EN.MEŠ-*YA šarnikzel parkann-a* KUR-*e šer šarninkiškimi* 'Ich aber werde euch, den Göttern, meinen Herren, Ersatz und Sühne wegen des Landes leisten'. Comparison of this and the preceding passage from the Code above shows that the verb should be given in the lexicon as compounded with a preverb, *šēr šarnik-*.[24] It may occur intransitively, as in the passages above, or may take an object, like *noxiam sarcire*: Pestgebet I Rs. 21–2 DINGIR-MEŠ *BELU*.MEŠ-*YA* ŠA ^{I}*Dutḫaliya kuit ešḫar* EGIR-*an sanḫatteni nu-kán* ^{I}*Dutḫaliyan kueš kuennir nu ešhar apūs šarninkir*. 'Ihr Götter, meine Herren, weil ihr das Blut des Dutḫaliyaš rächen wollt: die den Dutḫaliyaš töteten, die haben die Blutschuld gebüsst.'

We can thus make a functional and formal equation of Lat. *sarcīre* and Hitt. *šarnikzi*; it is significant that the institution of noxality is in fact the only point of their semantic overlap, but that here the two recover each other completely. The formal details of the equation need not detain us: Hitt. *šarnikzi* is a regularly formed nasal infix present from a root **serk-* (or state II **srek-*), **sṛ-n-ek-ti*. Lat. *sarcīre* is evidently a derived present in *-yo/ī-* to a base *sark-*; the sigmatic perfectum and verbal adjective to *-to-* are regular and predictable. The base *sark-* probably continues a root noun **sṛk-*, with morphological zero grade in *a*, according to the mechanism described in Kurylowicz's *Apophonie* 174ff. To judge from **bhreg-*, **bhṛ-n-(e)g-* > **bhrang-* > *frangō*, a **serk-* (*srek-*) with nasal infix **sṛ-n-(e)k-* (= Hitt. *šarnik-*) should give **srank-* > a Lat. **francō*. We may conjecture that the phonetic distance of such a form from the denominative *sark-yo-* (replacing **sṛk-yo-*) was at a certain time responsible for its elimination.

Before passing to the implications of this etymology in its cultural context, let us look at the expressions for the noxal surrender proper: *noxae dedere*, ÌR-*an-pat šuizzi*.

In the Latin verb *dēdere* we have a good example of the preverb *dē-* marking a transfer of status, as Benveniste has defined it (in lectures, 1958): the offender ceases to be under the jurisdiction of the paterfamilias, and comes under the jurisdiction of another. Hittite *šuizzi* is also to be so interpreted, in the meaning 'surrenders, transfers permanently, without recourse'. In this sense we have the solution to the much vexed problem of the common phrase in the Hittite laws *parna-šše-ya šuizzi* (*šuwāizzi*), which must mean 'and he surrenders (it, the 'fine' or compensation) to his (the plaintiff's) household'.[25] The Hittite verb is very likely related to OIr. *soid* 'turns' (both from **soy̯ḭeti*), though the latter does not to my knowledge have any comparable legal significance.

Let us return to the equation of Lat. *sarcīre* and Hitt. *šarnikzi*. G. Dumézil has seen clearly that the role of linguistic equations in the domain of comparative mythology is relatively restricted. This is exact; the question is primarily one of comparing structures and the interrelations of their constituents. But when we can independently compare social structures and their linguistic expression, we have furnished precious and conclusive evidence for the common—in our case Indo-European—origin of both. In the domain of comparative mythology, examples are the safely restorable **deiu̯o-* and **di̯eu- pəter-* (**pəter- di̯eu-*).

Human institutions may show similarities attributable to nongenetic factors: chance, (quasi-)universality, or diffusion (borrowing). It is this that the comparative method must be continually on guard against; and the danger is incontrovertibly greater in the comparison of institutions than in the comparison of languages. For these reasons it is useful to have some sort of "touchstone" by which to judge the impressionistic comparisons or equations that may be made between institutions, legal or otherwise. One of these touchstones is precisely that of linguistic equations of the kind made here between Lat. *sarcīre* and Hitt. *šarnikzi*: IE **serk-* (*srek-*)/*sṛk-*. But it is important to note that what is decisive is not simply the linguistic equation—which is after all only a root etymology, and scarcely very impressive as "straight" linguistic equations go—; it is the COINCIDENCE of *linguistic expression* and *legal content*. Specifically, we may term it the coincidence of the linguistic expression of a particular legal structure point, a "nexus" in two legal structures which may be compared and equated, point for point and relation for relation, in two cultures where mutual influence is impossible both for chronological and geographical reasons. We have here such an example; noxal surrender, and even the system of noxality as a whole, is not confined to Indo-European speaking societies. But it is the existence of a common inherited lexical item *sarcīre/šarnikzi* occupying the same position in the same legal structures which proves that the institution of noxality in Indo-European society must be as old as the community of Latin and Hittite, which is to say at the present state of our knowledge that it belongs to the common Indo-European period.[26]

It should be unnecessary, but is perhaps still worthwhile, to point out explicitly that a necessary consequence of the preceding discussion is that Hittite law is at least in part inherited from Indo-European customary law. This means that the culture area notion of 'cuneiform law'[27] can no longer be considered as a wholly adequate frame of reference within which to discuss Hittite law, synchronically or diachronically.

In view of the foregoing evidence from Latin and Hittite it is scarcely surprising that there is independent evidence from other early Indo-European traditions for the system of noxality. Thus from Greek we may cite Plato's Laws 936d: *ho toũ blápsantos despótēs ḕ tṑn blábēn exiósthō . . . ḕ tòn blápsant'autòn paradótō*;

'Let the master of the offending slave either make restitution for the damage . . . or hand over the offender himself.'[28] From a genuine legal docu-

ment we may cite the following, from the *Code of Gortyna* II.20–36 (Schwyzer 179, Buck 117): *ai ka . . . moikiōn ailethēi . . . proweipatō . . . tō de dōlō tōi pastai anti maiturōn duōn. ai de ka mē allusētai, epi tois elonsi ēmen krēththai opai ka leiōnti.* 'If he is caught in adultery . . . , one shall announce (it) . . . in the case of a slave to the master before two witnesses. But if he is not ransomed, it shall be in the power of the captors to do with him as they wish.' It is well known that Roman tradition saw a partial 'reception', or any rate a significant influence, from Greece of the Law of the Twelve Tables, and scholars have deduced a number of quite convincing phrasal reminiscences.[29] But it is the equation of Latin *sarcīre* with Hittite *šarnikzi* (where "classical" influence is out of the question), which proves that the Roman system of noxality must be independent from that of Greece.

In early Slavic law the possibility of diffusion from Byzantium must of course be reckoned with. But there is enough of Slavic, particularly Russian law in direct contrast with Roman usage (e.g. the law of murder) that its evidence should at least be heard. M. Kaser *Röm. Privatrecht* 2.311, notes that the institution of noxality was on the decline both in the Western and the Eastern Roman empire; its comparative significance in the early Slavic codes would strongly suggest an independent tradition. In the oldest manuscript (thirteenth century) of the *Russkaja Pravda*, Expanded Version (ed. E. F. Karskij, Leningrad, 1930) article 121 reads: *aže xolopъ kradetь kogo ljubo to g(ospodi)nъ vykupati i ljubo vydati i* 'if a slave robs a man, the owner may redeem or surrender him' (tr. Vernadsky). Likewise in the tenth century Bulgarian *Zakon Sudnyj ljudem*, our earliest Slavic legal text, but one where Byzantine influence is most suspect, we have the same proviso. In the normalized text of the Short Version, ed. M. N. Tixomirov (Moscow [1961]), §27: *kraduščemu rabu gospodinъ, ašče xoščetь iměti takovago raba, da bes toščety stvoritь; ašče li ne xoščetь iměti togo raba sego da otdastь v rabotu okradenomu* 'The master of a thieving slave, if he wishes to have such a slave, let him make [compensation] without loss; if he does not wish to have the slave, let him hand him over into slavery to the one who was robbed.'

III. The Roman Law of Theft: A Comparative Linguistic Approach

Like other aspects of culture in general, such an area of the law as that of theft is not merely the sum total of the list of relevant statutes or juristic opinions of one sort or another, though it may frequently be manifested in that way alone; it is a structural unity, an internally consistent and coherent whole. As such, *ex hypothesi*, its internal organization may be analyzed in terms of a set of binary oppositions, of 'distinctive features' in the technical linguistic sense of the term. For structural method and the principle of binary oppositions as applied in anthropology one may refer to Cl. Lévi-Strauss, *Anthropologie structurale* (1953). The same author has a pioneering analysis of a Pacific Northwest Indian myth into such binary oppositions in La geste d'Asdiwal, *Annuaire de l'École prat. des hautes études, Sect. des sci. relig.*, 1958, and has now expanded and refined the analysis in his brilliant work *Mythologiques. Le cru et le cuit* (1964). In the same tradition is the remarkable new monograph of Vjač. Vs. Ivanov and V. N. Toporov, *Slavjanskie jazykovye modelirujuščie semiotičeskie sistemy* (1965). It is this notion of structure which I suggest can be applied with profit to the field of law.

The earliest recorded Roman law of theft is set forth in a number of quotations, paraphrases, and reminiscences of the laws of the Twelve Tables, collected for the most part under the conventional rubric of Table VIII. They are most conveniently accessible in Bruns, *Fontes*[8]; a fuller, indeed nearly exhaustive philological and juridical analysis of these may be found in chapter I of the excellent work of P. Huvelin, *Études sur le furtum dans le très ancien droit romain*, 15–103 (1915). It is not my intention—nor within my power—here to attempt a complete analysis of the system of the earliest Roman law of theft, nor of its connections with other aspects of the law. Rather, my object is to attempt a preliminary sketch of the structural features underlying certain aspects of the earliest Roman law of theft, specifically the *furtum manifestum*, and to show that these recur almost exactly in the early legal systems of numerous other Indo-European speaking peoples. The similarities are such that, in accord with the basic tenets of the comparative method, this set of features of the law of theft may be attributed to the common legal system that obtained in the society of speakers of Indo-European itself.

That I have taken Roman law (albeit Archaic, not Classical) as the point of reference, is largely attributable to the simple fact that it represents the most thoroughly investigated of all the legal traditions of the Indo-European speaking world, and is the most familiar to students of comparative law. Such a justification is scarcely proper from a scientific point of view; in the last analysis I can only appeal to tradition, and recall the words of Leopold Wenger (*op. cit.* 9): 'Mag die darin liegende Minderbewertung . . . aller anderen Rechte als des römischen überwunden sein, eines ist bei aller Vergleichung noch geblieben: wenn man nach einem vergleichenden Masstab . . . sucht um zu vergleichen, so ist das römische Recht auch heute . . . das weitaus reichhaltigste, . . . der beste juristische Wertmesser und das beste Verständigungsmittel bei aller Rechtsvergleichung der verschiedensten Rechte untereinander.'

I have purposefully limited myself to Roman, Greek, Indic, and Slavic legal systems as comparanda; the rich Germanic, and even more archaic Celtic traditions have not been cited, in order not to swell beyond all measure an already lengthy study. But the same distinctive feature mapping will hold for both the Germanic and the Celtic systems, as D. A. Binchy informs me.

It is specifically theft which interests us here; but it must be noted at the outset that theft proper is only one member of the opposition theft (*furtum*)/robbery (*rapina*). The distinctive feature is the clandestineness and secrecy of the action: *nocte latent fures* (Catullus 42.34); cf. the relation *furtum*:*furtim*, or for that matter English *steal*:*stealth*. This opposition is very likely of Indo-European antiquity; it recurs in Greek *klopḗ* vs. *harpagḗ*, and in Germanic between the family of Goth. *hlifan* and that of *bi-raubon*.

In the early Roman law of theft proper the fundamental opposition is that between *furtum manifestum* and *furtum nec manifestum*. The binary, 'yes/no' character of this distinctive feature is evident from the linguistic expression, as is the fact that *furtum manifestum* is the marked member of the opposition. Yet the archaic form of the negation *nec* testifies to the great antiquity of this curiously modern structural interpretation. The same form is found elsewhere in Roman law, as in the opposition of *res mancipi* and *res nec mancipi*.[30] *Furtum manifestum*, as the marked member of the opposition, was the more serious, and was more severely punished; *furtum nec manifestum* was sanctioned only by restitution and compensation. So in the Twelve Tables (VIII 16) *si adorat furto, quod nec manifestum erit—duplione damnum decidito*. The latter clause is conjectural, after Tab. XII 3; but the double compensation itself is clear from the introduction of Cato's *De agri cultura: maiores nostri . . . in legibus posiuerunt furem dupli condemnari*. See the discussion in Huvelin, *op. cit.* 77, who also argues very plausibly from Lucilius 552–3 Marx, 582–3 Terzaghi, that the procedure of an action *furti nec manifesti* began with an *in ius vocatio*.[31]

Furtum manifestum itself was either simple or complex, depending on whether the thief was discovered in the act, or by tracking (Lat. doubtless *investigatio*), and the solemn search for the stolen goods in his house, *quaestio lance licioque* (*cum lance et licio*). The two were legally equivalent. As we shall see below, one of the distinctive features of manifest theft is *enclosure*: catching the thief within the yard or house, not in the open field. This house-search may be viewed as effecting a juridical equivalence of the thief discovered within *your* enclosure, and your stolen goods discovered within *his* enclosure: two alternative manifestations of the same distinctive feature. We would have in this system an excellent illustration of what Lévi-Strauss has termed 'le caractère relationnel de la pensée symbolique'.

This solemn, juridically recognized house-search was regulated as a ritual. The searcher had to be naked or nearly so; he carried with him a platter (*lanx*) and a tether (*licium*), which together symbolize the stolen articles: artifacts and foodstuffs, which could be (at least symbolically) carried on the platter, and chattels, which could be tethered, were in early Indo-European society the principal objects subject to theft.[32]

Catching a thief *in flagrante delicto* doubtless belongs to the plane of legal universals. But the solemn, ritual house-search does not; yet it is attested as a legal institution also among the Greeks, the Germanic peoples, and the Slavs (Jolowicz, p. 171, with references). Cf. the Scandinavian technical term for this house-search (ON *ransak*), which was borrowed into English. For this reason it has been quite rightly assumed by legal historians that this search was 'a very ancient institution, dating back to a time before the separation of the Indo-Germanic peoples, for so many parallels are found that direct borrowing is most unlikely' (Jolowicz, *loc. cit.*). [Cf. also C. V. Schwerin, *Die Formen der Haussuchung in idg. Rechten* (1924).]. This institution is peculiarly Indo-European, and for this reason valuable evidence;

but from the structural point of view it is the legal equivalence as *fur manifestus* among the Indo-European speaking peoples of the thief discovered in this peculiar way and the thief caught in the act, which permits us to recover one feature of the *system* of the Indo-European law of theft. The *quaestio lance licioque*, however precious its probative value for its very peculiarity, is only one element in the total structure.

We come finally to the specific legal provisions in which we are directly interested: the case of *furtum manifestum* where the thief is caught in the act. It will be observed that this situation up to this point may be represented by the model of a 'tree' or branching diagram; we have, in effect, passed through three successive nodes, representing the choices *furtum* (not *rapina*), then *f. manifestum* (not *f. nec. m.*) then *f. m.* caught in the act (not by the house-search *lance licioque*). As will appear below, the same model will handle the remainder of the law of theft manifest.

The first two relevant articles in the Twelve Tables are as follows, after Bruns: (VIII 12) *si nox furtum faxsit, si im occisit, iure caesus esto*, (VIII 13) *luci . . . si se telo defendit, . . . endoque plorato*. The first is evidently a textual citation; it is found in Macrobius, *Sat.* 1.4.19 introduced by *verba haec sunt*. The second is more conjectural, and more of a patchwork; it seeks only to give those words from various sources which may be reasonably presumed to have stood in the original article. In fact, only *luci* and *endoque plorato* may with any confidence be regarded as authentic. The general disposition of the law is clear from the paraphrases in Cicero (*P. Tull.* 20.47): *atque ille legem mihi de XII Tab. recitavit, quae permittit, ut furem noctu liceat occidere, et luci*, si se telo defendat. (*Ibid.* 21.50): *furem . . . luce occidi vetant XII tab . . . nisi se telo defendit, inquit; etiamsi cum telo venerit, nisi utetur telo eo ac repugnabit, non occides; quod si repugnat, endoplorato, hoc est conclamato, ut aliqui audiant et conveniant.* (*P. Mil.* 3.9): *XII tab. nocturnum furem quoque modo, diurnum autem si se telo defenderet, interfici impune voluerunt*

The form *luci*, found in the first passage in Cicero, recurs in a line from Ennius, *Ann.* 431 Vahlen, beginning *si luci, si nox*, where the rare and archaic adverbial *nox* 'by night' after *si* makes it likely that we have here in Ennius a reminiscence of the Twelve Tables. Ennius, like Cicero, would have learned the Twelve Tables *a parvo* as a *carmen necessarium*.

The very archaism of Cicero's *endoplorato* makes it reasonable to presume its authenticity; but the even more archaic syntagma is cited in Festus p. 402: '*sub vos placo*' . . . *ut in legibus 'transque dato' et 'endoque plorato'*. The unique circumstances of this juridical cry make it almost certain that *endoque plorato* comes from the law of theft, and thus that Cicero simply left out the *-que* for which there was no syntactic need.

To these two passages a third from the Twelve Tables must be added, which furnishes a further disposition in the law of theft. It is arbitrarily assigned to Table XII, but surely belongs with the two articles from Table VIII. (XII 2a) *si servus furtum faxit noxiamve no[x]it*. The context is that of the system of noxality, which has been amply discussed in the preceding

section. We have here an important feature of all early legal systems: *status*, and the fundamental opposition free/not-free. We should perhaps say rather slave/not-slave; for it is the not-free who is the marked member of the opposition, as is again clear from the linguistic expression. We need only juxtapose *si servus furtum faxit* and *si (nox) furtum faxit*; in the latter the free man, as the unmarked category, is simply not specified.

Though nowhere explicitly stated, it seems likely that the feature of status, *servus/liber*, is relevant only in the case of *furtum nec manifestum*, where there would be some sort of trial. In the case of *furtum manifestum*, both free man and slave could under certain circumstances be slain with impunity; here the opposition was thus neutralized.

Across these fragmentary legal texts and literary paraphrases we can clearly discern all the relevant features of an organized structural system. However much we may regret the incompleteness of our information about the Twelve Tables in general, it would appear that as far as theft is concerned, despite our uncertainty in matters of detail and particularly in the question of procedure, we have the essence of the law preserved. Taken individually, the legal texts as we have them appear to be only simple conditional sentences, preserved for us in a purely haphazard way. But considered together, they constitute a system with a definite purpose: they supply a set of distinctive features, the specification of which (as yes or no choices) in turn fully and uniquely specifies the juridical nature of the given instance of theft, and as such, the course of action to be followed in its sanction.

In the particular case which interests us, that sanction is the legal right to kill the thief with impunity, as an exercise of private justice. As F. Wieacker states in his important study, Endoplorare: Diebstahlsverfolgung und Gerüft im altrömischen Recht, *Münch. Beitr. z. Papyrusforsch. u. ant. Rechtsgesch.* (*Festschrift L. Wenger*) 34.129–79 (1944): 'Die Diebstötung ist nicht Rache- oder gar Notwehrhandlung, sondern vielmehr rechtmässige Unrechtsabwehr' (p. 158). At the time of the Twelve Tables, 'impunity' would mean that the slayer would not by his act become a *paricidas*, a murderer. At an earlier period this impunity would imply the nonoccurrence of a blood-feud; the kin group of the slain thief would not have the right (or rather obligation) of revenge upon the slayer.

The provisions of the law are therefore clear. In Jolowicz's words (172) 'If the thief came by night or if in the daytime he defended himself with a weapon the XII Tables allowed him to be killed without trial; in the latter case however the slayer must cry aloud in order to prevent any suspicion that he was a murderer attempting to hide his act.' We have here a path through successive choices, representing the specification of the relevant features.

The first feature is not noted by Jolowicz; but its structural relevance is clear from the discussion by Wieacker, op. cit. 164. The thief can be slain with impunity only if caught in the act within an enclosure, e.g. house, barn, or barnyard. Wieacker suggests very plausibly that when Cicero

(*P. Tullio*, v. supra) specifies *intra parietes tuas*, he is giving a juridically relevant condition. We know that theft in an open field, even by night, was sanctioned in an entirely different way, having nothing to do with the exercise of private justice. We have the testimony of Pliny, *Nat. Hist.* 13.3.12 (= Tab. VIII 9): *frugem quidem aratro quaesitam furtim noctu pavisse ac secuisse puberi XII tabulis capital erat, suspensumque Cereri necari iubebant.* In the crucifixion of the thief as an expiation to Ceres we should probably see an ancient religious law, which might well—pace Pliny—have had no connection at all with the laws of the Twelve Tables.

The next choice is the opposition *by night/by day*; *nox/luci*. Given a plus specification of the features 'enclosure' and 'night', the juridical course of action is completely specified: the thief may be slain with impunity, *iure caesus*. But in the case of a minus specification of the feature 'night', i.e. *luci*, it is necessary to specify two further features, in other words, to pass through two more successive nodes: the features of 'armed resistance' by the thief, *si se telo defendit*, and 'outcry' by the victim, *endoque plorato*. Only in the event of a plus specification of both these remaining features can the *fur diurnus* be slain with impunity, *iure caesus*.

Cicero (*loc. cit.*) states explicitly that the mere possession of a weapon is not adequate: *inquit etiam, si cum telo venerit, nisi utitur telo ac repugnabit, non occidi.* 'Armed resistance' or 'violence', as we saw earlier, is a redundant feature of *rapina*; but in the case of the *fur diurnus* it is fully relevant and distinctive.

There is some question as to whether the outcry was a necessary concomitant of the slaying of the *fur nocturnus* as well; see Wieacker, *loc. cit.*, and Jolowicz, p. 558, with the literature there cited. But from the structural point of view this is only a question of the ordering of the distinctive features: whether 'outcry' is specified before or after 'night/day'. Though some uncertainty persists for the period of the Twelve Tables, comparative law would suggest that the outcry was originally a necessary concomitant of all action taken in cases of *furtum manifestum*, even including the house-search *lance licioque*. In terms of our model, this implies that the feature 'outcry' was specified some nodes before the feature 'night/day'.

Clamor, the juridical outcry, is well attested at an early period throughout the Indo-European speaking world. The institution as reflected in early texts has been studied at great length both from the juridical and the philological point of view by Wilhelm Schulze, *SbPAW* (1918) 481–511 (= *Kleine Schriften* 160–89), and by L. L. Hammerich, *KDVS*, hist. -fil. medd. 29.1 (1941). The reader may be referred to these works for numerous illustrations. Schulze concludes that the juridical outcry (Germ. *Gerüft*) is an Indo-European heritage, while Hammerich, weighing much the same evidence, regards *Gerüft* simply as a 'juristische Verwendung des Allarmrufes' created only in the Germanic High Middle Age. The evidence is all for Schulze's view. In the first place, we have the linguistic equation of the technical term for the 'juridical outcry' in Sanskrit *krośa* and Old English *hréam* < Gmc. **hraugma-* (later replaced in English by the now 'secu-

larized' *hue and cry*). But of greater importance is the position of the outcry in the legal structure. The significance—and probative value—of the outcry as an institution of Indo-European date lies precisely in the fact of its being articulated and integrated into a total legal system, of which it is only one component. It is the close similarity of the structural integrations of the outcry in cognate legal systems in the Indo-European speaking world which represents the primary comparative datum, the equation which permits us to make a reconstruction of the state of affairs in Indo-European. The more primitive evolutionary bias which seeks to derive the juridical outcry from a 'simple' cry for help or cry of alarm actually—and artificially—removes the outcry from its status as an integrated social fact, and as such essentially deprives it of any interest or value whatsoever. The situation is exactly the same in another area of anthropology, where Lévi-Strauss has eloquently shown that we must take marriage by exchange as the primary social fact, 'seulement un aspect d'une structure globale de réciprocité qui fait l'objet d'une appréhension immédiate et intuitive de la part de l'homme social', rather than seeking to derive it from promiscuity, consanguineous marriage, or group marriage, as did Frazer.[33]

The resultant system, then, for this aspect of the Roman law of theft at the time of the Twelve Tables includes the following features, listed by the key Latin word or phrase for the marked member of the opposition:

1. furtum
2. manifestum
3. lance licioque
4. servus
5. endoque plorato
6. intra parietes
7. nox
8. telo

The given set of yes or no (+/−) specifications of each of these features is thus a complete description of the juridical nature of any given act of theft. It represents all the legally relevant information and as such determines the appropriate sanction; it is at once descriptive and prescriptive. Jolowicz has stated (p. 177) that 'the XII Tables, like other primitive systems, are detailed and rigid; the code tries to lay down exactly what is to happen in every case, so that when the question of guilt is decided nothing is left to the judge.' In principle this is quite correct; but a structural analysis shows that the detail and rigidity, the *specificity* of the law is on a much deeper level than, for example, the fixed monetary penalties Jolowicz cites as an instance. The latter, in fact, testify to a relatively late and far advanced development.

It is possible finally to show that many of these distinctive features recur elsewhere in the system of Roman law: just as in phonology, these oppositions are the elemental structural units, the 'building blocks' of the system.

Thus *furtum manifestum/f. nec manifestum* may be put more generally as an opposition *present/absent* (*not* present): (*furtum*) *manifestum* is only a

contextual variant. Another variant of 'present' occurs in the law of procedure in the Twelve Tables. Proper 'court' procedure requires that both parties to the action be present, *ambo* praesentes (Tab. I 1, 9): the opposition must in a certain sense be neutralized. Where one of the two is not present, the case is adjudged by default to the party present, the marked member of the opposition: (I 8) *post meridiem praesenti litem addicito.*

The opposition *night/day* is only one feature of a larger system of divisions of time, different elements of which are relevant ('distinctive') in different areas of the law. The specification 'by night' recurs, as we have seen earlier, in Pliny's *noctu pavisse ac secuisse* (Tab. VIII, 9). In the law of procedure (I 7-9), we have another temporal opposition: *ante meridiem/post meridiem*. These represent the divisions of day; the limits of day—beyond which a case cannot go—are expressly defined in the law of procedure (I 9): *sol occasus suprema tempestas esto.*

The feature of status, as in all early legal systems, is of paramount importance. Both members of the opposition *servus/liber* are explicit in Tab. VIII 2, from the law of *iniuria*: *si os fregit libero, CCC, si servo CL poenam subito* (in all likelihood not the original wording). The free man is explicit in the law of Numa Pompilius (Bruns 12): *si qui hominem liberum dolo sciens morti duit, paricidas esto.* From the comparison of the latter two cases with the law of theft an interesting principle can be inferred: where the slave is the offender, as in the case of theft, he is the marked member of the opposition; but where the slave is the victim, the injured party, he is the unmarked member of the opposition, and as in the law of Numa need not be explicitly specified.

The general category of status was of course further elaborated, as we would in any case expect in any early Indo-European society. Other distinctions of status were legally relevant in different areas of the law; it is scarcely necessary to mention the legal aspects of the opposition between the sexes, or the position of an individual *in potestate* and the whole question of legal capacity. For another case, compare the opposition *adsiduus/proletarius* (both free) in the law of procedure (I 4): *absiduo vindex adsiduus esto; proletario iam civis qui volet vindex esto.* I give the text as amended by F. Wieacker, *loc. cit.*, who quite rightly reads *civis qui* for *civi quis*, since it would be the civic status of the *vindex*, not of the *proletarius* which would be juridically relevant. The structural simplicity of this legal formulation is remarkable: its author clearly saw that only the *vindex* of the *absiduus* need be specified; for the other, the unmarked number of the opposition, he lets *civis qui volet* 'anyone, so long as he is a citizen' be *vindex*. It is perhaps not too farfetched to see in this keen structural 'sense' of the early jurists the true foundations of Rome's greatest and most lasting contribution to world culture: her jurisprudence.

The feature of *outcry* is of particular interest, and indeed deserves a separate study. There are in early Roman law and in early Roman society in general an enormous number of formal, legal public outcries, each with its own particular sphere of use, and usually with its own lexical expression.

From the Twelve Tables, we may note (I 6) *rem ubi pacunt, orato*; (II 3) *cui testimonium defuerit, is tertiis diebus ob portum obvagulatum ito.* A *kalator* is mentioned in our oldest epigraphic fragment of Roman sacred law (Bruns, p. 14), though the mutilated context precludes our knowing what his function was. Outside the laws proper, we have the imaginative *flagitatio* in Catullus 42, where E. Fraenkel has so clearly shown the relation to Italic popular justice (*Kl. Beiträge* 2.121ff = *JRS* 51.49ff. [1961]). We may point out a large number of special technical uses of *nuntiare* and its compounds, each of which denotes a specific sort of legal or ritual public outcry or proclamation. Cf. *bellum denuntiare, alicui testimonium denuntiare, aves nuntiare, renuntiare* 'announce the election of', and others, which have never been studied as a group and certainly merit such an investigation. All of these public outeries in Roman culture are contextual variants of a single feature, each conditioned by its own sphere of application. In the law of theft, he who kills a thief without making an outcry (*endo plorare*) is a murderer (*paricidas*); in the law of nations, we may compare Cicero, *Rep.* 2.17: '. . . *ut omne bellum quod* denuntiatum *indictumque* non esset *id* iniustum esse *atque impium iudicaretur.*' The structural relation of the public outcry, *endo plorare* or *denuntiare* is the same in either case.

We are now in a position to look more closely at the comparative evidence: the law of theft in the early legal systems of the various Indo-European speaking peoples. It will not be possible to go as fully into these systems as we have into that of Rome; but it is proposed that the relatively brief textual citations from legal documents will be sufficient to show that to a remarkable extent the same structural features recur in the same configurations as in early Roman law. When the occasional innovations are abstracted from these various legal doctrines, we are left with a coherent system which may be regarded as common patrimony.

For Indic law, the far greater part of our information, and the totality of our 'legal' texts proper, the *smṛti*, belongs to a relatively late period, posterior to the Vedic epoch. The law as it is known to us in Indian culture has already undergone a long and properly Hindu development. Yet despite the numerous religious innovations, as a result of which Hindu law superficially resembles *ius canonicum* rather more than *ius civile*, it still clearly preserves sufficient features reflecting an earlier state of affairs to be extremely valuable as comparative legal evidence. This is particularly evident in civil and criminal law.

By the time of the 'Laws of Manu', the Mānavadharmaśāstra, the exercise of private justice has been almost completely restricted or eliminated, and the function of punishing those guilty of delicts has already devolved upon the public authority, the king. The right to slay with impunity exists only in cases of self-defense (VII 349–51). Yet clear traces of the earlier system remain, in the death penalty for the thief caught *in flagrante delicto*, and explicitly for the nocturnal housebreaker:

na hoḍhena vinā cauram ghātayed dharmiko nṛpaḥ/sahoḍhena sopakaraṇaṃ ghātayed avicārayan

(IX 270). 'A just king shall not cause a thief to be put to death, (unless taken) with the stolen goods (in his possession); him who (is taken) with the stolen goods and the implements (of burglary), he may, without hesitation, cause to be slain' (tr. Bühler).

A subsequent passage gives the further specification:

saṃdhiṃ chittvā tu ye cauryam rātrau kurvanti taskarāḥ/teṣāṃ chittvā nṛpo hastau tīkṣṇe śūle niveśayet.

(IX. 276) 'But the king shall cut off the hands of those robbers who, breaking into houses, commit thefts at night, and cause them to be impaled on a pointed stake'.

Here *rātrau* 'by night' exactly recovers Lat. *nox*; we have the same distinctive feature, with the specification of the marked member, as in Rome. The punishment of cutting off the hands is doubtless homoeopathic; one may note that the same verb is used for house-*breaking*, (*saṃdhiṃ*) *chittvā*, as for *cutting off* the hands of the malefactors, *chittvā* (*hastau*). The two verbs likewise occupy the same position in the line. We need only replace the king (*nṛpa*), the symbol of public justice, by the injured party in the historically antecedent system of private justice, to recover the Indo-European system intact. In the form of the Sanskrit directive to slay, we have an exact semantic equivalent of the Latin *iure caesus esto*: *ghātayed avicārayan*, rendered by Bühler 'he may, without hesitation, cause to be slain', could be equally well if not better translated 'he shall slay without departing from the right'.

In Hindu law as well we find the distinctive feature of enclosure. It is implicit in the technical legal expression *saṃdhiṃ chittvā* of the preceding passage from Manu, the equivalent of our 'breaking and entering'. And in the Gautamadharmaśāstra, perhaps the oldest of our Hindu legal texts, and the only one entirely in prose, we have the following passage (XII.28): *go 'gnyarthe tṛṇam edhān vīrud vanaspatīnāṃ ca puṣpāni svavad ādadīta phalāni cāparivṛtānām* 'He may take, as his own, grass for a cow, and fuel for his fire, as well as the flowers of creepers and trees and their fruit, *if they be unenclosed*' (tr. Bühler). In other words, given a minus specification of the feature 'enclosure', removal of the articles enumerated does not constitute theft. Similarly, in the law relative to trespass and property damage by domestic animals, responsibility falls on the owner or herdsman (Gautama XII 19–20). But the law further specifies (XII 21): *pathi kṣetre 'nāvṛte pālakṣetrikayoḥ* '(If the damage was done) in an unenclosed field near the road, (the responsibility falls) on the herdsman and on the owner of the field' (tr. Bühler).

For the feature of *outcry* in Hindu law, we may refer to the numerous textual citations and references in the study of W. Schulze noted above. One example may suffice, from the Rigveda (4.38.5): *enáṃ vastramáthiṃ ná tāyúm ánu krośanti kṣitáyaḥ* 'The inhabitants cry out to him as to a clothes-stealing thief'. We have here the earliest instance of the verb (*anu-*) *kruś-* which Schulze convincingly connects with OEng. *hréam* '(juridical) outcry'. For the feature of *tracking* and house-search ('Spurfolge' and

'Haussuchung'), see Schulze, *op. cit.* 168 and 188; for Pūṣan the patron deity of tracking, see section four below.

We have already seen the Greek opposition *klopḗ/harpagḗ*, 'theft'/'robbery', which corresponds exactly to the Latin *furtum/rapina*. The opposition *furtum manifestum/f. nec manifestum* is likewise attested in Greek; cf. the expression *ep'autophórōi labeîn* 'catch in the act' (a derivative of *phór* 'thief', *phōrá* 'theft').

The search for stolen goods, tracking and house-search, has its proper technical term, *phōráō*. In Greek law as well, the searcher was obliged to enter the house naked, or clad only in an undergarment. Cf. Aristophanes, *Nubes* 498–9: *gumnoùs eisiénai nomízetai. all'oukhì phōrásōn égōg'eisérkhomai.* The same proviso recurs in Plato's Laws, 954a: *gumnòs dè khitōnískon ékhōnázōstos . . . hoútō phōrân.*[34]

The distinctive feature of *status* is likewise present in Greek; the opposition *slave (doûlos)/non-slave* runs through the whole legal system, as in the institution of noxality discussed earlier.

For the opposition *night/day*, and the right to slay the nocturnal thief as an exercise of private justice, we may quote the law of Solon cited by Demosthenes, *c. Timocr.* 113, pl. 736: *ei mén tis meth'hēméran hupèr pentékonta drakhmàs kléptoi, apagōgèn pròs toùs héndek'eînai; ei dé tis núktōr hotioûn kléptoi, toûton exeînai kaì apokteînai kaì trôsai diókonta kaì apagageîn toîs héndeka, ei boúloito.*

This law is Indo-European in substance; the Solonian innovation is doubtless solely in introducing the *option* of handing over the nocturnal thief to the public authority: characteristically an early step in the extension of public authority and the concomitant restriction of the area of private justice.

In the law of Gortyna (which has nothing to say about theft) we have also the opposition *night/day* in the law of rape, where it is unknown in Attic law: (II.13–15) *ai de ka dedamnamenan ped'ameran, odelon, ai de k'en nutti, du'odelons.*[35]

In the Twelve Tables, it is unlawful to kill the thief by day unless he offers armed resistance, *nisi se telo defendat*; this clause evidently formed part of the article beginning *si nox furtum faxsit.* In Greek we have the same proviso, in the law reported by Demosthenes, *c. Aristocr.* 60, p. 639: *kaì eàn phéronta dè ágonta bíai adíkōs euthùs amunómenos kteínēi, nēpoinèi tethnánai.*

In Greek law just as in Roman law, if the feature *night* is specified as 'no', then the feature *violence* must be specified as 'yes' if the thief is to be rightly slain. Together these two exactly recover the legal system of articles VIII.12 and 13 of the Twelve Tables, and it is beyond question that the two Greek statutes simply cover two aspects of a unitary law of theft.[36]

For the remaining features of the Greek law of theft we may—pursuing a fruitful suggestion of W. Schulze, *loc. cit.* 184—examine a passage of Euripides' *Trojan Women*, 998ff. Hecuba bitterly attacks Helen, and her impassioned speech springs from a sense of legal, not merely moral outrage. The operative word appears in her conclusion (1031–2) when she implores

Menelaus to slay Helen: *n ó m o n dè taîs állaisi thès / gunaixí, thnḗiskein hḗtis àn prodôi pósin.* Hecuba has scornfully asked Helen (998ff.):

Bíai gàr paîda phēis s'ágein emón; tís Spartiatôn éisthet'? è poían boèn anōlóluxas? . . .

epeì dè Troían èlthes Argeîoi té sou kat'íkhnos . . .

This passage is impregnated with technical legal terms: *ágein* the stealing, *bía* the violence, *boḗ* the outcry, *íkhnos* the tracking. We have in these few poetic lines a specification of four juridical distinctive features. Taken in isolation, each of these terms is only a lexical item, and one common enough in Euripides. But here they are structurally interrelated and sequentially ordered to form a legal system. It is this total legal system which Euripides makes Hecuba invoke. For had Paris stolen (*ágein*) Helen by force (*bía*), had Helen made an outcry (*boḗ*), it would have been Paris who could be rightly slain (*nēpoinèi tethnánai*, supra). But it is Paris' innocence and Helen's guilt which Hecuba asserts; and the inexorable legal consequence is that Helen should be rightly slain (*thnḗiskein*).

IV. An Indo-European God of Exchange and Reciprocity?

A discussion of theft would not be complete without a reference to the patron god of thieves, Hermes-Mercury in the Greco-Roman tradition. Hermes is a complex and interesting figure, and his patronage of theft is only one aspect of a more general function; see the detailed article of Eitrem in Pauly-Wissowa *RE s.v. Hermes* (henceforth cited as Eitrem). If we were to attempt to characterize that function by a single word, we would be inclined to term him the patron god of the fundamental anthropological and sociological principle of *reciprocity*, as promulgated in Mauss' *Essai sur le don* (cf. p. 20 above).

On the one hand, he presides over the circulation of goods and wealth, of exchange: thus Hermes *Agoraîos, Empolaîos, kerdôos* (Eitrem, col. 755–6); *Mercurius nundinator, negotiator* (Dessau 3202, 3201), and the possible connection of his Latin name (via Etruscan?) with *merx*. On the other hand, he is called in an inscription (Dessau 3200) *sermonis dator*; cf. his Greek epithet *lógios*, which surely figures the exchange inherent in the speech situation, in discourse, rather than being merely derivative from the herald's strong voice (so Eitrem col. 781). It is remarkable that the characteristic actions of Hermes are all reversible, or go in two directions: he gives sleep—and takes it away; he conducts the dead from the earth to the underworld—and back again. Thus Vergil, *Aen.* 4.242–4:

tum virgam capit; hac animas ille evocat Orco/pallentis, alias sub Tartara tristia mittit,/dat somnos adimitque, et lumina morte resignat.

He is the go-between, the *mediator* between the earth and the underworld, between heaven and earth, between the sphere of the divine and the sphere of mortal men. It is this function as intermediary which is paramount in Hermes as the 'messenger of the gods', *ángelos athanátōn, kêrux theôn, Iovis qui nuntius perhibetur.* As the envoy of Zeus, Hermes is the intermediary, as it were, from up to down. But this is only one aspect of the total

notion; the direction is reversed (movement down to up) in Hermes' function as announcer of the sacrifice TO the gods, which appears in the archaic formula (with the iteration characteristic of ritual language) *spondḗ spondḗ* uttered by Hermes in Aristophanes, *Pax* 433.[37]

As the mediating figure between two points, it is not surprising to find him closely associated with roads, and protecting travelers. We have the epithets *hódios* and *enódios*, and in particular the ubiquitous herms (*hermaî*) which mark the way. Priam meeting Hermes (not recognizing him) terms him a *hodoipóros* 'wayfarer' at Ω 375. Here the opposition of directionality (up/down) is neutralized.

Hermes as the patron god of thieves may be looked upon as presiding over the circulation of wealth *in malam partem*; he is similarly *dólios* as well as *lógios* in the exchange of words. But in complete agreement with the reciprocal, reversible character of his attributes, Hermes is also *mastḗrios*, the patron of tracking: Aeschylus, *Suppl.* 920 *Hermêi megístoi prosénoi mastērtōi*. Cf. Dindorf ad loc.: 'Mercurius dicebatur *mast.*, quatenus res amissas recuperare, et ubi delitescerent inquirere credebatur. SCH.' Hermes is thus both the prince of thieves (*philētêōn órkhamos*) and the discoverer of theft (*mastḗrios*); again a reciprocal relation. Nowhere is this more clearly set forth than in the Homeric Hymn to Hermes. The episodes of the stealing of Apollo's cattle by Hermes and of the tracking of the cattle by Apollo form an antithetic couple, together recovering two aspects of the unitary function of the god Hermes to whom—not to Apollo—the hymn is composed. This symbolic representation in the sphere of myth is yet another justification for Mauss' characterization of the system of reciprocity as *un phénomène social 'total'*.

The figure of Hermes *mastḗrios* permits also a comparison further afield, with Vedic mythology. Wilhelm Schulze has pointed out (*Kl. Schriften* 188n1), in connection with tracking but without specifically comparing Hermes *mastḗrios* (noted *ibid.* 168n 3), that there is a Vedic patron divinity of tracking, Pūṣan. His function is delineated in RV 6.54; cf. line 7 *pūṣā́ gā́ ánu etu naḥ* 'let Pūṣan go after our cattle'. It is worthwhile dwelling briefly on the figures of Hermes and Pūṣan, for their similarity is quite systematic; just as Hermes, so Pūṣan incarnates the notion of exchange and reciprocity.[38]

Hermes as *agoraîos, empolaîos* presides over the circulation of wealth. So Pūṣan is *paśupā́* 'protector of wealth', (6.58.2) *ánaṣṭavedas* 'he whose property is not lost' (10.17.3),[39] as well as presiding precisely over the recovery of lost, strayed, or stolen property.

We have noted the symbolism of Hermes and the road, as *enódios*. In RV 6.53.1 Pūṣan is called *pathas pate* (voc.) 'master of the way'; we have an archaic collocation *pathas-pati-* like IE **dems-poti-*. The parallelism with Gk. *hodoi-póros*, likewise an old collocation with a locative, is noteworthy. He is implored for the protection of travelers, RV 1.42.2–3, and in general this aspect of Pūṣan is well marked in the Rigveda and later Indic tradition.

Just as the road symbolizes the notion of reciprocity, so do doors. Thus Hermes assures the protection of the threshold, doors, and even hinges; cf. his cultic epithets *propúlaios, púlios, thuraîos*, and *strophaîos* (*stróphigges* 'hinges'). Macdonell notes from the House-Sūtra literature (ŚGS 2.14.9) that in the morning and evening offerings to all gods and beings, Pūṣan receives his on the threshold of the house.

Hermes is regularly depicted in Greek literature and art as having alternatively a herald's staff (*kērukeîon*), a scepter (*skēptron* B 103), a whip for driving cattle (*mástiga phaeinḗn/boukolías Hymn Herm.* 497), or a golden wand with magical powers to put to sleep or awaken the sleeping (Ω 343–4, cf. *Hymn Herm.* 529–30):

héileto dè rhábdon, têi t'andrō̃n ómmata thélgei/hō̃n ethélei, toùs d'aûte kaì hupnóontas egeírei

Pūṣan in the Rigveda has alternatively a golden axe (*hiraṇyavāśīmattama* 1.42.6), a goad (*áṣṭrā* 6.53.9), or a similar instrument (*árā* 6.53.8 cf. Geldner *ad loc.*) which has the specific property of arousing *brahma*: *yā́m pūṣan brahmacódanīm árām bibharṣi*. Compare also his epithet *dhiyaṃjinvá* 'Gedankenwecker' at 1.89.5, 6.58.2, 10.26.4. In both the Hellenic and the Vedic deity this symbolic attribute is doubtless phallic. For Hermes this is above all certain from his most archaic representation, the herm, 'deren wichtigstes Kennzeichen das männliche Glied war' (Eitrem, col. 774). In the case of Pūṣan we may note that the verb *codayati* 'arouse' underlying the epithet *brahmacodanī* of his *ārā* 'goad' is the same as that used of the male organ in the graphic mantra 10.101.12:

kápṛn nárah kapṛthám úd dadhātana codáyata khudáta[40] *vā́jasātaye*

'Das Glied, ihr Männer, das Glied richtet auf, machet fix, stosset zu, um den Preis zugewinnen'

Exactly like Hermes, Pūṣan is the go-between, the mediator, the intermediary. His boats traverse the space between Heaven and Earth (*antárikṣe caranti*) and with them he acts as messenger of the sun (*dūtyā́m yā́si* 6.58.3), though normally the messenger proper in the Rigveda is Agni.[41] But it is Pūṣan who conducts the dead to their abode, just as Hermes does (first at *Od.* 24.1–5, of the suitors of Penelope). In 10.17.3 (the lines are addressed to the dead man): *pūṣā́ tvetáś cyāvayatu . . . sá tvaitébhyaḥ pári dadat pítṛbhyo* 'Pūṣan soll dich von hier befördern . . . Er übergäbe dich diesen Vätern' (together with Agni and Savitṛ).

We have noted the two-way character of Hermes' characteristic actions which symbolically represents his basic function of incarnating the notion of reciprocity. He gives and takes away, goes and comes: moving between in either direction, he is the link between the poles of earth and heaven, between the living and the dead, between gods and men, whether as messenger, guide, or companion. Just so Pūṣan in the final mantra of the cultic episode just quoted, 10.17.6:

prápathe pathā́m ajaniṣṭa pūṣā́ prápathe dívāḥ prápathe pṛthivyā́ḥ /ubhé abhí priyátame sadhásthe ā́ ca párā ca carati prajānán

'On the forward road of the roads hath Pūṣan been born, on the forward road of heaven, on the forward road of the earth; unto both the dearest stations, both hither and yon, goeth he, foreknowing'[42]

Hermes is the mediator, the communication link between gods and men

not only from up to down (*ággelos athanátōn*) but from down to up, in his function as sacrificer (Eitrem, col. 779) and announcer of the sacrifice. In the latter we have an exactly comparable function of Pūṣan. In the aśvamedha hymn 1.162.4 the sacrificial horse is led around the place of sacrifice, preceded by a goat identified as Pūṣan's; the goat (likewise sacrificed) has the specific function of anouncing the sacrifice to the gods:

átrā pūṣṇáḥ prathamó bhāgá eti yajñáṃ devébhyaḥ prativedáyann ajáḥ
'so geht dabei das Opferanteil des Pūṣan voran, der Bock, der den Göttern das Opfer meldet'

The goat is elsewhere an attribute of Pūṣan; his chariot is drawn by goats instead of horses, and is contrasted with Indra in 6.57.3. Whether there is a specific connection with the goat as an attribute of Hermes (along with other animals, cf. Eitrem, col. 757–9) is uncertain; but the annunciatory function is clearly common to both traditions.[43]

In the Vedic passage just quoted, the verb used for 'announcing' is the participle *prati-vedáyant-*, an iterative-causative **ɣoid-eie-* to the root *ɣeid-*. This form has an exact cognate in Old Irish *foídid* 'sends' (**ɣoid-eie-*), and the equation is the more probative for the derivational isolation of this verb in Irish, and the relative rarity of the *o*-grade iterative-causative type in Celtic in general. From this verb we have formed the agent noun *foídem* (archaic *foídïam*) 'messenger'. It is worth noting that in the oldest Irish text that we possess, the late sixth century eulogy of St. Columba, this noun occurs in the following context (LU 596): *ardon bath bá fiadat foídiam* 'he has died (on us *vel sim.*) who was the messenger of the Lord', which the later native glossator rendered as *atbath erund intí nod faidmis co ar Fiadat* 'he has died on us whom we used to send to our Lord'. It is possible to interpret this in purely Christian terms, with the earlier revelatory function (*fiadat foídam*) of the saint later rendered as an intercessory function (*intí nod faidmis co ar F.*). But the etymological connections of *foídiam* and the fact that the Irish name of the Lord itself is clearly a pre-Christian divine name or epithet (from the same root, **ɣeid-ont-* 'seeing, knowing', and cf. the dwarf *Alviss* in Norse mythology) would at least suggest the possibility that the representation of St. Columba as the 'messenger of the Lord' (*fiadat foídiam*) transposes a pre-Christian Celtic mythological figure entirely similar in function to Hermes.

There is one final and striking point of comparison between Hermes and Pūṣan. Hermes has in Greek literature the function of leading the bride to the groom, *numphagōgós* (Eitrem co. 774–5). So in the Homeric Hymn to Aphrodite, Hermes allegedly brings Aphrodite to Anchises (117ff.):

énthen m'hérpaxe khrusórrapis Argeiphóntēs . . . /Ankhíseō dé me pháske
paraì lékhesin kalécsthai/kouridíēn álokhon, soì d' aglaà tékna tekeîsthai.

The same situation is comically depicted in Aristophanes' *Pax* 706ff., where Hermes gives the bride away with the formula *íthi nun epì toútois tḕn Opṓran lámbane/gunaîka sautôi tḗnde* and then bids them raise not children but grapes (*ekpoioû sautôi bótrus*). In the Vedic figure of Pūṣan we find the same function, even more clearly delineated as bidirectional. In the

wedding-hymn 10.85 ('eine Sammlung von Hochzeitssprüchen', Geldner *ad loc.*) the spokesman for the bride's household invokes Pūṣan to carry her away, *out of the old home*: *pūṣā́ tvetó nayatu hastagṛ́hya* (26) 'Pūṣan soll dich von hinnen führen, deine Hand fassend', where we may note the close parallelism with the phraseology of the hymn cited above invoking Pūṣan to carry away the dead, *pūṣā́ tvetáś cyāvayatu*; the distinction is clearly marked in the wedding ceremony by the use of the particular verb *nayati* '(uxorem) ducit', on which see Benveniste, *Hittite et indo-européen* 33ff. But in verse 37 of the same wedding hymn, at the ceremony of the grasping of the bride's hand by the groom (*gṛbhṇā́mi te . . . hástam* 'I grasp thy hand'), it is the groom who invokes Pūṣan to carry her *into the new home*: *tā́m pūṣañ chivátamām érayasva*. Thus Pūṣan assures both the going out of the bride (from her natal household) and her coming in (to her marital household). Another instance of the latter function in the Rigveda, from an earlier book, is 9.67.10, when Pūṣan is called upon to provide the singers with maidens, i.e. from outside: *pūṣṭ́/ā́ bhakṣat kanyā̀su naḥ* 'Pūṣan verhelfe uns zu Jungfrauen'.

It is this function of the two divinities, clearly present in the figure of Hermes and more specifically described in the role of Pūṣan, which provides the conclusive proof of their basic attribute as incarnators of the principle of exchange and reciprocity. For Lévi-Strauss has shown at length in his work *Les structures élémentaires de la parenté* that perhaps the fundamental principle regulating human society is the circulation of women, according to the system of exchange and reciprocity: women are given out of the family in order that others come in in return—and vice versa.

Hermes and Pūṣan thus preside over both the physiological and the economic well-being of society, by assuring both the circulation of women and the circulation of wealth, through the notion of exchange. Both divinities symbolize the relation of reciprocity, bidirectionality, by their association with the road; both are the mediators, who assure the communication in either direction between gods and men, heaven and earth, or the living and the dead. Finally Hermes assures likewise the circulation of speech, communication proper; this function is not associated with Pūṣan, but perhaps only because in the Rigveda there a special goddess *Vāc*, the divinized 'Speech'. As Hermes gave speech to men (*sermonis dator*), so did Vāc: 8.100.10 *yad vā́g vádanty avicetanā́ni . . . niṣasā́da* 'Als die sprechende Rede . . . sich bei den unvernünftigen niederliess'. In the hymn to Vāc 10.125 the goddess vaunts her annunciatory and mediatory function in terms that strikingly recall the descriptions of Pūṣan: *ahám dyā́vāpṛthivī́ ā́ viveśa* (6) 'ich durchdringe Himmel und Erde', cf. 10.17.6 cited above. Hence it is possible that the figure of Vāc embodies a function that was once another aspect of Pūṣan; the transparent name would argue for this as well.

As mentioned above, Wilhelm Schulze noted at two points in the same article Hermes as *mastḗrios* and Pūṣan as 'Gott der Spurfolge', yet forebore to compare the two figures directly, as we have done. Perhaps this is to be explained by Schulze's etymological equation of *Pūṣan* with the Greek god

Pán, especially in the Arcadian form *Paōn*, *Kleine Schriften* 217. But in Greek tradition Hermes is the father of Pan (*Hermeíao gónos* Hymn. Hom. Pan 1). In the archaic Arcadian figures of Pan transformed into Hermes = Pūṣan, we have to deal with the reflexes of an Indo-European divinity reconstructible both in name and in function. A certain haziness in the form is in a divine name to be expected, because of the factor of tabu-deformation: Schulze noted the relation between *uṣas* and *ēōs*, Dor. *awōs*, and we may further cite the Lithuanian deity *Perkūnas* with long *ū*, beside the Slavic *Perunъ* < **per(k)aunos*, with the dipthong appearing in Gk. *keraunós* (from metathesized **ker(p)aunos*).

Notes

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[2] Die Quellen des römischen Rechts (*Öster. Akad. Wiss., Denkschriften* Bd. 2) 10 (Wien, 1963). The italics are mine.

[3] R. von Ihering, *Vorgeschichte der Indoeuropäer* 357 (Leipzig, 1894 [from his Nachlass]): 'Versetzen wir uns im Geist in die Zeit zurück, als die Arier, nachdem die Auswanderungsfrage in Princip entschieden war, die genaueren Modalitäten der Auswanderung berieten. Wann soll man aufbrechen? Im Winter? da ist es noch zu kalt, wir wissen, dass auch die Arier den Winter schwer empfanden. Im Sommer (unserm Sommer und Herbst)? da ist es zu heiss. So erübrigt sich nichts als der Frühling, da ist es weder zu heiss, noch zu kalt, es herrscht eine milde Witterung, welche das Marschieren ohne alle Beschwerde möglich macht. Im Frühling und zwar noch der römischen Tradition genauer gesprochen: am ersten März haben unsere Vorfahren ihre Heimat verlassen.'

[4] So C. W. Westrup, Recherches sur les formes antiques de mariage dans l'ancien droit romain (*KDVS. hist.-fil. medd.* 30.1) p. 69 n3 (Copenhagen, 1943); Th. Mayer-Maly, *Pauly-Wissowa, RE*, 2. Reihe 17.1132.

[5] Cf. E. Hermann, Die Eheformen der Urindogermanen 46–8 (*Nachrichten Gesell. Wiss. Göttingen* N.F. 1.2 [1934]). *Raubehe* is certainly not confined to the Indo-European tradition alone. For the practice in present-day Turkey, for example, see the study of J. Cuisenier in *L'homme* 4.80–1 (1964), with the delightful illustration from a contemporary text. But it should be noted that the social status of *Raubehe* and of those who practice it is fundamentally different in Turkish and the given early Indo-European society; cf. note 7 below. The structural integration of the same institution is thus not parallel in the two cultures, and it is that which would have to be the primary datum for any application of, or evaluation of the results of, the comparative method.

[6] *Cáin Lánamna* §§4, 34, in R. Thurneysen, *Studies in Early Irish Law* (Dublin, 1936).

[7] J. Friedrich, *Die hethitischen Gesetze* I §37 (Leiden, 1959). I have adopted the reading of the oldest manuscript A, written in the Old Hittite ductus; see H. G. Güterbock, JCS 15.62–78 (1961). Friedrich may be correct in suggesting that the formula implies that the abductor(s) became outlawed. In any case, a legal interpretation of this passage is to be preferred to V. V. Ivanov's recent suggestion that it is a reminiscence of totemic lycanthropy, *Xettskij jazyk* 23 (Moscow, 1963). Marriage by abduction is particularly associated with the *kṣatriyas*, the warrior class in Hindu law; Manu III 24 *rākṣaṣam kṣatriyasya ekam* 'the *rākṣasa* (rite) belongs alone to the *kṣatriya*'. The association of the wolf with warrior is common in archaic Irish; cf. the epithets *caínḟáel* 'fair wolf' in Meyer, *Aelt. ir. Dicht.* 2.23, *delb canann* 'form of a wolf-cub', Meyer, *Bruchstücke* 21. The Hittite URBARRA-*aš* is thus directly in accord with this tradition.

[8] So Friedrich, after Hrozny, *Code hittite* §37, p. 28n6; but more likely dittographic *appan⟨an⟩da*, cf. EGIR-*anda* in B.

[9] The text is that of M. David and H. L. W. Nelson. (Leiden, 1954).

[10] The restoration of *usus* here is certain, cf. David and Nelson's commentary *ad loc.*

[11] *Lectures on the Early History of Institutions* 315–16 (London, 1875).

[12] The emphasis is mine.

[13] E. Benveniste, *Noms d'agent et noms d'action en indo-européen* 97 (Paris, 1948). Note the contrast between the 'subjective', 'internal' *-tu-* in *ūsus*, and the 'objective', 'external' *-ti-* (or its equivalent) in *ūsūcapiō*, *ūsurpatiō*.

[14] Examples from both literary and scientific contemporary English may be found in K. Vonnegut, Jr., *God Bless You, Mr. Rosewater, or Pearls before Swine*, Chapter 2 (New York, 1965), and W. P. Lehmann, *Historical Linguistics* 101 (New York, 1962).

[15] Probably to be corrected to *noxiam*. Cf. Gaius, *Dig.* 47.9.9 *noxiam sarcire*, where the original *noxia* of F was 'corrected' to *noxa* by F^b.

[16] *L'année sociologique* 3e série (1948–49), 7–20.

[17] Cf. the formula *furto noxaque solutus* in the transfer of slaves, which must refer directly to the article *si servus furtum faxit noxiamve noxit* of the Twelve Tables.

[18] Benveniste points out specifically (pp. 19–20) that 'Chez Homère, *alphánō* signifie certes "procurer un gain", mais ce sens est lié à une situation bien définie; le gain en question est celui qu'un captif rapporte à celui qui le vend." Further, 'La "valeur" se caractérise, dans son expression ancienne, comme une 'valeur d'échange' au sens le plus matériel. C'est la valeur d'échange que possède un corps humain qu'on livre pour un certain prix.' It is this fact which completely confirms the etymology of Old Irish *cimbid*, g. *cimbetho* (*i*-stem) 'captive': a Celtic **kṃb-i-ati-* to the root of Gallo-Latin *cambio*, *cambiāre* 'exchange'. The importance of the notion of ransom and exchange in early Celtic society is likewise shown in the Middle Welsh legal technical term *lleydyr gwerth* 'a thief that could redeem himself by paying' (T. Lewis, *A Glossary of Medieval Welsh Law* s.v. *guerth*) in the *Llyfr Blegywryd* 39.8, 122.15 (eds. Stephen J. Williams and J. Enoch Powell, Caerdydd, 1961). Cf. also D. A. Binchy's contribution to this conference on the role of the personal surety.

[19] H. Pedersen, *Hittitisch u. d. anderen indoeur. Spr.* 145; J. Friedrich, Heth. Wb. 187; E. H. Sturtevant, *Comp. Gram of the Hittite lang*2 127; Walde-Hofmann, *Lat. etym. Wb.* s.v. *sarciō*; J. Pokorny, *Idg. etym Wb.* s.v. **serk-*; Hj. Frisk, *Griech. etym. Wb.* s.v. *hérkos*. Vjač. Vs. Ivanov, *Obščeindoevropejskaja, praslavjanskaja, i anatolijskaja jazykovye sistemy* 177 (Moskva, 1965), raises the further possibility of connecting *šarnikzi* with Hitt. *šark-* 'rise', *šer*, *šarra* 'up', as well as with *sarcīre*. (His *sparsī* is presumably a lapsus for *sarzī*, cf. the index, p. 296). But the semantics seem far-fetched. Hitt. *šark-* is synchronically unsegmentable, cf. the old adjectival derivative *šark-u-* 'mighty < lofty'; the derivational relation and the semantic field are identical to those of the Hittite verb *park-* 'rise (mid.)' to *park-u-* 'lofty, high'. On these archaic deverbative adjectives in *-u-* (which are basic to the formation of the Hittite factitive-causative verbal suffix *-n-u-*) cf. also The origin of the *f*-future, *Ériu* 20 (1966).

[20] In Hittite legal language the genitive of the word for 'theft', *tayazil-aš*, is used both as subject and object of a verb, in the meanings 'he of the theft = the thief', 'it of the theft = the compensation' (I §73, 94, 95, of Friedrich *ad loc.*). In my opinion this considerably strengthens Thurneysen's brilliant etymology of Latin *reus*, indifferently 'plaintiff' or 'defendant' at the time of the Twelve Tables, as the old genitive of *rēs*: 'der des Prozesses' (*IF* 14. 131 [1903]). Szemerényi's alternative explanation of

reus, *KZ* 73.179–81 (1956), I find less convincing. The construction with the genitive is probably Indo-European in date, and doubtless underlies such developments as Greek *tà tôn polémōn* (Thuc. 2.11.4), formally posterior to the creation of a definite article. The defining genitive in *urbs Romae*, *Iliou pólis*, or *hérkos odóntōn* ('the barrier—that of the teeth') is likewise to be so explained. A similar construction exists in Akkadian with *ša* + gen. of the infinitive: Hammurabi §133a *ina bītišu ša akālim ibaššī* 'in his house "such of eating" (subject) existed; §8.67 *ša nadānim la išū* 'such of paying" (object) he does not have'. But while this might have been a factor in the maintenance of the construction in Hittite, it cannot explain its genesis. One may note also that while the defining genitive exists also in Akkadian (*māt šumerim* 'land of Sumer') the 'such of' construction is not found with the genitive without *ša*. Hence the function of the genitive is not exactly comparable in the two families. Cf. H. Kronasser, *Etym. d. Heth. Spr.* §171–2, but who argues unconvincingly for Akkadian origin, and in my opinion lumps together wholly different Hittite constructions.

[21] The archaic construction of A with possessive pronoun suffixed to the preverb, *šer-šit* (*-wa*) *šarnikzi*, is particularly noteworthy, beside the more 'modern' preverb + enclitic pronominal dative *šer* (*-wa*)*-ši šarnikzi* in B. The importance of the former type for Indo-European syntax cannot be overestimated; it is now fully exploited in Vjač. Vs. Ivanov, *Obščeindoevropejskaja, praslavjanskaja, i anatolijskaja jazykovye sistemy* 194–227 (Moskva, 1965).

[22] I have noted in *Celtica* 6.230 n.1 (1963) the striking parallel in legal phraseology between Hitt. *mekki/tepu-še išḫiyanzi* with Old Irish *naiscid . . . for nech* 'binds (an obligation) on someone'; cf. also Latin *nexum*, *obligātiō*.

[23] Ed. Götze, *Kleinas. Forsch.* 1.161ff. (1929).

[24] Thus correct Friedrich, Heth. Wb., s.v. *šarnikzi*. Similarly we have *mān BEL-ŠU šer UL šarnikzi* in the treaty fragment KUB VIII 81 (III 3, 5) edited by Petschow (*loc. cit.*). When *šarnikzi* occurs without the preverb, as in § 95 and § 99 of the Code, or in the texts edited by Petschow, it always resumes an occurrence with preverb in a preceding clause or sentence. This construction is Indo-European in date; see in greater detail my study in *Harv. Stud. in Class. Phil.* 71.115–9 (1966).

[25] For a discussion of the question in the literature before 1959, see Friedrich, Heth. *Gesetze* 88–90; later references in Heth. *Wb. Ergänzunsheft* 2 (1961) s.v. *parn-*. Add E. A. Menabde's study in *Peredneaziatskij Sbornik* p. 22n 30; Menabde's interpretation is very similar—though for different reasons—to that suggested here.

[26] This is not to say that *sarcīre*/*šarnikzi* represent the only Indo-European expression for the notion. We have the root of Gk. *tinō*, *poinḗ*, Skt. *cáyate*, Av. *čikayat* 'he shall atone' (cf. *račšam čikayat*, virtually identical to *noxiam sarcire*); Lith. *káina*; OCS *cěna* and *kajati sę*; and OIr. *cin* 'liability' < **kʷinut-s*. In the last the identity of **kʷinu-(t-)* with Gk. *tinu*-makes it evident that we have the direct suffixation of-*t*-onto the present stem with suffix *-nu*. Exactly the same applies to Hitt. *šarnikzel*, where *-zel* < **-tēl* (cf. Lat. *-tēla*) has been added directly to the present stem with nasal infix *šar-ni-k-*. This makes it most likely that Celtic as well once had a verb **kʷinu-ti* 'pays compensation, atones, discharges liability'. Hence we have a large Eastern area with **kʷei-* (Armenian alone not being represented), together with (Goidelic) Celtic—but not Italic, n.b.

[27] R. Haase, *Einführung in das Studium keilschriftlicher Rechtsquellen* (Wiesbaden, 1965).

[28] Although the Laws represent an idealized conception, and as such are not direct evidence, it is still less than credible that Plato would have invented out of whole cloth a system of noxality identical with that of Rome and Hattušaš alike.

[29] E. Norden, *Aus altrömischen Priesterbüchern* 254ff. (Lund, 1939).

[30] Cf. Jolowicz, *An Historical Introduction to the Study of Roman Law*[3] 139ff. (Cambridge, 1965).

[31] The opposition *manifest theft/not manifest theft* is clear in the eleventh-century *Russian Law*; as in Roman law, the thief who is not caught in the act is subject to restitution and fine, and contrary to the manifest thief, may not be executed. We have

in the older short version of the Russkaja Pravda, in the Academy manuscript ed. B. D. Grekov (Moscow, 1940):

§ 13. *ašče poimetь kto čjuzъ konь, ljubo oružije, ljubo portъ, a poznajetь vъ svojemъ miru, to vzjati jemu svoje, a* 3 *grivně za obidu*

§ 14. *ašče poznajetь kto, ne emletь jego, to ne rci jemu 'moje', nь rci jemu tako: 'poidi na svodъ gdě jesi vzjalъ' ili ne poidetь, to poručnika za piatь dnii*

'If anyone takes another's horse, or weapon, or clothes, and the owner identifies the object within his township, he receives it back and 3 *grivně* for the offense'

'If the owner identifies his property outside of his town he must not seize it outright; do not tell the man who holds the property "this is mine," but tell him thus: "come for confrontment to the place where you got it"; and if he does not come immediately he must produce two bails to guarantee that he will come within five days.' (tr. G. Vernadsky, *Medieval Russian Laws* (New York, 1947).

[32] See in general the study of E. Weiss, *'lance et licio'*, *ZSS* 43.455–65. But in the interpretation of *licium* as 'tether, rope' rather than the traditional 'loincloth', I follow F. Wieacker in his excellent study, Zwölftafelprobleme, *RIDI* n.s. 3.459–91 (1956). A 'tether' would accord more with the apparent meaning of the rare word *licium* in other contexts; the meaning 'loincloth' is a rationalization of the classical Roman jurists, who dimly recalled the proviso of nakedness, but for whom the ritual house-search itself had already long since fallen into desuetude.

[33] Cf. *Les structures élémentaires de la parenté* 177 (Paris, 1949).

[34] For the institutions of tracking (Russ. *sled*) and house-search (Russ. *obysk v dome*) in Slavic, see the old study of H. Jireček, *Über Eigentumsverletzungen und deren Rechtsfolgen nach dem altböhmischen Rechte* (Vienna, 1855). Our earliest detailed information would appear to be the Byelorussian *Statut velikoyo knjažestva litovskogo* of 1529 (ed. with Russian translation by K. I. Jablonskis [Minsk, 1960]), where the technical term for house-searching is *tresti dom*. Jireček states that the searcher must remove his outer garment, and this Slavic proviso of quasi-nakedness, which would accord very nicely with Greek, Roman, and Germanic practice, has been repeated in studies of historical jurisprudence. Unfortunately, the Slavic law texts themselves do not mention any such proviso that I have been able to discover; but it may well appear in folkloristic texts.

[35] See the edition of Bücheler and Zitelmann, *Rhein. Mus.* 40, Ergänzungsheft (1885), with the latter's juridical commentary (p. 102).

[36] These features are likewise distinctive in Slavic law in the case of manifest theft. The relevant articles in the short version of the Russkaja Pravda are as follows: § 38 *ašče ubьjutь tatja na svojemъ dvorě, ljubo u klěti ili u xlěva, to taji ubitъ; ašče li do světa deržatъ, to vesti jego na knjažь dvorъ; a ože li ubьjutь, a ljudi budutь viděli svjazanъ, to platiti v nemъ*. 'If they kill a thief in their own yard, or at the barn, or at the stable, he is [rightly] killed; but if they hold him until daylight, they have to bring him to the prince's court; and in case they hold him until daylight and then kill him, and people have seen him bound [before he was killed], they have to pay for him'. (tr. Vernadsky). The passage does, however, bear a certain resemblance to the Mosaic law (Exodus 22.2–3), as noted by V. O. Ključevskij in his discussion of the Russkaja Pravda, *Kurs russkoj istorii*, čast' 1, lekcija 13 (*Sočinenija* 1.210 [Moskva, 1956]), and the possibility of diffusion cannot be ignored. § 21 *aže ubijutь ogniščanina u klěti, ili u konja, ili u govjada, ili u korovьjé tatьby, to ubiti vъ psa město*. 'And if, while stealing cows, they murder the bailiff near a barn, or near a horse[stable] or a cow[shed], [the one who murders the bailiff] is to be killed like a dog' (tr. Vernadsky).

In both articles we have the feature of enclosure, the equivalent of the Latin *inter parietes*: *na svojemъ dvorě* 'in their own yard', *u klěti* 'at or near the barn'. In article 38 the opposition *night/day* is clearly specified by the phrase *do světa* 'until daylight'. And finally, the feature of violence is specified in article 21. In Slavic law the provisions thus are virtually identical with the early Roman and Greek law of manifest theft: the nocturnal thief caught in the act may be slain with impunity; the diurnal thief only if he further commits murder.

The Russian *aščе ubьjutь tatja . . . to toji ubitь* is remarkably similar to the Latin *si im occisit, iure caesus esto*. Have we to deal with a reminiscence of Indo-European phraseology? On the archaic absence of the preverb in *caesus* = *occīsus* see the forthcoming paper mentioned in note 20 above, with the literature cited. Old Russian *to* in this passage (and commonly elsewhere in the Russkaja Pravda) is a sentence connective, cognate with Old Hittite *ta*, and continuing intact an archaic Indo-European syntactic feature; cf. Ivanov, *Obščeidoevr. . . . sistemy* 188–9.

[37] For the notion of *mediation* and the term or figure which provides for the *communication* between heaven and earth, as well as for the notion of directionality and the opposition *up-down*, cf. Lévi-Strauss, *Le cru et le cuit* 72, 123–4, 141–5, 171, et *passim*. For such oppositions as heaven-earth, earth-underworld, divine-mortal, see also the treatment in Ivanov-Toporov, op. cit. (p. 335 above).

[38] For a concise description of the functions and attributes of Pūṣan, with ample textual references, see Macdonnell, *Vedic Mythology* 35-7; cf. also Hillebrandt, *Vedische Mythologie* (Kleine Ausgabe) 111–115.

[39] On *paśu* 'wealth' *cf.* Benveniste's contribution in the present volume. Here the earlier *ánaśtavedas* (Bk. 6) provides the interpretation of the later *ánaśtapaśu* (Bk. 10), despite the *bhúvanasya gopáḥ* 'herdsman of the world' which follows the latter.

[40] Note the 'expressive' value of the RV hapax *khudáti* here, phonetically and morphologically a rhyme-word to *tudáti*, in connection with the problem of the Indo-European voiceless aspirates and the well-known views of Meillet.

[41] For other similarities between Hermes and Agni cf. Eitrem, col. 778–9.

[42] Whitney's translation at AV 7.9.1 (Harv. Orient. Ser., vol. 7).

[43] A type of European snipe (scolopax gallinago) is called *Himmelsziege* in German (dial. *Himmelsgeiss*), and in the Baltic lands Lith. *dangaus ožys* 'heaven's goat', *dievo ožys* 'god's goat', and the more striking *Perkuno ožys* 'Perkunas' goat'. Likewise Finn. *taivaanvuohi* 'heaven's goat', and Karel. Finn. *Pyhän Iljan vuohi* 'die Ziege des heiligen Ilja (I. als Bezeichnung des Donners); cf. Perkunas. According to the *Handwörterbuch des deutschen Aberglaubens*, s.v. *Himmelsziege*, this bird is connected with mythology, and its flight announces a coming storm. But the similarity of Pūṣan's goat, who announces the sacrifice, may be mere coincidence.

Celtic Suretyship, A Fossilized Indo-European Institution?

by D. A. Binchy

The very title of this paper is bound to evoke controversy. Legal historians, in particular historians of Roman law, tend to fight shy of the 'comparative' method; indeed their attitude toward it recalls that of the older school of 'classical philologists,' from whom I learned Greek and Latin, toward comparative linguistics. To quite a number of Romanists the adjective 'Indo-European' applied to law and institutions is almost a dirty word. I readily admit that there are genuine reasons for this mistrust: laws and institutions cannot be affiliated to a common ancestor with anything like the same certainty as languages, and the mere fact that the same legal rule is found among most or all of the Indo-European nations does not necessarily prove common origin. Yet, when every allowance has been made for this uncertainty, there is to my mind ample justification for the tentative conclusion reached by one of the greatest of modern Romanists, Leopold Wenger:

> Gewisse Rechtssätze lassen sich als indogermanisches gemeinsames Erbgut ansprechen, das alle oder einige arische Tochtervölker aus einer gemeinsamen Vorzeit in ihre nationale geschichtliche Sonderentwicklung mitgebracht haben.[1]

Another objection from quite a different angle may be urged against my title. Suretyship is an almost universal feature of early society. In 1964, for example, the Société Jean Bodin chose for the theme of its two international congresses at Vienna 'personal securities (*les sécurités personelles*)' in ancient legal systems; papers were submitted on suretyship in Babylon and Assyria, Israel and Japan, China and Indonesia, as well as in Greece, Rome, and the Germanic countries. Faced with such far-reaching distribution, can one safely assume that suretyship in the 'Indo-European' systems is 'gemeinsames Erbgut'? May it not have been evolved independently in each system in accordance with Toynbee's formula of 'challenge and response'—the same challenge evoking a substantially similar response in all societies, Indo-European and non-Indo-European alike? This explanation must always be considered possible, for I know of no way of disproving it. There is, for example, no inherited word for suretyship to buttress the argument that the institution was already in existence during the period of Indo-European unity; the correspondence between Lat. *uas*