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Author(s): Donald R. Kelley

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Gaius Noster:
Substructures of Western Social Thought

DONALD R. KELLEY

“tu regere imperio populos, Romane, memento . . .”¹

GAIUS, THE MOST INFLUENTIAL OF CLASSICAL JURISTS, is apparently a modern discovery. The dramatic story of his resurrection has often been told. In 1816 the historian Barthold Georg Niebuhr came across a manuscript in Verona, a text from Saint Jerome written over a much earlier work. He reported this palimpsest (at some points *ter scriptus*, a double palimpsest) to his friend Friedrich Karl von Savigny, the greatest legal scholar of the age and the emerging leader of the so-called Historical School of Law. Savigny immediately recognized it as the work of the second-century jurist Gaius, otherwise preserved only in fragmentary form in that great sixth-century anthology, the *Digest of Justinian*. “Let us hope that we can decipher more of Gaius in these pages,” he wrote to Niebuhr. (So it fortunately turned out, for over eleven-twelfths of the *Institutes of Civil Law* were recovered with the help of this manuscript.) “This will surely give new life to our jurist,” Savigny predicted.² This book, the only nearly complete pre-Justinianian text, has indeed had a profound impact upon Roman legal history and scholarship since its publication in 1820.

Yet in a deeper sense Gaius had never really been lost to view. Despite the elementary and defective form in which his work was transmitted, the structure of his *Institutes* can be traced in the thought of many generations not only of jurists but also of historians and of political and social philosophers. Whether consisting of notes by Gaius himself or by a student (the same sort of debate that has raged around the works of Aristotle), the book became more influential than those of more authoritative jurists like Ulpian and Pomponius (who, unlike Gaius, possessed the right to interpret the law, the *jus respondendi*). Distilling, simplifying, and organizing the resources of ancient legal

As so often before, I must express gratitude to friends and colleagues at the Institute for Advanced Study for sympathetic stimulation and, for material support, to the National Endowment for the Humanities.

¹ Vergil, *Aeneid*, 6. 851. Also see note 85, below.

² Savigny to Niebuhr, December 5, 1816, in A. Stoll, *Karl Friedrich von Savigny*, 2 (Berlin, 1929): no. 321. Also see Savigny to Eduard Schrader, July 16, 1817, in *ibid.*, no. 33: “Das muss ein neues Leben unter unseren Juristen geben!”

wisdom, Gaius became the mentor not only of Rome but also of Byzantium and Europe. He was “the true architect of Justinian’s collection,” his most recent commentator has told us;³ he was the model for many later constructions as well, including national codes like the *Siete Partidas* and the *Code Napoléon*, legal treatises like Antoine Loisel’s *Institutes of Customary Law*, Savigny’s own *System of Modern Roman Law*, and a variety of more tangential philosophical ventures. Gaius’ pedagogical role has been almost as various and substantial as that of Aristotle. To Justinian he was “Noster Gaius,” and so he has remained for centuries to many others, including Savigny. He was, so to say, “our teacher.”

“Gaianism” is not a conventional term, but in view of his role perhaps it should be. Many lesser authors—jurists as well as philosophers—have engendered eponymous “isms” with inferior claims, while Gaius formulated (if he did not create) one of the most distinctive and enduring systems of thought in Western history. It is not too much to say that Gaius established a dominant archetype of social thought, a more practical and human paradigm to rival the metaphysical structure of Aristotelianism.⁴ Though by intent a method of teaching law, his book suggested an epistemology, a potentially “scientific” method and various guiding principles for the systematic study of society and culture. His work exhibits, it seems to me, the fundamental kinship between the old science of jurisprudence (*legitima, legalis, or civilis scientia*, as jurists liked to call it) and the modern science of society.

In recent times, however, the Gaian tradition has been virtually unappreciated, and most likely unperceived, by historians of philosophy and of culture in general. What is the reason for this? Why has such neglect fallen on Gaius’ *Institutes* and not, for instance, on Cicero’s relatively vacuous *De Legibus*? One answer is surely that the study of law, even in Savigny’s time, has diverged from history, literature, philosophy, and other fields with which it formerly had so many vital connections. A more important answer, perhaps, is that the significance of Gaianism—even for those disciplines apparently closest to jurisprudence, such as political and social philosophy—cannot be perceived merely from the literal and legalistic surface of the text. To appreciate this significance we must try to grasp the underlying meaning of the text by deciphering another—a historical and conceptual sort of—palimpsest. Not in any sense, however, should this approach be tried through speculative interpretation or what textual critics used to call “divination.” Rather, we should proceed by trying to assess some of the implications that have in fact been

³ A. M. Honoré, *Gaius* (Oxford, 1962), 128. In general, see H. Wagner, *Studien zur allgemeinen Rechtslehre des Gaius* (Zutphen, 1978); and Pauly-Wissowa. RE 21, pt. 1 (1951): 286. The secondary (and tertiary) literature on Gaius and his text is enormous. The text, for example, is the subject of a periodical, *Gaius Studien*, begun in 1968, edited by R. G. Böhm, and published out of Freiburg. Here, as elsewhere, I will not attempt to provide bibliographical references on law and legal history, except as they bear upon relevant questions of social thought and, even then, only selectively in terms of the argument.

⁴ For the standard study, see F. X. Affolter, *Das römische Institutionen-System* (Berlin, 1897). Also see Helmut Coing, *Juristische Methodenlehre* (Berlin, 1972); and H. Jolowicz, *Roman Foundations of Modern Law* (Oxford, 1957), 61–81. For the most recent survey with an excellent bibliography, see G. Fassò, *Storia della filosofia del diritto*, 3 vols. (Bologna, 1966–70).

drawn out, some of the transformations that historically have been attempted: the aim is not to read between the lines of Gaius but, instead, to survey the career of Gaianism. The subject of these remarks is not *ille* but *noster* Gaius.

OF THE JURISCONSULT GAIUS LITTLE IS KNOWN, not even his full name, and his doctrinal background is not clear. When he began to teach and to assemble his book, there were already two schools of legal thought in Rome. One was the conservative and republican "Proclian," the other the imperial-minded "Sabinian." It may or may not be significant that Gaius belonged to the latter, more innovative group. Whatever its provenance, the power of Gaianism derives in general from three distinguishing features. The first is his basically historical approach, displayed most prominently in the fragment heading the famous second title of the *Digest*: "On the Origin of Law."⁵ His historical orientation is, however, most concretely evident in the substance of the *Institutes*, which constitutes a kind of ordered cornucopia of Roman legal wisdom. The second is his dialectical method, which generated essential distinctions, divisions, and methods of interpretation. The last, and the most important, is the celebrated tripartite arrangement of social categories, a sequence of rubrics that entail not only moral priorities and a means of ordering reality but also a characteristic mode of perceiving and construing the world. What Gaianism suggests is not quite a doctrine (on the analogy, say, of Calvinism) but rather a methodological system (on the analogy of sixteenth-century "Ramism," which accommodated Calvinism, yet was distinct from it), a framework for a *Weltanschauung* encompassing natural as well as social experience.

Although never satisfactorily explained, the Gaian triad, set forth under the rubric *De juris divisione*, has fascinated scholars for centuries. Down to the present day it has enjoyed, if not self-evident rationality, at least extraordinary authority in some circles.⁶ According to this anthropocentric, secular trinity, judicial and pedagogical cognizance had to be taken first of persons (*de personis*), second of things (*de rebus*), and last of actions (*de actionibus*): (1) "personality"—the *sine qua non*, so to speak—including degree of "liberty," kinship, citizenship, and other social relations;⁷ (2) the "real" world, though for Gaius *res* could be intangible (*incorporales*) as well as tangible; and (3) the relations between and among subjects and objects—that is, "actions in a general sense, themselves divided reflexively into "personal" and "real" types. This presumably exhaustive classification represents, in effect, one enduring expression of the metaphysical foundations of social thought.

⁵ *Digest*, 1. 2. 1: "*Gaius libro primo ad legem duodecim tabularum*: Facturus legum vetustarum interpretationem necessario prius ab urbis initiis repetendum existimavi. . . ."

⁶ *Digest*, 1. 5. 3; and Gaius, *Institutiones*, 1. 8, in J. Baviera, ed., *Fontes Iuris Romani Antejustiniani* (Florence, 1940): "Omne autem ius quo utimur vel ad personas pertinet vel ad res vel ad actiones."

⁷ In general, see Fritz Schulz, *Principles of Roman Law* (Oxford, 1936), 42, 140-63. And, in particular, see P. Duff, *Personality in Roman Private Law* (Cambridge, 1938); Paolo Zatti, *Persona giuridica e soggettività* (Padua, 1975); and Carlo Maiorca, *La Cosa in senso giuridico* (Turin, 1937). Also see Adolf Berger's standard *Encyclopaedic Dictionary of Roman Law* (Philadelphia, 1953).

This distinctive form makes it possible to isolate a Gaian tradition, even though Gaius himself had no claim to originality or profundity. For underneath the Gaian text there are still older formulations. In fact, Gaius was not the first systematizer of Roman legal science. This honor seems to belong to Quintus Mucius Scaevola, a first-century B.C. jurist who, according to Fritz Schulz, created "the first dialectical system of law in the grand manner." The Mucian scheme was quadripartite, resting upon the divisions of inheritance law, persons, things, and obligations; but it bore obvious affinities to that of Gaius. As late as the second century Scaevola's work was the subject of commentaries by Pomponius and by Gaius himself. Thereafter, it disappeared and was unknown to Justinian's editors. "Well may we complain of a fate which has preserved so utterly worthless a work as Cicero's *De Legibus*," Schulz has written with characteristic assertiveness, "but which has allowed the book which laid the foundations of not merely of Roman, but of European, jurisprudence to perish."⁸ Paleographical fortune more than intellectual merit, then, leads us to celebrate a Gaian instead of a Mucian tradition, derivative and perhaps even degenerate as it might be in terms of Roman legal history.

What more fundamentally qualifies Gaian claims, of course, is the manifold indebtedness of Roman legal science in general to Greek philosophy and, more particularly, to Greek rhetoric. No one places much stock in the story (told by Pomponius and included in the *Digest*—paired, incidentally, with Gaius' celebration of history) about the visit of the *Decemviri* to Athens before the establishment of the law of the Twelve Tables, but the tale does nicely symbolize the cultural contribution of Greek thought. Although the channels of transmission are obscure, Platonic ideals, Aristotelian categories, sophistic *topoi*, and especially dialectical method constitute the original level, unfortunately illegible in detail, of the Gaian palimpsest. It was Greek conceptualization, especially the theory of interpretation so central to jurisprudence, that transformed the practice and teaching of Roman law into a Hellenistic "science" in the classical (as well as medieval and, before the present century, modern) sense of the term.⁹

More specific Greek influence can be detected at certain crucial points. Among the most important are the practice of making divisions (*divisio*, *differentia*, or, especially among medieval commentators, *distinctio*, corresponding to the Aristotelian *διαίρεσις*), the setting down of initial definitions (*definitio* or *regula*, corresponding to *ὅροι* or *κανόνες*), and a number of rhetorical topics, such as the contrast between the letter and the spirit, or meaning, of a statement (*verba* and *voluntas* or *ratio*). Indeed, many of the basic terms of civil law are simply translations from Greek terminology, such as the distinction between natural and civil law (*jus naturale* and *civile*, corresponding to

⁸ Schulz, *History of Roman Legal Science* (Oxford, 1953), 94. Also see G. Scherillo, "Il civilistico pre-Gaiano," in *Studi in onore di Vincenzo Arangio-Ruiz*, 3 (Naples, 1953): 445-67. On "abstraction," see Schulz, *Principles of Roman Law*, 53-65.

⁹ Schulz, *History of Roman Legal Science*, 62-69. In general, see the monumental work of Erich Wolf, *Griechisches Rechtsdenken*, 6 vols. (Frankfurt, 1950-).

φύσει δίκαιον and θέσει or νόμῳ δίκαιον), between the law of nations and civil law (*jus gentium* and *civile*, corresponding to κοινὸν δίκαιον and πολιτικὸν δίκαιον), and between written and unwritten law (*jus scriptum* and *non scriptum*, νόμος γεγραμμένος and νόμος ἄγραφος). So it was, too, with the idea of equity (*aequitas*, ἐπιείκεια) and the method of disputation (*disputatio in utramque partem*, δισσοὶ λόγοι).¹⁰

If Gaianism made use of Greek forms, it gave them a Latin dress and style. Indeed, behind the pedagogical intent of the *Institutes* there are philosophical implications that seem distinctively Roman. Consider, in the first place, the epistemological significance of the anthropocentric ordering of social categories. For Gaius understanding began not with cosmology, in other words, but with the human subject—the subject of consciousness, that is, as well as of rights. Thus, the problem of the human condition (*De condicione hominum* for Gaius, encompassed by the civilian rubric *De statu hominis*¹¹) provided the point of departure, and the philosophical implication was a sort of rudimentary sociology of knowledge. Having established the subject, horizons could be expanded to include other individuals and natural objects, potentially possessions; and, finally, the social field could be completed with consideration of actions and interactions of various sorts. Secondly, and correlative to this, the Gaian system was aimed not merely at causal explanation—value-free science, so to speak—but also at human problems and the rendering of practical judgments. On these grounds jurisprudence was useful as well as theoretical, concerned with the life active as well as the life contemplative, and enabled jurists to argue for the superiority of their “science” and to identify it with “true philosophy.”¹²

In a fundamental way, then, Gaianism was set apart from the naturalistic tradition of Greek philosophy. Perhaps the best way to clarify this is to recall the fundamental polarity that arose in Greek thought between nature (*φύσις*) and convention, or law (*νόμος*).¹³ “By convention exist color and taste,” said Democritus; “in reality there are atoms and the void.” As later elaborated by rhetoricians, Roman as well as Greek, the opposition was by implication between the world of human will and behavior (of symbols and “civilization”) and that of extra-human (objective or transcendent) reality. In the tradition of Roman law, of course, both concepts have their place: the first as a rational norm identified with natural law (*jus naturale*), the second as the human substance of civil law and that extra-Roman growth formulated as the law of nations (*jus gentium*). But the procedure was quite different. In contrast to the naturalistic or mathematical (especially Euclidean) strategy of starting with

¹⁰ See H. Hübner, “Subjektivismus in der Entwicklung des Privatrechts,” in *Festschrift für Max Kaser* (Munich, 1976), 5–42; and Giovanni Pugliese, “‘Res corporales,’ ‘res incorporales,’ e il problema del diritto soggettivo,” in *Studi in onore di Vincenzo Arangio-Ruiz*, 223–60. Also see the works cited in note 7, above.

¹¹ *Digest*, 1. 5; and Gaius, *Institutiones*, 1. 3.

¹² For this related subject, see my “Vera Philosophia: The Philosophical Significance of Renaissance Jurisprudence,” *Journal of the History of Philosophy*, 14 (1976): 267–79, and the references cited therein.

¹³ F. Heinemann, *Nomos und Physis* (Basel, 1945); and Wolf, *Griechisches Rechtsdenken*, *passim*. Also see C. A. Maschi, *La Coscienza naturalistica del diritto et degli istituti giuridici romani* (Milan, 1937); and F. Lanfranchi, *Il Diritto nei retori romani* (Milan, 1938).

general principles and reasoning from them, Gaianism gave prominence and priority to the human aspect, to what from the twelfth century onward would be termed "positive law,"¹⁴ and then advanced, empirically in a sense, to higher degrees of rationality and universality.

What about the structural significance of Gaianism? Does the secular trinity of persons-things-actions reflect some religious or procedural convention? Does it have some logical or linguistic base? Or is it merely, as one modern expert has suggested, one more manifestation of a general Roman fixation on "trichotomy"?¹⁵ Whatever the prehistorical source, the arrangement was repeated and elaborated in countless ways for many centuries down to the present day. It antedated, and became hardly less ingrained than, the Christian trinity; and, because of its function in liberal as well as legal education, it may have played a larger role in the history of thought than has generally been recognized. Almost seventeen centuries after Gaius the young Karl Marx complained about the trichotomizing (*trichotomisch*) method forced on him by Savigny and other of his teachers—but not before Marx composed a three-hundred-page treatise of private law based on the Gaian scheme.¹⁶ And, though he abandoned both this scheme and the "idealism" associated with it, Marx went on, under Hegel's influence, to adopt another not dissimilar trichotomy likewise based on a dialectic of subject-object. In other ways, too, ghosts from the Roman past haunted Marx's mature works, but of course this discussion goes beyond the confines of the direct tradition of Gaianism.

AFTER GAIUS' DEATH (A.D. 178 OR LATER) his authority grew in legal as well as pedagogical terms, especially from 426 onward, when the law of citations named him as one of five jurists to be followed in the courts.¹⁷ The worldwide appeal of his *Institutes* is suggested by various survivals outside Italy, such as the excerpts made for the *Breviarium* of Alaric and the sixth-century commentary made for the law school of Autun. At about the same time, Justinian remarked that Gaius' work was the only elementary textbook assigned to law students in the Byzantine schools, though by 533 it was already obsolete in some respects.¹⁸ In fact, Justinian, or rather his editor Tribonian, preserved Gaius for posterity, until the nineteenth century at any rate, not only by citing him often (531 times to be exact) in the *Digest* but also by making his book the model for Justinian's own *Institutes*. In his preface the emperor revealed his philosophic intention of "bringing into bright harmony" (*in luculentam ereximus*

¹⁴ Steven Kuttner has shown that "positive law" (*jus positivum*) comes from a misreading of "posited law" (*jus positum*); Kuttner, "Sur les origines du terme 'droit positif,'" *Revue historique du droit français et étranger*, 15 (1936): 728–30.

¹⁵ H. Goudy, *Trichotomy in Roman Law* (Oxford, 1910); and Karl Friedrich von Savigny, *System des heutigen römischen Rechts*, 1 (Berlin, 1940): 322–26.

¹⁶ Marx to Heinrich Marx, November 10–11, 1837, in *Marx-Engels Gesamtausgabe*, 1, pt. 1 (Berlin, 1927): 213–31; and see note 87, below.

¹⁷ *Codex Theodosianus*, 1. 4. 3.

¹⁸ "Deo auctore," Constitution prefacing the *Digest*

consonantiam) the confused mass of ancient jurisprudence and legislation, and, indeed, just at this point he made the famous proprietary claim that his manual was largely based on the work of “our Gaius” (*praecipue ex commentariis Gaii nostri. . .*).¹⁹ Through this Byzantine vehicle and, secondarily, through the *Digest* the form and substance of Gaianism was transmitted to modern European culture.

The *Institutes* of Justinian began with the same premise as the *Institutes* of Gaius: “All of our law is related either to persons or to things or to actions.” Justinian then explained the reason for that order—“it is of little purpose to know the law if we do not know the persons for whom the law was made.”²⁰ Accordingly, Book I is a topical discussion of the title, “De personis,” including analyses of the levels and limitations of personal liberty, especially in terms of paternal and marital power (the *patria potestas* of the father and the *potestas de manu* of husband and wife). Books II and III continued “De rebus” and were devoted to particular problems of possession and property, exchange and inheritance, except for those things designated as public, common to all, or unpossessable because of their ecclesiastical character (*res sacrae*). Finally, Book IV treated “De actionibus”—logically and interlockingly divided into personal and real things—and concluded with judicial procedure and criminal actions.

This Byzantine effort at remodeling differs in two fundamental respects from the Gaian original. One difference is the considerable emphasis placed upon public law, illustrated above all in the notorious, post-Gaian text from Ulpian, “What pleases the prince has the force of law” (*Quod principi placuit legis habet vigorem*).²¹ This emphasis, of course, arose from Justinian’s determination to exalt, if not to deify, his imperial authority above all previously recognized sources of law, including juristic responses (*responsa prudentum*); but it did not directly affect the social categories encompassed by private law. The other difference is that Justinian, drawing on later classical jurisprudence and rhetorical hyperbole, made larger philosophical claims for the science of law, even claiming for it the status of true wisdom (*divinarum ac humanarum notitia*, the equivalent of the Ciceronian formulation of *sapientia*). But his hyperbole only served to enhance the attractions of Gaianism.²² There is no denying that from this point most of the words of the Roman legal canon are those of Justinian (or rather his paraphrase of many generations of jurists), but in many respects the assumptions and conceptual base continue to be those of “our Gaius.” In any case, in this somewhat disguised form Gaianism was passed on to the West and preserved for the next phase of its posthumous career.

¹⁹ “Imperatoriam maiestatem,” Constitution prefacing the *Institutes*. And, in general, see L. Wenger, *Die Quellen des römischen Rechts* (Vienna, 1953), 600–37.

²⁰ *Institutes*, 1. 2. 12. Also see Gaius, *Institutiones*, 1. 8.

²¹ *Institutes*, 7. 21. 6.

²² *Digest*, 1. 1. 1. The system of the *Digest*—and, indeed, that of the *Code*—has its own character and history; but it is closely related to, and in some ways dependent on, that of the *Institutes*, and it was much more severely criticized in later centuries. Because of its pedagogical and “methodical” purpose and because of its broader impact, the *Institutes* has been chosen for examination here.

The third level of the Gaian palimpsest, historically *ter scriptus*, began during the twelfth-century revival of Roman law and the establishment of professional faculties of law at the University of Bologna and elsewhere.²³ At this stage the problem of deciphering becomes increasingly complicated by the intrusion of other intellectual forces, including canon and feudal law and Aristotelian philosophy in its scholastic form. Henceforth, the Gaian tradition was enmeshed in glosses, commentaries, questions, opinions, and—though strictly forbidden by Justinian himself—more or less distorting “interpretations.”²⁴ As Gaius’ work was lost, so Gaianism became increasingly difficult to perceive.

Nevertheless, the basic principles were preserved, and certainly no alternatives were suggested. The most authoritative of glosses, that by Accursius, remains mostly grammatical corrections, small quibbles, and large justifications. About the first Gaian text in the *Digest*—the law “omnes populi” declaring that “all people are ruled by civil law or the law of nations”—Accursius wondered, “But what of those who are not so ruled?” The answer was not difficult: “I respond that these are uncivilized men.”²⁵ This simplified version of the *disputatio in utramque partem* Accursius also applied to the broader question whether Gaius’ threefold division might be false (*hoc videtur esse falsum*), and again he resolved the difficulty, in this case by arguing for a more than merely literal view of “things” and “actions.” There was also a tendency, illustrated by Petrus de Bellapertica, to replace “action” by the more sophisticated concept of “obligation,” which arose from an agreement (*obligatio nascens ex contractu*) and was guaranteed by natural law.²⁶ But despite such rationalizing tendencies the Gaian system was not seriously questioned.

Following the Glossators from the late thirteenth century, the still more philosophically minded Commentators began to diverge more basically from Gaian principles. Concerning the same law “Omnes populi,” for example, Baldus had a different answer to the problem whether “all people” were indeed ruled as Gaius had asserted. “I respond that not all are,” said Baldus, “for many cities have their own statutes by which they are ruled.”²⁷ Although technically the emperor was still the only source of law, the right of people to make their own law (*jus proprium* or *jus proprissimum*) could be justified in legal

²³ For general orientation on the Roman legal tradition, see Paul Koschaker, *Europa und das römische Recht* (3d ed., Berlin, 1958). And, for bibliography, see Franz Wieacker, *Privatrechtsgeschichte der Neuzeit* (2d ed., Göttingen, 1967); and Walter Ullmann, *Law and Politics in the Middle Ages* (Ithaca, N.Y., 1975). On particular themes, see E. Cortese, *La Norma giuridica*, 2 vols. (Milan, 1962–64); and my “Clio and the Lawyers: Forms of Historical Consciousness in Medieval Jurisprudence,” *Medievalia et Humanistica*, new ser., 5 (1974): 25–29.

²⁴ M. Fuhrman, “Interpretatio,” in *Symptica Franz Wieacker* (Göttingen, 1970), 80–110; F. Pringelsheim, “Justinian’s Prohibition of Commentaries to the Digest,” in his *Gesammelte Abhandlungen*, 2 (Heidelberg, 1961): 86–106; and V. Piano Mortari, “Il Problema dell’interpretatio nei commentatori,” *Annali di storia del diritto*, 2 (1958): 29–109.

²⁵ Accursius, *Ad Digestum*, 1. 5. 1, which is the equivalent of Gaius, *Institutiones*, 1. 8.

²⁶ Petrus de Bellapertica, *In libros Institutionum commentarii* (Lyon, 1536), 111. And, in general, see C. Karsten, *Die Lehre von Verträge bei den italienischen Juristen des Mittelalters* (Rostock, 1882).

²⁷ Baldus, *Super Digesto veteri* (Venice, 1535), f. 26. In general, see *L’Opera di Baldo, per cura dell’Università di Perugia nel V centenario della morte del grande giureconsulto* (Perugia, 1901); and, in particular, see J. Tarducci’s essay in *ibid.*, 409–66; Norbert Horn, *Aequitas in den Lehren des Baldus* (Cologne, 1968); and, for the classic work, C. N. S. Woolf, *Bartolus of Sassoferrato* (Cambridge, 1913).

terms, Baldus argued; for did not the imperial rule against a people making "illicit statutes" imply that they could make *licit* ones? In this way Baldus, following his master Bartolus and other Italian jurists, built up the case for the legitimacy of city-states and other political units that were independent of imperial jurisdiction and so, presumably, of Roman forms. For some jurists, of course, there was an answer to this problem, too: such post-Roman statutes and customs should be included in the *jus gentium*.

Gaius' famous statement about the legal "condition of men" likewise received expanding interpretation—and "interpretations," as Accursius reminded his students, implied correction. In the first place the topic "De statu hominum" was an invitation to some jurists to philosophize about the human condition in general, about the natural as well as the social state of that "most worthy of creatures" (*dignissima creaturarum*), as Alberigo de Rosate called man. But the main theme was the historical change that had occurred since the time of Gaius, the difference between the ancient and the "modern state of men" (*status modernus hominum*). "In modern times" (*secundum moderna tempora*), observed Alberigo, "there are various states of men that are not treated under the title" of Gaius. "And, because the state of men is in constant motion and never at rest," he proposed to bring the discussion up to date by treating a variety of more recent questions, including those of the Jews and Saracens and different sorts of Christians (real and supposed)—laymen and clerics.²⁸ In fact, the general problem that absorbed most of the energies of European jurists was how to accommodate their own experience and institutions, feudal as well as ecclesiastical, to Roman forms and rules or, in other words, how to transform, as Justinian had transformed, the *jus antiquum* into a *usus modernus*. In this effort jurists increasingly turned to extra-Roman experience, but they did so in orthodox terms of custom (*consuetudo*) and the *jus gentium*, based (as Gaius had said) on "natural reason."

Another major force that acted to transform Gaianism was the intrusion, or rather re-intrusion, of Aristotelian philosophy. Attempts to find or to impose logical species, especially the use of the famous "four causes," again illustrates the infiltration of naturalism and metaphysics into jurisprudence and social thought. Accursius had accepted Gaius' demand for the study of the "origin of law," though he interpreted "necessary" as "useful" and justified it simply on grounds of logic and propriety—that it provided a way of introducing basic elements (*principia*) and that it agreed with the method of a lawyer (*advocatus*), which was to start with his exordium. For commentators like Baldus, however, concern for origins and sources was translated into the system of Aristotle's efficient, material, formal, and final causes; and, indeed, this procedure was associated with the growing claims of scholastic jurisprudence to be a rational "science" because it was universal and treated its material in terms of cause and effect (*per causas*).²⁹ The long-range implica-

²⁸ Alberigo, *In primam FF [Digesti] Veter. part.* (Venice, 1585), f. 44v.

²⁹ See R. Weigand, *Die Naturrechtslehre der Legisten und Dekretisten von Irnerius bis Accursius und von Gratian bis Johannes Teutonicus* (Munich, 1967); and my "Vera Philosophia: The Philosophical Significance of Renaissance Jurisprudence," 274.

tions of these tendencies were momentous; they continued to inform professional jurisprudence down to Savigny's time and after. Yet Gaianism was modified rather than replaced; another level was added to the multilayered Gaian text.

SERIOUS CRITICISM AND TRANSFORMATION of the Gaian paradigm began in the sixteenth century. The first condition of this mutation was the rise of humanistic jurisprudence, beginning in fifteenth-century literary circles and then infiltrating the academic and professional study of law.³⁰ From the second quarter of the century deepening historical perspectives and expanding geographical horizons encouraged by humanism led certain jurists to begin the task of "reforming" the Roman system of jurisprudence fixed by Gaius, codified by Justinian, and canonized by the medieval Glossators. The "reformers" wanted to fulfill the famous Ciceronian ideal of "reducing law to an art" (*jus in artem redigendo*)—or, better, Justinian's ideal of elevating it to a science, a concept that was vital and a prime rubric of Romanist jurisprudence. Pursued by elaborate violations of Justinian's strictures against "interpretation," the task was justified in the name of that abstract reason contained in the law (*recta ratio; ratio juris*) as well as a novel concern for "method," which was a dominant force in the intellectual life of the sixteenth century. The men involved in this enterprise were the founders of that modern school of jurisprudence that Savigny designated "the systematists" (*die Systematiker*) and that represents a latter-day Gaianism—the last, or perhaps next-to-last, layer of the Gaian palimpsest.³¹

Underlying this tradition was another movement for "reform" associated with humanism, namely the attempt to improve and to re-order dialectic by bringing it into contact with, or even submerging it in, rhetoric.³² This aim of various pedagogical reformers, including Rudolf Agricola and Petrus Ramus, was carried over by like-minded jurists into their own field of study, which, of course, had other longer-standing ties with rhetoric in technical ways. In 1520, building on Agricola's work, Claudius Cantiuncula published his *Topica legalia* in an effort to find a better arrangement for the major "commonplaces"

³⁰ On the historical implications of "legal humanism," see D. Maffei, *Gli Inizi dell'umanesimo giuridico* (Milan, 1956); and my *Foundations of Modern Historical Scholarship* (New York, 1970). For the philosophical implications, see Hans Troje, *Graeca Leguntur* (Cologne, 1971), which is useful for orientation, new insights, and bibliography if not for all of its judgments.

³¹ Savigny, *Das Recht des Besitzes* (7th ed., Vienna, 1865), 10. For the classic and still indispensable work on this tradition, see R. Stintzing and E. Landsberg, *Geschichte der deutschen Rechtswissenschaft*, 4 vols. (Munich, 1880–1910).

³² See, in general, Neal Gilbert, *Renaissance Concepts of Method* (New York, 1956); and Walter Ong, *Ramus, Method, and the Decay of Dialogue* (Cambridge, 1958). On law in particular, there has been an upsurge of work lately; see, for example, Hans Troje, "Wissenschaft und System in der Jurisprudenz des 16. Jahrhunderts," in J. Blühdorn and J. Ritter, eds., *Philosophie und Rechtswissenschaft* (Frankfurt, 1969), 63–88; Aldo Mazzacane, *Scienza, logica, e ideologia nella giurisprudenza tedesca del sec. XVI* (Milan, 1971); F. Carpintero, "'Mos italicus,' 'mos gallicus,' y el humanismo racionalista," *Ius Commune*, 6 (1977): 108–71; C. Vasoli, "La Dialettica umanistica e la metodologia giuridica nel secolo XVI," in *La Formazione storica del diritto moderna in Europa*, 1 (Florence, 1977): 237–79; and A. Giuliani, "The Influence of Rhetoric on the Law of Evidence and Pleading," *Juridical Review* (1962), 216–51.

of law (*locorum divisio*).³³ This work was pursued further in the *Methodica dialecticis ratio* by Johann Apel, who illustrated his topical reform with a series of diagrams showing the logic of social, especially as contrasted to natural, structure and process. Among German jurists like Johann Frey and Nicolaus Vigelius the influence of Ramus was particularly strong, partly because they hoped with his help to restore jurisprudence to a more central position in general learning and, through its association with oratory, to enhance its social utility. As Frey suggested in his schematic prescription for an "idea of the good and complete juriconsult," the finished product, a paradigm of practical and theoretical knowledge, would be the "political man" (*homo politicus*).³⁴ But most of all, raising their sights from pedagogy to philosophy, these jurists wanted to fashion the Roman legal tradition into an orderly system; for "order," wrote Christopher Ehem, another of these legal reformers, "is the soul of things themselves" (*ordinem esse animam ipsarum rerum*).³⁵

Although not generally appreciated or even admitted, the movements to reform dialectic and jurisprudence continued to have recourse to old traditions of naturalism and scholasticism, despite a lot of careless anti-Aristotelian rhetoric. Johann Oldendorp, in another treatise on "legal topics," used Aristotelian categories to organize his *materia* and *exempla* and the idea of the four causes to interpret "actions" in particular.³⁶ Even more systematically, Vigelius, who indeed set out to reorganize in such dialectical terms the whole *Institutes* of Justinian (*resolutio Institutionum Imp. Justiniani*), relied upon Aristotle.³⁷ Similar attitudes are evident in contemporary theories of "interpretation," which, despite Justinian's prohibition, had become a recognized part of law.³⁸ The "order" sought by critical methodologists like Jean Coras and Pietro Gammara was a natural order, which they contrasted sharply with civil law. The latter was founded "not on nature," as Coras observed, "but only on opinion and the authority of legislators."³⁹ This social authority might suffice for law as an "art," but a science needed to judge "through causes"—precisely what the new theories of interpretation proposed to accomplish. A rational method, or methodical rationale (*methodica ratio*), as

³³ Cantiuncula listed twenty-five places or means of making distinctions; see his *Topica legalis*, printed with Johann Apel, *Methodica dialecticis ratio ad iurisprudentiam* (Basel, 1545).

³⁴ Nicholas Reusner, ed., ΧΕΙΡΑΓΩΓΙΑ sive *Cynosura iuris*, 2 (Speier, 1588), no 32: Freigius, "Idea boni et perfecti iuris consulti" (fold-out diagram in the appendix). Also see Mazzacane, *Scienza, logica, e ideologia*.

³⁵ Ehem, *De principis iuris libri septem* (Basel, 1556), 1.

³⁶ Oldendorp, *Actionum forensium progymnasmata in septem classes distincta* (Lyon, 1566), f. 3v. Also see his *Topica legalis* (Lyon, 1555). On Johann Oldendorp, see E. Wolf, *Grosse Rechtsdenker der deutschen Geistesgeschichte* (2d ed., Tübingen, 1951), 134-75; and Guido Kisch, *Erasmus und die Jurisprudenz seiner Zeit* (Basel, 1960), 227-59, *Claudius Cantiuncula* (Basel, 1970), 57-71 ("Methodenlehre"); and *Melanchthons Rechts- und Soziallehre* (Basel, 1967). For a topical analysis of Bartolus, see A. Brederode, *Loci communes . . . novi et uberrimi in Bartoli . . . opera omnia* (Basel, 1589).

³⁷ Vigelius, *Dialecticis iuris civilis libri III* (Basel, 1620). Also see his *Methodus universi iuris civilis absolutissima* (Lyon, 1591).

³⁸ See V. Piano Mortari, *Ricerca sulla teoria dell'interpretazione del diritto nel sec. XVI* (Milan, 1956). Also see H. Schürpf, "Ratio interpretandi," in Stintzing and Landsberg, *Geschichte der deutschen Rechtswissenschaft*, 1: 1071.

³⁹ Coras, *De iure civile in artem redigendo*, in *Tractatus universi iuris*, 1 (Venice, 1584): 59; and Gammara, *De extensionibus*, in *ibid.*, 18: 247. On Coras, see A. Fell, "The Classical Four Causes in the Renaissance Art of Law" (Ph. D. dissertation, Columbia University, 1974).

Oldendorp put it, "requires that the interpreter of law have recourse to the law of nature."⁴⁰

Yet this widespread search for system—"methodus," "schemata," "ratio," and "partitiones" are among the operative terms—by no means implied abandoning the human and positive aspects of jurisprudence. The jurist had to judge fact as well as law; he had to find authorities as well as devise arguments. The dual aim of jurisprudence, according to Conrad Lagus, was to answer both the historical and the philosophical questions: Philosophy, he explained, was no doubt "the first part of law, that is, the truth and reason of law insofar as the human mind can attain them"; but no less essential was "the second part" (that is, history), "the bare narration of facts . . . to show the forms of law observed by Roman legislation in particular cases."⁴¹ Precisely in this sense of "history" could law be analyzed in terms of persons, things, and actions. In the preface to his standard anthology of legal treatises on method, Nicolas Reusner provided the aphorism that best expresses the enduring importance of the Gaian scheme: "Bonus Institutionalista," he stated, "bonus Jurista."⁴²

The continuing and cumulative critique of the Roman canon was an international enterprise; but the major efforts of revision were begun in France, especially by disciples of Andrea Alciato at the University of Bourges. Alciato was the founder of humanistic jurisprudence, of the *mos gallicus* as it was later called, although he personally lacked any particular systematic interests. The most notable of his followers—François Connan, Eguinaire Baron, François le Douaren, and Hugues Doneau—were deeply indebted to the humanist movement; but each made a practice of also introducing modern materials and ideas, not only feudal law, which was regularly taught at Bourges, but a variety of historical issues, such as the influence of Celtic and Frankish institutions. Each of them also contributed massively to the criticism of the Roman legal canon, and none hesitated to break with Roman forms in their attempts to realize the ideal of law as "true philosophy."

Connan's master work, published posthumously in 1557, was called *Commentaries on Civil Law*; but its general purpose was actually to shift emphasis away from civil law and to discuss instead such topics as obligation and property in terms of the law of nations, as Gaius had defined it. For Connan the *jus gentium* was equivalent to the "form of a people" (*forma populi*), and it was, logically if not chronologically, "prior to civil law." As a consequence, he tended to examine conventional topics of civil law in the context not only of natural law, identified with the "first law of nations" (*ius hoc gentium primum*), but also of European, often comparative, history. He also gave large and continuing roles to custom in the progress of legal institutions and to jurists in rationalizing these customs. "Custom interprets law," he wrote, and "judgments confirm custom" (*consuetudo legum interpretatur; res iudicatae consuetudinem*

⁴⁰ Oldendorp, *Iuris naturalis gentium et civilis εισαγωγή* (Antwerp, 1539), sig. Aiii.

⁴¹ Lagus, *Methodus iuris utriusque traditio* (Lyon, 1566), 3.

⁴² Reusner, *ΧΕΙΡΑΓΩΓΙΑ sive Cynosura iuris*, 1: 13.

confirmat).⁴³ Law was, of course, grounded in nature, but the first laws (*priscae leges*) were barbaric; there was no original “golden age” (*aetas aurea*), only “the rule of lusts, factions, evils, seditions, plunderings, war, and an absence of equity and justice.”⁴⁴ The perfection of law only developed over the course of time, with the ratiocinations of jurists and especially with the efforts to establish a rational system of law. Connan had reservations about the triadic system of Gaius and argued that the rubric of actions was unnecessary since it could be divided between persons and things. On a more general level, however, Connan carried on the spirit of the Gaian tradition.

So, in even more modernizing and vernacularizing terms, did Eguinaire Baron, the eldest and in some ways the most original of these four French pioneers. In addition to a manifesto of the new jurisprudence, Baron produced a series of commentaries on all parts of civil law according to a unique and self-consciously comparative method that he termed *commentaria bipertita*, by which he “accommodated civil law to French customs and legislation” (*accommodata hujus tituli ad mores Galliarum et leges regias*).⁴⁵ He “accommodated” both the *Institutes* of Gaius and the *Digest* of Justinian, in part simply by translation. He explained, for example, that “among the French the *plebs* is the Third Estate” and went on to point out parallels and contrasts in the respective social and legal systems. He agreed with Gaius that all law concerned persons, things, or actions, but his experience prompted him to expand “the condition of man” beyond the distinction of free and unfree. Women were “persons” too, and, like Connan, he was aware of their peculiar position (*quia status foeminarum deterior in multis causis*). There were also the problems of foreigners and naturalization (*aulbains, ou etrangers, et lettres de naturalité*); and, in fact, Baron composed a monograph on succession among foreigners.⁴⁶ Other difficulties, such as the antiquated Roman paternal power (*patria potestas*), likewise led him to depart from Roman convention, though without rejecting the entire Roman framework of jurisprudence. The work of Baron, a marvelous and many-sided illustration of the cultural shock that antiquity could inflict on sensitive and learned moderns, certainly deserves closer study.

Better known and probably more influential is the work of Baron’s colleague and rival Le Douaren. Although these two “Alciateans” had a variety of disputes, personal and religious as well as professional and political, they fundamentally agreed about “method”; and Baron subscribed to his younger colleague’s formulation that emphasized the systematic-pedagogical (*ars docendi*) as well as the humanistic-philological (*sermonis proprietates*) aspects of the

⁴³ Connan, *Commentariorum iuris civilis libri X* (Paris, 1557), f. 43. For analyses, see C. Bergfeld, *Franciscus Connanus* (Graz, 1968); and V. Piano Mortari, “La sistematica come ideale umanistico dell’opera di Francisco Connano,” in *La Storia del diritto nel quadro delle scienze storiche* (Florence, 1966), 521–31. The same formula appears in Lagus’ *Methodus iuris utriusque traditio*, 42, from the *Digest*, 1. 3. 37.

⁴⁴ Connan, *Commentariorum iuris civilis libri X*, ff. 32v, 16.

⁴⁵ Baron, *Opera omnia*, ed. F. Baudouin (Paris, 1562), *Commentarii*, *passim*, and *Institutionum civilium ab Iustiniano Caesare editarum libri IIII* (Poitou, 1550). On Baron there is no useful study of any sort.

⁴⁶ Baron, *Opera omnia*, 1: 52, 78 (“De statu hominum”), 92.

new jurisprudence.⁴⁷ For Le Douaren legal education ought to begin with the *Institutes* and, despite the humanist prejudice against scholasticism, ought to include the works of Bartolus, Baldus, and the best of the philosophical commentators. Like his friend Connan, Le Douaren was devoted to the ideal of "true philosophy," and he declared that "there is nothing either divine or human that the jurisconsult does not treat and that is not relevant to civil science." He wrote extensively on both canon law and, under the civilian heading of "custom," feudal law; and he denied that Roman law had in any sense been "received" into France. Nevertheless, civil law continued to provide the terms and framework of his legal philosophy. In his discussion of the problems of legal system, he leaned perhaps more toward the naturalistic interpretation, making an analogy to mathematics in particular, since he believed that "the elements of law, the grounds of its maxims and basic issues are as points, lines, surfaces, etc., are to geometry."⁴⁸ Such was the basis of Le Douaren's various "methodical" discussions (*methodica enarratio*, *methodica partitio*, and *tractatio*, as he characterized his interpretations of the Roman canon).

Of all of the work of the great "systematists," that of Hugues Doneau, disciple and successor of Le Douaren at Bourges, is probably the most comprehensive and influential. For Savigny, Doneau's *Commentaries on Civil Law* marked the introduction of the French school into Germany, and for Savigny's disciple R. Stintzing, the great authority in the field, Doneau was "the creator of modern jurisprudence."⁴⁹ At Bourges and later at the Universities of Altdorf and Heidelberg, Doneau carried on the work of transforming Romano-Byzantine law into a universal system in accordance with the ideal of law as "true philosophy," as an expression of "right reason."⁵⁰ Like many other contemporary "anti-Tribonianists," Doneau was much disturbed by the state of the *Code* and especially of the *Digest* of Justinian, although it was the form, or rather the formlessness, instead of the substance (the post-classical interpolations, or "Tribonianisms") that he wanted to correct. The *Institutes*, on the other hand, he continued to admire, especially the tripartite classification; and, in fact, much of his work of "reformation" consisted of trying to gather together and to arrange the scattered and sometimes contradictory material on persons, things, and actions into an intelligible and symmetrical system. For Doneau each of these headings had three sub-headings: (1) divine and human, with the latter divided into public and private; (2) obligations, which followed the discussion of rights and which were grouped under "things"; and (3) forms of procedure to obtain rights, which appeared under "actions." Doneau's work, like that of his elder colleagues, shows the strong imprint of formal philosophy, including the four

⁴⁷ Le Douaren, *Opera omnia*, 1: 1. For an analysis, see W. Vogt, *Franciscus Duarenus* (Stuttgart, 1971).

⁴⁸ Le Douaren, *Opera omnia*, 1: 1. Also see Coras, *Opera omnia*, 1 (Wittenberg, 1603): 1.

⁴⁹ Stintzing, *Hugo Donellus in Altdorf* (Erlangen, 1869), 42.

⁵⁰ Doneau, *Opera omnia*, 1 (Rome, 1828): 133. On Doneau, see the old appreciation and analysis by A. Eysell, *Doneau* (Dijon, 1860); on Doneau's significance for French systematizing and codifying efforts, see A.-J. Arnaud, *Les Origines doctrinales du Code civil français* (Paris, 1969), 121.

Aristotelian causes, and at least a touch of Ramist, or Ramoid, method; but in general the *Commentaries* remains within the Gaian tradition.

In the generation after Doneau the rising tide of “vernacular humanism” brought this tradition into contact with the tangled question of customary law. In France two close colleagues who studied at Bourges, Étienne Pasquier and Antoine Loisel, took Justinian’s *Institutes* as the model and guide for their efforts to bring some system to vernacular law. Pasquier found parallels to the Gaian model in other “institutes”—Quintilian’s “oratorical,” Lactantius’s “divine,” and Ramus’s “dialectical” (to which we might add Calvin’s “institutes” of religion)—and began his work with a short history of Roman systematizing from the time of Scaevola.⁵¹ Pasquier argued that law was more closely allied to rhetoric than to philosophy and that, because of the jurist’s reliance on memory and human judgment, his art was called *juris prudentia* instead of *juris scientia*. Like his Latinate colleagues, Pasquier operated in the domain of the *jus gentium*, which he equated simply with “human law” (*droit humain*). His *Interpretation of the Institutes of Justinian* (unpublished until the nineteenth century) started out as a translation but ended up as a comparative study of Roman and French legal institutions, following the Gaian pattern very much in the style of Baron’s work. Pasquier, however, was generally hostile to civil law, deplored its tyrannical and rigid tendencies, and was at pains to point out contrasts with French customs. With respect to the first division, for example, all French “persons” were free (*libres et franchises*) except in a few antiquated provincial *coutumiers*. In most ways Loisel agreed with and, indeed, consulted Pasquier on these matters, and was more insistent on the differing status of French “persons,” arguing that the primary division was between *noble* and *roturier* (itself divided into *bourgeois* and *vilain*), since all men were or could become free by baptism. Loisel’s *Customary Institutes*, again following the Gaian pattern but composed of native proverbs, literary expressions of folk wisdom, and maxims of customary law, moved even further from Romanism toward some sort of national system.⁵²

There were other efforts at system-building in the sixteenth century, but these works, like the celebrated *Republic* of Jean Bodin, tended to be concerned with political rather than social or legal thought. One instructive exception, abused when not neglected, is the curious construction fashioned by Bodin’s rival, Pierre Grégoire of Toulouse. For Grégoire “method” was an “imitation of nature,” and in his own grandiose *Republic* he tried to assemble a man-centered cosmology to emulate the natural cosmos.⁵³ Grégoire, like Bodin, denied the universality of the Roman tradition and, specifically, French subjection to it; but on the fundamental point, the nature of the commonwealth, he had a very different emphasis. The center of his political cosmos was occupied not

⁵¹ Pasquier, *L’Interprétation des Institutes de Justinian, avec la conference de chaque paragraphe aux ordonnances royales, arrestz de Parlement et coutumes générales de la France*, ed. M. le duc Pasquier (Paris, 1847), 9, 45.

⁵² Loisel, *Institutes coutumiers*, ed. M. Reulos (Paris, 1935).

⁵³ Grégoire, *De republica libri sex et viginti* (Frankfurt, 1609), 10: 54, 13: 12, 21. And see the discussion by C. Collet, *L’École doctrinale de droit public de Pont-à-Mousson* (Paris, 1965).

by the prince—as it was for Bodin and for that “most pernicious man, Machiavelli”—but by that Roman form of wisdom called law. This emphasis is even clearer in Grégoire’s other systematic effort, his *Syntagma juris universi*, a book treating “all law, divine, human, and natural,” according to a “new method.”⁵⁴ The novelty of this method, however, fades on examination, not only because it relies on traditional views of hierarchy but also because its principal categories turn out to be variations on the old Gaian theme. The first volume (books 1–6) covers a wide range of things—natural, divine, and human (including “communal” and “feudal”)—and then (books 7–19) persons and the various conditions thereof. The second volume concludes with an elaborate consideration of human “actions,” criminal as well as legitimate, collective as well as individual, public as well as private. Reversing the position of the first two categories was done for the orthodox reason that in Creation things had in fact preceded persons. In general, Grégoire’s work illustrates a crucial turning point in the career of Gaianism—the shift from a normative legal doctrine to a descriptive interpretation of society and culture.

Other endeavors, apart from the tinkering with the Roman system, were operating to transform modern views of jurisprudence. One was the gigantic contemporary enterprise in the field of classical and historical scholarship, although this effort may have served to confuse as well as to broaden perspectives on the old legal tradition. Jacques Cujas was the symbol and leading spirit of this critical assault on the textual aspect of this tradition. Also positive and empirical in a certain sense was the growing appreciation even among academic jurists of the value of modern judicial experience. Cujas’s student, Pierre Ayrault, for example, turned from theory to practice (*usus*) as the best means of access to legal wisdom. For him the true source of law lay in particular judgments (*res judicatae* is the civilian rubric). These Ayrault regarded as the first or only or “supreme” part of the law; and he compiled a modern digest (*pandectae*) of such judgments that followed, of course, the conventional order. “Look to the practitioners,” he advised, “for those things that pertain to their art.”⁵⁵ Finally, there were the long-standing ideological objections to Romanism, especially national jealousy of imperial-papal intrusions and claims to universalism. In France the standard formula was “that the civil laws of the Romans may not be alleged in the courts of France or in any inferior courts on the basis of their authority but only on the basis of their rationality” (*pro ratione*).⁵⁶ In this way, though in few others, nationalism can be said to have reinforced rationalism. In all of these ways the intimidating position of the Roman canon and of Gaianism in a general sense was increasingly undermined, or at least relocated, in a more pluralistic and rational conception of human history and society.

⁵⁴ Grégoire, *Syntagma iuris universi* (Cologne, 1623). Also see his *De iuris arte, methodo, et praeceptis* (Lyon, 1580).

⁵⁵ Ayrault, *Rerum ab omni antiquitate iudiciorum Pandectae*, 1 (Geneva, 1677): 84. On *Digest*, 42. 1 (“*Res judicatae*”), also see Ulrich Zasius, *Opera omnia*, 3 (Lyon, 1550): col. 360. There is no modern study on Ayrault.

⁵⁶ Charles de Grassaille, *Regalium Franciae libri duo* (Paris, 1545), 45.

AT THIS POINT THE GAIAN PALIMPSEST seems to be exhausted: between the historical and empirical assaults on the one hand and the efforts of rationalization on the other, academic jurisprudence could hardly retain its conventional form; it moved, in a sense, from the letter to the spirit of Roman jurisprudence. In general, the seventeenth century was suffused not only with *l'esprit de système* but also with *l'esprit de géométrie*, and these combined with the enthusiasm for the "new science" of Galileo and Descartes to ensure that legal scholarship would be intimidated if not dominated by what has inelegantly been termed "jusnaturalism." For the next two centuries, so it seemed to many observers at that time and since, legal and social as well as political philosophy was captive to this modern idea—"antique-modern," as Otto Gierke preferred to call it—of natural law.⁵⁷ This cast of mind is a deflection from Gaianism. The resurgence and prominence of the idea of "nature" was used in the explanation and legitimation of human categories, social as well as legal (that is, descriptive as well as normative). Indeed, the "state of nature" tended to take over the function both of the moral basis of social behavior and of the historical interpretation of civilization. Thus, the significance of "convention," so essential to Gaius and other Romanists, was subordinated or distorted. Moreover, the principle of authority—and with it the force of custom, prescription, tradition, and even "interpretation" in a usual sense—tended to be overshadowed by the claims of universal reason. The result was that the "law" seemed in many ways to be dehumanized: man himself—his will, his history, his cultural individuality as well as his irrationality and perhaps sinfulness—was increasingly lost to view.

Gottfried Wilhelm Leibniz, who published his own "new method" of jurisprudence in 1667, provides the most extreme example of legal rationalism (*jurisprudentia rationalis*). Although thoroughly grounded in legal scholarship and attached to the "reformed" dialectic associated with Ramus, Leibniz turned to mathematics, specifically to Euclid, for his model of rationality. He rejected the threefold division of Gaius because, as so many others had pointed out, "actions derive from both persons and things." Most fundamental to his objection was the apparently random empiricism of conventional jurisprudence. "Its method," he remarked, "was taken from the inmost parts not of law but of fact" (*haec Methodus non ex Juris sed Facti visceribus sumpta*), "for persons and things are terms of fact, as power, obligation, and the like are terms of law."⁵⁸ The confusion and irrationality inherent in such an approach was too absurd for a modern conception of law: "Who would not laugh at such a new Euclid?" For Leibniz, however, jurisprudence, along with other humanistic studies, was subordinated to metaphysics, ultimately

⁵⁷ Still fundamental, in addition to Stintzing and Landsberg, *Geschichte der deutschen Rechtswissenschaft*, is Otto Gierke, *Das deutsche Genossenschaftsrecht*, the relevant part of which has been translated by Ernest Barker as *Natural Law and the Theory of Society, 1500–1800* (Boston, 1957); but, in general, the subject of natural law is too peripheral and too voluminous to allow bibliographical comment here.

⁵⁸ Leibniz, *Nova methodus discendae docendaeque iurisprudentiae* (Frankfurt, 1667), in *Sämtliche Schriften und Briefe*, 6, pt. 1 (Berlin, 1971): 298. On Leibniz in general, see K. Dickerhof, *Leibniz' Bedeutung für die Gesetzgebung seiner Zeit* (Freiburg, 1941), and F. Sturm, *Das römische Recht in der Sicht von Gottfried Wilhelm Leibniz* (Göttingen, 1968).

to mathematics; and his position represents a pole rather than a school of thought in the range of legal and social doctrines.

The major figure in the re-emergence of natural law was Hugo Grotius, though he, too, was steeped in humanistic and legal erudition. His main legal works were devoted to that anarchic arena of international relations, which itself seemed to represent a pre- or extra-legal "state of nature." Like Leibniz a generation later, Grotius had a basic contempt for unclassifiable particulars. "For the principles of the law of nature," he wrote in the prolegomena to the *Law of War and Peace*, "since they are always the same, can easily be brought into a systematic form; but the elements of positive law, since they often undergo change and are different in different places, are outside the domain of systematic treatment, just as other notions of particular things are."⁵⁹ In a youthful work on prizes and booty he took the same view and, reasoning from a set of general rules and law, affected an even more deliberately mathematical plan.

Yet this renewed emphasis on nature and reason is by no means the whole story of social and legal thought in the age of reason. The *ius naturale* was, after all, an essential part of the Roman legal tradition; and, as Richard Zouche reminded his seventeenth-century contemporaries, Gaius himself had explained that the basis of the law of nations was that "natural reason among men" (*naturalis ratio inter omnes homines*).⁶⁰ Indeed, the continuing association of the *jus gentium* and the *jus naturale* permitted the legal tradition to maintain its human groundings. Grotius, for example, was not only a jusnaturalist and "father of international law" but also, as Giambattista Vico later called him, the "jurisconsult of the human race."⁶¹ Like Vico, Grotius neither forgot history nor despised tradition. He persisted in citing ancient "authorities," including not only the Bible, jurists, and scholastic philosophers but also literary and especially historical writers, who provided judgments as well as illustrations. Grotius's intentions were, perhaps, less rationalizing than universalizing; for his primary field of operations was indeed "positive law," specifically the kind of "voluntary human law" (*jus humanum voluntarium*) defined as the law of nations (*jus gentium*, exclusive of the *jus civile* as posited by Gaius). Universal law, according to Grotius, arises not only from nature and from divine ordinance but also from custom or tacit consent—that is, from human will. "And the Law of Nations is proved in the same manner as the unwritten Civil Law," he wrote, "namely, by long usage and the testimony of its professors; for this law, as Dio Chrysostom says, is 'the invention of time and experience,' and here the great historians are of the greatest service to

⁵⁹ Grotius, *De iure belli ac pacis libri tres*, trans. W. Knight (London, 1922), prolegomena, 22, and *De iure praedae commentarius*, trans. G. Williams and Q. Zeydel (Oxford, 1950), 7.

⁶⁰ Zouche, *Iuris et iudicii feccialis* (1650), ed. T. Holland (Washington, 1911), 1. Also see J. W. Textor, *Synopsis iuris gentium*, ed. L. von Bar (Washington, 1916), 2.

⁶¹ See Dario Faucci, "Vico and Grotius: Jurisconsults of Mankind," in G. Tagliacozzo and H. White, eds., *Giambattista Vico: An International Symposium* (Baltimore, 1969), 61–76; L. Rosa, "Grozio fra il giusnaturalismo scolastico e il giusnaturalismo moderno," in *Miscellanea Adriano Gazzana*, 2 (Milan, 1960); Wolf, *Grosse Rechtsdenker der deutschen Geistesgeschichte*; and Fassò, *Storia della filosofia del diritto*.

use."⁶² In these ways Grotius managed to retain at least indirect contact with the old Roman tradition.

In France at the very height of the enthusiasm for Cartesianism and that "geometric spirit" sensed and to some degree resisted by Blaise Pascal, the persistence of Gaianism is apparent in a sublimated form. The clearest example, as well as the greatest monument of jurisprudence before Robert Pothier, is the work of Pascal's friend, Jean Domat, whose great system began to appear in 1695. Although Domat's *Civil Laws . . .* were arranged . . . in *Their Natural Order* (an excellent illustration of the craving to reduce convention or history to nature), they remained, in effect, a rationalizing commentary on Roman experience. And, though he affected to seek out fundamental (natural, perhaps prehistorical) principles, Domat found their human expression in the usual texts of civil law. He gave precedence to the natural over the civil state, but he continued to conceptualize within the Roman paradigm, keeping the rubrics of persons, things, and actions. Convention and not nature, for example, led him to define persons in terms of "liberty" (or the lack thereof), citizenship (or the exclusion therefrom, as in foreign or exiled status), and fatherhood (or subjection thereto).⁶³ The general impression is of rationality, or the rhetoric of rationalism, imposed on the old Roman categories. Even Domat's ultimate goal, famously defined as the "spirit of the laws," was a more rationalized version of the old juristic aim of getting at the true meaning.

Montesquieu's *L'Esprit des lois* of 1748 is, of course, the work that made this phrase and concept universally famous, although the connection with the earlier legal tradition was effectively obscured by the author himself, whose claims to originality have never been disputed and seldom even examined. "My ideas are new," wrote Montesquieu, "and therefore I have been obliged to find new words, or give new acceptations to old terms, in order to convey my meaning."⁶⁴ To point out the relation of Montesquieu's system to the old Roman tradition, which he had surveyed historically in his *Grandeur and Decadence of the Romans* (1734), is not to deny its novelty or conceptual force. His basic concern was not with antecedent "laws of nature" but rather with the old law of nations and civil laws; and, if he construed his subject in an extraordinarily wide-ranging fashion, he followed the lead of Baron, Bodin, and others in adopting a comparative approach, in taking universal history and the law of (all) nations as his field, and in emphasizing climate, geography, and cultural tradition. In more specific ways, too, he retained contact with Roman forms as well as with the texts and modern scholarship of civil law, and the book has with some justice been regarded as a "new *De Legibus*." As Le Douaren and others who commented consecutively on the *Corpus juris*

⁶² Grotius, *De iure belli ac pacis*, xiv.

⁶³ Domat, *Les Loix civiles dans leur ordre naturel*, 1 (Paris, 1835). On Domat, see R. F. Voeltzel, *Jean Domat (1625-1696)* (Paris, 1936), 107; and, most recently, G. Tarello, ed., *Materiali per una storia della cultura giuridica*, 2 (Florence, 1972): 127-57.

⁶⁴ Montesquieu, *L'Esprit des lois* (Paris, 1748), preface. On the problem of the work's structure, see Franz Neumann's introduction to the English translation, *The Spirit of the Laws*, trans. T. Nugent (New York, 1949), and, more recently, Mark Waddicor, *Montesquieu and the Philosophy of Natural Law* (The Hague, 1970); S. Goyard-Fabre, *Philosophie du droit de Montesquieu* (Paris, 1973); and Tarello, *Materiali per una storia*, vol. 1.

began with a definition of the law, its species, and its sources (*quid jus, de divisione juris, and unde jus*), so Montesquieu began with general definitions, continued with the species of constitutions (corresponding to democratic, aristocratic, and monarchical sources of law) and then likewise proceeded to the law of persons (liberty and servitude) and of things (commerce), family, and succession. Montesquieu also ended up with a discussion of feudal law (corresponding to the *Libri feudorum*, which modern jurists had accepted as a continuation of “Roman law”). Although Montesquieu’s book may have been “without a mother” (*prolem sine matrem creatam* was its motto), it did have a kind of conceptual godfather: the “spiritual consanguinity” of the basic Roman paradigm. *The Spirit of the Laws* can be read as a set of variations, however remote and figurative, on Gaian and Justinianian themes.

As Cartesianism did not entirely efface the old Roman canon in France, *Naturrecht* did not exclude the study of positive law or even end the tradition of Gaianism in Germany. Most representative of jusnaturalism in Germany was the encyclopedic work of Johann Gottlieb Heineccius, though he belonged as well to the continuing enterprise of humanistic scholarship and looked back in particular to Le Douaren. Like Le Douaren, Heineccius worked along both philological and philosophical lines. His historical surveys of civil and Germanic law and his various investigations into crucial topics of modern critical jurisprudence—including Justinian’s prohibition against “interpretation,” the ignorance of Greek (that is, the “specious dictum,” *Graecum est, non potest legi*), the “anti-Tribonianist sect,” and biographical sketches of Cujas and other jurists—exemplify his philological analysis.⁶⁵ The second line of endeavor consists of a series of commentaries—“Elements,” he called them in Euclidean style—not only of philosophy in general but also of natural law, the law of nations, and especially civil law, from the Twelve Tables down to his own day. The Gaian tradition is represented by his *Syntagma* of 1718, a systematic treatise “according to the order of the *Institutes*,” but also making use of Oldendorp and other modern scholars.⁶⁶ In general, his first concern was with the human condition (*de statu hominis*), and he expressly repudiated Thomas Hobbes’s naturalistic tendency to derive all law from contractual agreement. For Heineccius the mainstream of wisdom, though it certainly originated in Greek philosophy, was that “knowledge of things divine and human” (the title of another of his dissertations) identified with jurisprudence.⁶⁷ In a number of ways Heineccius—like Grotius, Domat, and others—provides a link between enthusiasm for natural law and older traditions of positive scholarship—and also, not accidentally, between the old jurisprudence and newer views of how to go about studying society.

The importance of the Roman experience in the thought of the Enlightenment is most conspicuous in the historical works of Montesquieu and Edward

⁶⁵ Heineccius, *Opera omnia*, 4 vols. (Geneva, 1744), 3: 17, 21, 171, 203. On Heineccius, see Stintzing and Landsberg, *Geschichte der deutschen Rechtswissenschaft*, 3: 179–97.

⁶⁶ Heineccius, *Antiquitatem Romanarum iurisprudentiam illustrantium syntagma secundum ordinem Institutionum Justiniani digestum*, in *Opera omnia*, 4. Also see *Opera omnia*, 1: 191.

⁶⁷ Heineccius, “De iurisprudentia divinarum humanarumque rerum notitia,” in *Opera omnia*, 3: 374–89.

Gibbon, but it was not only decadence and decline that fascinated scholars. The positive force of Gaianism persisted in a variety of ways and so did the grand tradition of Renaissance scholarship that had accumulated around Roman law. François de Boutaric, like Loisel more than a century earlier, offered a comparative analysis of French customary law within the framework of Justinian's *Institutes*.⁶⁸ And Damiano Romano, in the fashion of Bodin almost two centuries earlier, offered a treatise "on the true law of nature and of nations" that was organized according to universal history and drew upon the scholarly work of François Hotman, Cujas, Doneau, Le Douaren, and many other, especially Protestant, jurists of the sixteenth and seventeenth centuries.⁶⁹ Other examples of adherence to older scholarly traditions can be found among jurists who ostensibly belonged to the natural school but who were repelled by the naturalistic excesses of Hobbes, Samuel von Pufendorf, Christian Thomasius, and Wolf. This repugnance was especially clear in the continuing efforts to improve international law, the roots of which went back directly to Gaius via Grotius. Gaian notions also continued to inform encyclopedic enterprises; for instance, Joachim Daries' *Institutions of Universal Jurisprudence*, somewhat like Grégoire de Toulouse's *Republic*, proposed to describe the nature of man, society, and public and private law in a "systematic," "methodical," and "scientific" fashion, yet again following the old Roman forms.⁷⁰

But the clearest expression of Gaian influence during the age of Enlightenment was surely the effort to codify positive law, which came to maturity during the next century and, indeed, became a central political issue in Savigny's time. Once again the center of attention was France, where the codification movement had arisen in the sixteenth century in connection with the work of Charles Dumoulin and other "systematic" jurists already discussed. What was required for such an enterprise to succeed, according to A. -J. Arnaud, a recent historian of the movement, was the "juridical rationalism" and "modern philosophy" of the age of Descartes, especially the work of Domat and his eighteenth-century successors, including Montesquieu but even more Pothier and Henri Daguesseau, who were more directly significant for the Napoleonic Code.⁷¹ Yet, as Arnaud himself has shown, the "order" achieved by modern philosophy retained much of its Roman composition, especially the tripartite Gaian scheme, which carried over into the French civil code. The "philosophic" ideal of the rationalizing jurists, of course, was itself a central feature of the Roman legacy. Antoine Terrasson was, perhaps, "the first historian of law really concerned with the philosophy of law"; but

⁶⁸ De Boutaric, *Les Institutes de Justinien conférés avec le droit français* (Toulouse, 1738). In general, see Klaus Luig, "Institutionen-Lehrbücher des nationalen Rechts im 17. und 18. Jahrhunderts," *Ius Commune*, 3 (1970): 64-97.

⁶⁹ Romano, *Del vero diritto della natura e delle genti* (Naples, 1757).

⁷⁰ Daries, *Institutiones iurisprudentiae universalis in quibus omnia iuris naturae socialis et gentium capta in usum auditorii sui methodica scientifica explanantur* (3d ed., Jena, 1748).

⁷¹ Arnaud, *Les origines doctrinales du Code civil français*, 27, *passim*; and Ph. Sagnac, *La Législation civile de la révolution française* (Paris, 1898), 51.

Terrasson's history is specifically of Roman law as an embodiment of this philosophy. And, when he wrote, "Philosophy is the true source of jurisprudence," he was thinking of Ulpian, not of Descartes or Leibniz.⁷² In any case, what was really required to achieve a code in France was not a conceptual effort; it was a revolution.

PARALLELING THESE RATIONALIZING TENDENCIES in the eighteenth century were various and increasingly obvious survivals of older humanistic traditions. Indeed, this resurgence of historical and literary erudition divided the Enlightenment from the earlier "age of reason." Despite attacks by naturalizing philosophers on "authority" (and, by inference, on history), positive legal and literary scholarship continued to flourish among a variety of unfashionable *érudits*, who refused to allow the new philosophy to cast everything in doubt. Neither Descartes's skepticism nor Galileo's scorn for historians ("memory experts") could stem the flow of antiquarian social, legal, and institutional history. In Germany Hermann Conring, Heineccius, and Leibniz (!), in the Netherlands Perizonius and Grotius, in France Jacques Godefroy, Terrasson, and Montesquieu, in Italy Giovanni Gravina and Ludovico Muratori, and even in England John Selden and Henry Spelman carried on the great enterprise begun by earlier humanists.⁷³ Without them, it is too seldom recalled, the work not only of Gibbon and other historians of the Enlightenment but also of Niebuhr and Savigny, however original and ground-breaking, would have been impossible. Indeed, Savigny's famous manifesto of the Historical School, "The Vocation of Our Age for Legislation and Jurisprudence" (1814), may be regarded as a celebration of the monumental efforts of this (philosophically) tenuous tradition of scholarship as well as an assault on naturalism and its attendant fallacies.⁷⁴ Under cover of these tendencies, Gaianism could maintain a certain precarious existence even outside of narrow professional circles.

In fact, resistance to a physical, or metaphysical, approach to the study of humanity long antedated the rise of the nineteenth-century historical schools. The first great nemesis of radical naturalism was Giambattista Vico, who was at the same time a leading champion of Roman jurisprudence. Vico waged his campaign not only against the current Cartesian form of naturalism but also against its earlier philosophical manifestations. For him a true "science" of humanity had to accommodate not only nature but also convention, not only reason but also authority (and unreason), not only determinism (*necessitas naturae*) but also the free and creative wills of men. As Le Douaren, Lagus,

⁷² Terrasson, *Histoire de la jurisprudence romaine* (Paris, 1750), 101.

⁷³ In addition to Stintzing and Landsberg, *Geschichte der deutschen Rechtswissenschaft*, volume three, there are various specialized studies. For two notable ones, see C. Chisalberti, *Gian Vincenzo Gravina, giurista e storico* (Milan, 1962); and K. Kossert, *Hermann Conrings rechtsgeschichtliches Verdienst* (Cologne, 1939).

⁷⁴ See, for example, Savigny, *Das Recht des Besitzes*. For other works by and about Savigny, see notes 80–81, below.

Grotius, and many others had said, human science had to combine historical-philological with philosophical investigations. And according to Vico the model for such a science was neither Greek philosophy nor rhetoric, which had unfortunately remained conceptually separate, but instead that characteristic Roman kind of “wisdom” (*sapientia*) that was jurisprudence—or, rather, the modern expression of this “civil doctrine” born of humanism and best expressed by Grotius.⁷⁵ In the context of Vico’s epistemology, itself derived from or, at least, analogous to civil law, the “new jurisprudence” combined the study of the cultural products of human will, the “certain,” with the study of the products of God’s will, or nature, which was the “true.” It had to combine, in other words, an understanding of “authority,” or history, with a search for “reason,” or the divine ideal, in just the same way that philosophical jurists proceeded. Such was the argument of Vico’s treatise, *Universal Law*, which was indeed the first version of the *New Science*—the bottom level of an intellectual palimpsest hardly less complex than Gaius’ own.

Vico was one of the great transformers as well as champions of jurisprudence. His method—indeed, his obsession—to reformulate everything into historical terms meant he could not directly take over the static Gaian triad. Yet Vico himself was notoriously a trichotomizer; and his own neotrinitarian structures displayed certain analogies with those of Gaius. On the level of epistemology, or psychology, the Vichian classes were *nosse*, *velle*, and *posse*; and they might be rendered respectively as self-consciousness (perhaps self-possession or self-control), vitality (or the urge to live and to relate to others), and activity (or desire to act and to achieve). In the course of the historical process these three basic faculties of human nature were transformed into what can be considered as social, beyond a mere individual, consciousness (*mens*), rationality (*ratio*), and awareness of divinity (*Deus*). In the sphere of civil society, another homologous triad, the institutional categories, again were produced by historical development: *dominium*, which can be understood as control of things, the basis of civil possession, or property; *libertas*, in social terms the legal order, the rule of law; and *tutela*, active control over and direction of society on behalf of its values and goals—that is, government.⁷⁶

It will not do to make too close an identification between the Vichian and the Gaian systems. For one thing Vico was inordinately proud of the “geometric” design of his “new science,” and increasingly the Romanoid structure was lost in the successive and increasingly sublimated versions of the system. But both the *Universal Law* and the *New Science* contained a common denominator: both systems retained, on the one hand, a primary category of personality (that is, the subject of rights and obligations) and, on the other, a secondary category of natural reality (that is, objective “otherness,” which represented the field for acquisition—both natural and civil possession). In

⁷⁵ For a fuller treatment of the place of rhetoric, see my “Vico’s Road: From Philology to Jurisprudence and Back,” in G. Tagliacozzo and D. Verene, eds., *Giambattista Vico’s Science of Humanity* (Baltimore, 1976), 15–29.

⁷⁶ Vico, *De universi juris uno principio et fine uno*, ed. F. Nicolini (Bari, 1936).

both systems actions were defined in terms of these two classes. These remarks hardly begin to reveal Vico's relations to the legal tradition, not only to the ancient sources but to the scholarship of Domat, Grotius, the French "systematists," and other commentators of the preceding two centuries; they may, however, serve to suggest some of his importance as a link between jurisprudence and a modern philosophy of society and culture—another way in which a traditional legal science could become the point of departure for a modern social science.

In various ways Vico anticipated, even if he had no direct impact on, the new view of jurisprudence that began to appear in the late eighteenth century—the Historical School of Law, which became more fully defined, and in some ways even dominant, in the wake of the Napoleonic wars. The point of departure of this school was a historically minded—whether conservative, nationalistic, or "romantic"—rejection of theories of natural law or, at least, a reformulation of them. Its home territory was, of course, Germany, where the wars of liberation were directed not only against Napoleonic domination but also against Bonapartist and Jacobin ideology.⁷⁷ To simplify a very complex matter, the assault on rationalism and jusnaturalism (and, related to this attack, the emergence of the Historical School) took its strength from three interrelated traditions. First, the continuing efforts of antiquarian research into the national as well as the classical past followed the work of Heineccius and earlier historians and ultimately stemmed from the philological achievements of Renaissance humanism. Second, again related to sixteenth-century concerns with practical matters, "cameralistic science" (whatever its politics and goals) acted as a solvent upon grand theories of natural law, whether older rationalist schemes or newer idealistic constructs, such as that of Kant. Third, most immediate and most emotional was opposition to that concrete embodiment (or, at least, symbol) of oppressive and arbitrary systems, the Napoleonic Code (and, to some extent, its earlier Prussian and Austrian counterparts). These were the grounds on which the *Historische Rechtsschule* was established in the early nineteenth century.

The man most often regarded as the founder of this school—*Altervater*, Marx called him, and *Naturmensch*—was Gustav Hugo, whose attitudes stemmed quite directly from the tradition of classical humanism. Among other works, he published a new edition of the famous fragments of Ulpian (first published by Cujas and referred to by both Montesquieu and Vico) and a translation of Gibbon's forty-fourth chapter surveying the history of Roman law, likewise based on humanist scholarship; he also wrote voluminously on and taught legal history. He began publishing his systematic and historical works in 1789, taking as his special target "dogmatic" jusnaturalism and setting in its place his own realistic sort of natural law.⁷⁸ His system was founded on a "juristic

⁷⁷ Like Gaius himself, the *Historische Rechtsschule* has spawned a literature too voluminous to mention and a long concatenation of journals starting with those of Savigny and Hugo and ending with the *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte*. See, for example, Georges Gurvitch, *L'Idée du droit social* (Paris, 1932).

⁷⁸ Hugo, *Lehrbuch des Naturrechts als eine Philosophie des positiven Rechts*, which was part of his *Lehrbuch eines civilistischen Cursus*, which began to appear in 1789.

anthropology,” in which he considered the animal characteristics of persons (*der Mensch als Tier*) and went on to consider law as “natural” in the sense not of rationality but of a *de facto* growth. In one sense, Hugo recapitulated the method of Gaius, who likewise accepted without question the “reality” of past Roman experience, thereby giving “authority” to history, and then rationalized it through dialectical argument. Not surprisingly, Hugo was, like Gaius, open to charges of being arbitrary and authoritarian; and, as conventional Romanism came under fire from rationalists like Leibniz, so the Historical School was attacked by idealists—especially Hegelians, the most famous of whom was the young Marx. Although he recognized that Hugo represented a “reaction against the frivolous spirit of the eighteenth century,” Marx objected to the irrationality of the alternative. About Hugo’s historical method Marx observed, “Everything serves him as an authority, every authority serves him as an argument”; and about the true principles of justice he concluded that Hugo “desecrates them in the eyes of reason in order afterwards to make them honorable in the eyes of history.”⁷⁹ So Hugo seemed even to justify slavery; and, in general, Marx reduced Hugo’s philosophy of law to the proposition that “the sole juridical feature of man is his animal nature.”

Savigny, Marx’s teacher, who first joined and then superseded Hugo in the leadership of the Historical School, regarded this attack, of which he was only an indirect target, as unfair and obtuse. Throughout his life Savigny rejected the charge that his view supported the “tyranny of the past” (*Herrschaft der Vergangenheit*), and he argued that the basis of his thought was not authority but realistic human perspective. His views were expressed first in his youthful yet magisterial treatise on possession, *Das Recht des Besitzes* (1803).⁸⁰ Here Savigny decisively contributed to a discussion that had been going on for centuries, a discussion that had indeed begun with Gaius and that included other jurists, especially Le Douaren, Doneau, and Pothier. The controlling assumption of this book was that practical questions of law had to be settled in terms of Roman law understood not only systematically but also historically—that is, in terms of a process that included not only ancient forms but also medieval interpretations and modern (*heutige*) transformations. Savigny later followed this method in his treatise on the law of obligations and, above all, in his *System of Modern Roman Law*; presumably, he also maintained the same stance in his teaching and in his career as minister of justice for the reform of Prussian law. Savigny was involved, of course, in other contemporary controversies, most notably that between the “idealists” (especially the Hegelians) and the “realists,” with whom he was identified; but the extent to which his ideas can be understood in terms of the longer legal tradition as well as the more immediate context of German philosophy is surprising.

⁷⁹ Marx, “Das philosophische Manifesto der historischen Rechtsschule,” in *Marx-Engels Gesamtausgabe*, 1, pt. 1 (Berlin, 1927): 251–59. Also see H. Jaeger, “Marx et Savigny,” *Archives de Philosophie du droit*, 12 (1967): 65–89; and J. Blühdorn, “Naturrechtskritik und ‘Philosophie des positiven Rechts,’” *Tijdschrift voor Rechtsgeschiedenis*, 45 (1974): 3–17.

⁸⁰ Savigny, *Das Recht des Besitzes*, 124, and A. Rudorff’s addition, 543–62. Also see Vogt, *Franciscus Duarenus*, 89–108.

From the first, Savigny, like Gaius, had systematic ambitions; and his age, like that of Gaius, was similarly divided, both ideologically and pedagogically, over jurisprudence. The basic question of the suitability of a modern code of laws for German society was the issue on which Savigny and the Historical School rose to prominence.⁸¹ Savigny ridiculed the “positivist” notion advanced by A. F. J. Thibaut of constructing an abstract and academic code as simplistic and outmoded naturalism already discredited historically by the evident failures of the Napoleonic, Prussian, and Austrian codes of the previous half-century. Arguing that law, like language, was the product of a long and gradual development, Savigny concluded that the answer lay in the tradition of Roman law, which had been officially “common law” for three centuries and, in fact, for longer than that. As a result, he came to replace Hugo as the leader of the Historical School, especially after the publication of his manifesto of 1814 and the founding of his journal, *Zeitschrift für geschichtliche Rechtswissenschaft*, in the following year. The premise of this journal, that a true “science” must be the product of centuries of development, was another illustration of the affinity between Savigny and Gaius. Thus, it is appropriate that in the next year came the miraculous discovery of that most ancient relic and deepest root of Roman legal science—Gaius’ *Institutes*.

IRONICALLY, GAIUS APPEARED TOO LATE to be of practical value for the science of jurisprudence; it was too late in the evening for the Roman owl to take flight. The principal significance of the discovery lay in the field of historical scholarship and Roman antiquities. Even more ironically—tragically, in fact, for Savigny—the Historical School was itself more important in the long run for academic—scholarly and philosophical—than for professional achievements. In a sense this culmination of a long process of “historicizing” (*Historisierung*, as a recent historian of eighteenth-century universities calls it⁸²) underlies the great works of Theodor Mommsen, Rudolf von Jhering, and others of the next century. In fact, Savigny’s reputation today rests largely on his massive *History of Roman Law in the Middle Ages*, even though it was intended originally to be a preliminary study of the sources of law and, thus, ancillary to its author’s professional aims and ambitions. Nevertheless, Savigny’s *System of Modern Roman Law* was the principal monument of the Historical School; and in many ways it proposed, in modern terms, to carry out the same sort of task, philosophical as well as pedagogical, that Gaius had set for himself. In a sense, it was a move back toward Gaianism.

Savigny’s neglected masterwork represents not only the culmination of the Historical School but also a kind of historically oriented *summa* of the legal

⁸¹ Savigny, *Vom Beruf unserer Zeit für Gesetzgebung und Rechtswissenschaft* (Heidelberg, 1814), published with Thibaut’s article and other material in J. Stern, *Thibaut und Savigny* (Darmstadt, 1959). On the problem of codification, see J. Vanderlinden, *La Concept du code en Europe occidentale du XXIII^e au XIX^e siècle* (Brussels, 1967); G. Tarello, *Le Ideologie della codificazione nel secolo XVIII* (Genoa, 1971); W. Ebel, *Geschichte der Gesetzgebung in Deutschland* (2d ed., Göttingen, 1958); S. Gagnér, *Studien zur Ideengeschichte der Gesetzgebung* (Stockholm, 1960); and Koschaker, *Europa und das römische Recht*.

⁸² Notker Hammerstein, *Jus und Historie* (Göttingen, 1972), 216.

tradition going back to the classical period of jurisprudence—most specifically to Gaius himself, who figures prominently in as well as provides the prototype for this treatise. Like Gaius, Savigny proposed to give shape to a vastly “rich heritage” through critical and selective judgment.⁸³ He rejected the current fallacy of both historical and legal scholarship, which assumed that a systematic treatment could merely be a collection of monographs (though that treatment, indeed, drew upon such works, including Savigny’s own on possession and obligation). “Scientific” jurisprudence was the creation not of amateur philosophers like Cicero (or even Montesquieu, despite his training) but only of men of professional authority (*auctoritas prudentium*) like Gaius and Savigny himself. To Savigny’s system in general Gaius had made at least three contributions. One was the transmission of particular formulas derived from more ancient Roman legal wisdom. Another was the distinction between the two basic kinds of law—that is, civil law and the law of nations, which was properly identified with natural law (as Savigny thought, in contradiction to those who recognized it as a third type) since it was based on “natural reason.” And, almost unavoidably, the third was the notorious Gaian triad. Although Savigny had critical remarks to make about the triad, he did incorporate it into his own structure. What is more, he went on to point out a number of analogous trichotomies of Roman law that history, if not nature, had endorsed.

At the center of Savigny’s (as of Gaius’) cosmos was, of course, the individual “person,” the first member of the Gaian trinity, which perhaps not originally but eventually opened up the whole question of the “status” and “condition” of man in a philosophical as well as a legal sense. In this connection he referred to Doneau, one of the most important of his systematizing predecessors, who elaborated on the concept of personhood by distinguishing aspects not only of life and security but also of liberty and belief (*existimatio*), all of which stemmed from an “original” rather than an “acquired” right. As Savigny described the basic *conditio hominum*, “Man stands in the midst of the outer world, and the most important element, to him in this surrounding of his, is the contact with those who are like him, by their nature and destination.” From the individual Savigny moved to the social sphere, where as he put it, “in the richness of living reality all jural relations form a systematic whole.” On the level of this web of jural relations (*Rechtsverhältnisse*), the counterpart of the individual was the “people” (*Volk*—that is, the Roman *gens*), and the law thereof was an expression of the old law of nations (*jus gentium*, rendered as *Volksrecht*).⁸⁴ Then, in Gaian fashion, he took up the law of things, actions, and their various derivatives and interactions. Romanic and organistic imagery aside, Savigny’s strategy was quite in keeping with the Romanist tradition, which he was, in his “historicist” way, espousing.

⁸³ Savigny, *System des heutigen römischen Rechts*, ix, 413, 393, 38. And, for a very important article, see Aldo Mazzacane, “Savigny et la storiografia giuridica tra storia e sistema,” in *Scritti in onore di Salvatore Puliatti*, 4 (Milan, 1978): 515–29.

⁸⁴ Savigny, *System des heutigen römischen Rechts*, 357, 331, xix, 17.

Savigny's influence, though restricted in the long run to the intellectual sphere (his struggle against modern jusnaturalism was defeated with the adoption of the German civil code in 1900), was profound and in many ways pervasive, illustrating again the humanist commonplace that Rome, although it had collapsed as a political structure, continued its dominance through linguistic, literary, and especially legal channels. Gibbon opened his forty-fourth chapter with the observation that "the public reason of the Romans has been silently or studiously transfused into the domestic institutions of Europe . . .," but even deeper and more enduring has been the effect upon legal, historical, and social thought. Before Savigny this Roman influence was most conspicuously evident in the work of Montesquieu and Vico, who had also striven to recapture the essence of the tradition and give it modern form; after him, it was evident in the work of many others, not only disciples but also critics like Rudolf von Jhering, whose magisterial *Spirit of Roman Law* was devoted to the same purpose. To illustrate this purpose, both Vico and Jhering quoted the famous lines of Vergil,

Remember, O Romans, you keep universal rule over nations
In these ways: by maintaining peace through law,
By doing justice to the lowly, by bringing down the haughty. . . .⁸⁵

This prophecy might be taken as the epitaph of Savigny and his school—not only in their efforts to reform and to regulate society but also in their impact on modern social thought in general.

THE ACHIEVEMENT OF THE HISTORICAL SCHOOL had repercussions far beyond the legal scholarship of Savigny, Johann Eichhorn, and their disciples and the parallel historical writings of Barthold Georg Niebuhr and of Leopold von Ranke and his academic offspring. Based upon a total and "organic" view of culture, this approach involved many other areas of cultural study, most notably language, religion, and political economy. Out of the interdisciplinary matrix created by these complementary and overlapping "historical schools" emerged one phase of a new discipline called sociology. One of the first historians (and in this country a founder) of that discipline pointed to the Historical School of Law, especially to the Savigny-Thibaut controversy, as seminal for the growth of sociology.⁸⁶ A more concrete illustration of this connection is Marx, whose social thought arose in the context of his legal education and, specifically, in the quarrel between the Hegelians and the Historical School; and a number of his ideas, including class structure and "alienation," were directly linked with the civilian tradition.⁸⁷ Other particular instances could be added—including, perhaps, the systematic work of Max Weber and, certainly, his sociology of law.

⁸⁵ Vico, *Diritto universale*, 214; and Rudolf von Jhering, *Der Geist des römischen Rechts auf den Stufen seiner Entwicklung*, 1 (Berlin, 1852): 306.

⁸⁶ Albion Small, *Origins of Sociology* (Chicago, 1924), 37–62.

⁸⁷ See my article, "The Metaphysics of Law: An Essay on the Very Young Marx," *AHR*, 83 (1978): 350–67, which is a continuation of the present discussion.

A central remaining question is the significance of the old Roman and Gaian paradigm for modern social thought, especially in its systematic sociological forms. Although to provide an answer moves the discussion from the historical dimension to transhistorical speculation, the question at least provides a logical *terminus ad quem* for this discussion of the afterlife of Roman forms and of Gaianism in particular. To conclude with a retrospective glance at this tradition, it seems clear that the first, and perhaps the most fundamental, continuing influence was pedagogical. Civil law was a major vehicle of secular higher education in European universities from the thirteenth to the nineteenth century (as it had been in Gaius' time), and the *Institutes* (first in a Gaian, then in a Justinianian, and finally in a national form for various European states) constituted one of the basic textbooks of Western civilization, arguably the single most influential introduction to social thought. Certainly, the overwhelming majority of social thinkers prior to Savigny were juridically trained. Secondly, Roman civil law was an almost inexhaustible source of assumptions, insights, terminology, methods, formulas, and concepts for systematic thinking about social structure and process; and even for those who, like Marx, reacted against it, the importance of civil law in negative ways was considerable. Finally, through its ideals, systematic form, and practical intentions, Roman jurisprudence furnished a "scientific" and "philosophical" model for the understanding of human society. The specific relationships between the old legal tradition and the new fields of human study, including economics, sociology, and anthropology, for the most part still await investigation.

In assessing the significance of civil law in Western social thought, let us, in conclusion, return to the original epistemological basis of the Gaian tradition. The ancient dualism of nature and convention implied a distinction between the natural and the social or historical condition of man; and Gaius' subjective and "personal" starting point gave priority to the latter, in contrast both to the intimidating political philosophy of Aristotelianism and to modern naturalism. Jurisprudence could not extricate itself from the conventional, however much it reached toward the natural: as "true philosophy," it was incorrigibly man-centered, value-laden, and action-oriented. It had to view the human condition not as a natural process or a logical construct but as a human epic or drama that focused on the conflict of wills and the means of resolving them within the overall communal pattern. Ultimately, perhaps, the natural and the conventional—reason and custom, the "spirit of law," and the reality of society—might be reconcilable; but men cannot judge, act, and live "ultimately," though they can talk about doing so. Of this human yet global approach to "science," the symbol and in some contingent (and "conventional") sense the starting point is "our Gaius."