American and British legal systems are self-organizing because of their reliance on precedent: later courts are required to follow the decisions of earlier ones. Roman courts were not similarly bound. In fact, since decisions were not published, precedent was hardly even available. The emperors had the authority to make binding interpretations but in practice could do so in only relatively few cases. Second, the jurists were not interested in a system. They worked in a strictly "casuistic" (case-by-case) manner; this manner presented the *iudex* with many models for judgment in a new case, but few general rules. Finally, the legislative process itself was unhelpful. Romans tended not to repeal or emend outdated laws. Often they would simply ignore them or reinterpret them beyond all recognition. Thus, the "paper trail" of the law could be quite confusing or misleading.

Legal Implications. This disunity was doubtless confusing for the aspiring jurist or prospective litigant. It may, moreover, have had deeper implications for the law itself. Without much legal theory the Romans appear never to have solved certain problems simply because they never entirely recognized them. For instance, Roman jurists agreed that a person had to be at "fault" to be legally liable for damage to another's property. They never agreed, however, whether this fault was subjective (one was not as careful as one could be) or objective (one was not as careful as the ordinary person would be). They never decided this fault because they did not define their terms so abstractly. But the abstract difference can make a huge difference in individual cases. In modern terms this distinction between subjective and objective fault is what makes "negligence" much easier to prove than "recklessness" and means the former is almost never sufficient to convict someone of a crime. Similarly, they never discussed in general what it means to "cause" something. This lack of fault made it tricky to assign responsibility in complicated cases such as a multiple car pileup. Who "caused" which collisions?

Sources:

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ROMAN LAW: THE PARAMETERS

Extensive Scope. One of the most distinctive features of ancient Rome as compared to any of its contemporaries is its extensive legal system. Of course, many Greek and near-eastern civilizations had had law codes long before the Romans. Some have even speculated that the roots of the Celtic "Brehon" laws antedate the origins of Rome. None of these legal systems, however, nor any that were to appear for another thousand years (except the religiously based Jewish Talmud), had anything like the scope of Roman law. A consequence (and cause) of this large system was the Romans' interest in establishing legal rules not just for the most common or most general situations, but for every eventuality.

Criminal and Constitutional Law. In contrast to this interest in legal particulars, the Romans were not generally interested in grand theories of the law. Still, one can stay fairly true to Roman thinking by dividing the law into three parts: private, public, and sacred. Private law covered disputes between individual parties. (These were normally individual people, since Roman law did not really create "artificial persons" such as corporations.) This area is like modern "civil" law, though somewhat broader. Private law touched on areas such as commerce, property disputes and damage, family and inheritance, marriage and dowry, slavery, and defamation. It also included some matters that would be considered crimes today. Public law deals with matters which interest not just the parties but the whole community. It can be divided into two main branches. One includes most of what is called "criminal" law today. The other might be described as "constitutional." It controls the structure and functioning of the government, including standards of eligibility for office or rules for advance notice of pending legislation. Some parts of sacred law could be considered "merely" religious, such as requirements for holding priesthoods or rules for repeating sacrifices in case of ritual errors. Other parts of the sacred law could have a more dra-

ROME VS. GORTYN

In the early days Roman law was not any more sophisticated than their Greek neighbors'. For instance, the Twelve Tables (Rome, 450 B.C.) and roughly contemporary code of the Greek city of Gortyn have comparable rules of inheritance:

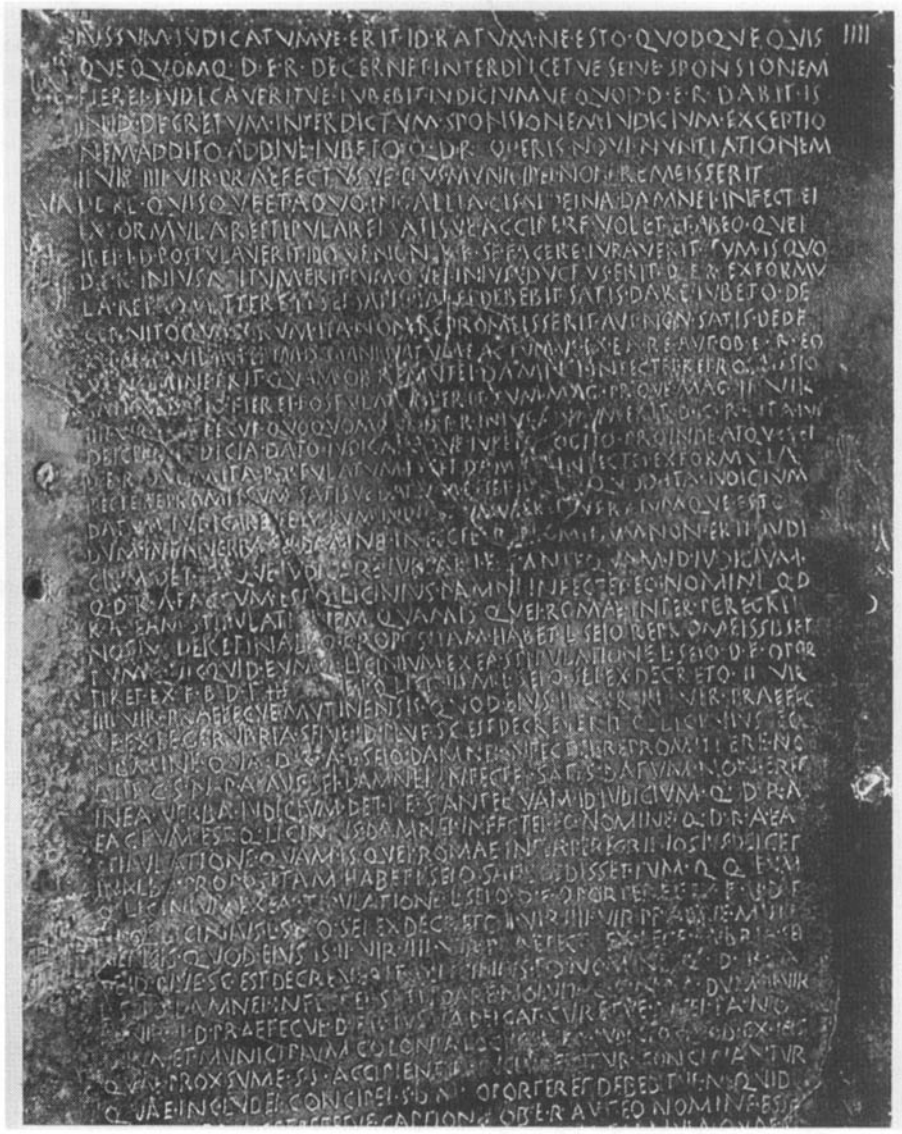
> If someone provides for his estate or guardianship by will, let this be legally valid. If someone dies without a will, and he has no *suus heres* (direct descendant), let the nearest "agnate" [relative traced only through male lines] have the property. If there is no agnate, let the members of the clan have the property. (*Twelve Tables* 5.3–5)

> When a man or woman dies, if there are children or grand-children or great-grand-children, they get the property. If there are no such people, then the brothers (or their descendents) get it. And if there are none of these either, the sisters (or their descendants) get it. . . . And if there are no others entitled, the serfs of the property get it. (Gortyn 5.9–28)

But the law of the later empire covers far more exotic circumstances:

> If a man with two grandsons has emancipated one of them and adopted him in place of a son, we must see whether he alone may be admitted to the estate as per a son. This is the case if he has been adopted as the father of the grandson who had been kept in power, but the better view is that he alone can come into possession of the estate. (Ulpian, *Digest* 37.4.3.1)

Source: *The Civil Law, Including the Twelve Tables*, edited and translated by S. P. Scott (New York: AMS, 1973).



Bronze tablet inscribed with Julius Caesar's "Lex Cisalpina" of circa 48 B.C.E. that defined the legal powers for the province of Cisalpine Gaul, whose inhabitants he had made citizens of Rome (Parma Museum, Parma)

matic impact on the human world. Consecration to the gods or use for burial took land out of the realm of human ownership. A Roman noble was once forced to tear down his house because it blocked the view of the priests whose job was to watch for omens in the sky. Others had to resign from the state's highest office when it was later discovered that rituals had not been carried out properly at their elections.

Elaborate Apparatus. Roman law was created both by legislative bodies and by individual magistrates in the government. It also received a substantial contribution from private legal specialists known as "jurists." The state had an elaborate apparatus for resolving disputes according to the law. Parties (usually represented by professional advocates) argued their case and presented their evidence before a court. Their cases were then judged by a single judge or set of jurors. This similarity in outline to the modern legal system makes it easy to use many of the same terms when speaking of the Romans. However, the detail of each part of the Roman system turns out to be much different from modern custom. Therefore, one must be careful not to take too much for granted on the basis of similar terminology.

Sources of Law. In modern nations of the "common law" tradition (including the United States and England) there are two primary sources of law. First, there is "statute" law—the enactments of legislative bodies such as Congress, Parliament, local councils, state legislatures, and the like. Second, there are judicial precedents—interpretations of these statutes and of long-standing conventions by judges. The sources of Roman law were similar, but not identical. Moreover, the balance of importance between sources was radically different.

Statute Law. The Romans had statute law called *lex* (plural *leges*). *Leges* were the enactments of the various popular assemblies. Compared to any modern nation, however, they passed few of these laws. Those that were passed tended to be concentrated in certain areas such as governmental structure and procedure, declarations of war and peace, and distri-

bution of land. Other areas, notably including most private law, were neglected.

Magisterial Edicts. By contrast, the role of the executive was much more important in shaping the law. The chief magistrate in charge of the administration of justice was called the urban praetor. At the beginning of his term, he would publish an edict listing the actions he would allow to be brought in court, that is, the circumstances in which someone could be sued in a Roman court. In a few instances these actions were mandated by statute law, but most were allowed solely on the basis of the praetor's authority. In principle the praetor was free to include or reject whatever he wished. In practice the edict tended to evolve slowly, with each praetor deviating only slightly from his predecessor's edict. Finally, in the second century C.E. the emperor had the praetor's edict fixed permanently. Several other officials of the Roman government also issued edicts explaining how they would carry out their respective offices, and some of these touched on specific judicial areas (e.g., the "aediles" were in charge of the markets, so their edict had some effect on commercial law). However, the urban praetor's edict was much broader and in any case tended to serve as a model for the others. Under the empire, the word of the emperor, in several formal guises, naturally became a crucial source of law.

Juristic Opinion. A third source of law, and at least equally important, was the work of legal scholars known as "jurists." Authoritative interpretation of statutes and edicts was carried out not by courts but by these jurists. Moreover, "interpretation" was capable of changing the meaning of laws drastically. For instance, an early law stated that a son who was sold by his father three times (presumably he came back home in between sales) would thereby be emancipated or freed from paternal control. Later jurists interpreted this law to mean that a daughter (not covered by the original law at all) would be emancipated by being sold only once. A few jurists of the early empire are known to have been granted a "right of responding" to legal questions by the emperor. It is not clear what this right meant, but in general, individual jurists did not have formal, legal authority. Nonetheless, judges sought out their advice, and where the jurists were in agreement, that consensus seems to have had the practical force of law.

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Trial Procedures under the Empire

Cognitio. The republican procedures continued to be used in the early years of the empire. Over the course of the first two centuries C.E., however, they began to be displaced. Criminal trials of senators came to be held before the senate itself. Other cases, in both public and private law matters, came to be tried by a process generally called *cognitio* today. The case was heard directly by a state official. These were still not professional judges in the modern sense but were perhaps a step in that direction. The presiding official also had considerably more control over the direction of the case than under Republican rules. He could impose legal terms, compel persons to appear, and conduct independent inquiries without the advice of the parties. With the new procedure also came increased substantive flexibility. The presiding officer had freedom to accept claims of justification or impose nonstandard penalties. *Cognitio* coexisted for some time with the earlier procedures. There were perhaps still jury trials for adultery being held in the early third century C.E. Eventually, however, it displaced the earlier forms. Also, it was the sole procedure for some offenses, such as tampering with the grain supply, which were created only under the empire.

Provinces. The above procedures were viable only near the city of Rome, since they required access to the praetor there. Outside Rome, his role was taken up by governors in the respective provinces. However, there were other complications there. For most of the Republic and early Empire many people were subject to Rome but were not themselves citizens. From the Roman point of view (as in most ancient legal thinking) this situation meant that they were not, or not automatically, subject to Roman law. Thus suits between two Egyptians generally continued to be heard under Egyptian law even after the kingdom was annexed by Rome. While there was probably no circumstance in which a governor felt he had no *right* to intervene in a case within his province, he ordinarily saw no *need* to do so. And even if he did intervene, he might only order a case to be decided under a particular local law.

Extended Reach of Roman Law. Nonetheless, the reach of Roman law extended steadily over time for at least four reasons. First, from the end of the Republic, grants of Roman citizenship were made to individuals and whole communities. This automatically brought more people under the scope of Roman law, though some local jurisdiction persisted even after universal Roman citizenship was granted in 212 C.E. Second, Roman political authorities increasingly used their own law to settle disputes in which the two parties were not both from the same foreign state, e.g., cases between a Roman and a provincial, between provincials from two different cities, or including persons from outside the empire entirely. We also know of cities that decided smaller cases themselves, but had to refer more important matters to the Roman authorities. Third, even communities that retained formal judicial independence sometimes changed their laws to resemble those of Rome, especially in the western half of the empire. This conformity seems to have been encouraged but not required by the central government. Finally, the losing party in any dispute might appeal to Roman authority just to have a second chance to win. In these last two instances, subjects and subject states colluded in weakening their own legal systems.