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To the Legal Theory Workshop:

The attached text is spliced from two essays written this summer. One, a lecture in French, explored the nature and limits of legal pluralism under the Roman empire and the relationship between procedural and substantive law at Rome and in provincial courts. This last is an unexplored problem in Roman legal history, largely because the Romans themselves emphatically insisted on distinguishing between the two and Roman legal historians have been largely content to operate within the horizons delivered to them by ancient actors. (Roman procedure was 'formulary'; procedure in the provinces was *extra ordinem*, meaning 'not ordinary'.)

I mention that the first essay was in French because I attach the handout from that event. It will be useful only to those who want to see the original texts in Latin and Greek or who desire some sense how much of any given papyrological or epigraphic document survives. All the essential texts are translated in the paper.

The second essay is a study of the legal effects of the grant of universal citizenship by the emperor Caracalla in 212 CE.

The final texts of both documents are due later this fall, to be published next year: "Pluralisme juridique et l'intégration de l'empire," in Stéphane Benoist, Ségolène Demougin, and Gerda de Kleijn, eds., *Impact of Empire X* (Leiden: Brill, forthcoming 2012) and chapter 4 in C. Ando, *Imperial Rome: the critical century (A.D. 193-284)* (Edinburgh: Edinburgh University Press, forthcoming 2012).

yours, Cliff

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## **Pluralism, procedure and legal change in the Roman empire**

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Law and legal institutions occupy a paradoxical place in the study of ancient empires. On the one hand, outsiders tend to regard law as an instrument of the imperial power, imposing metropolitan systems of norms on subjugated cultures and helping to sustain inequitable distributions of wealth and power both within colonized societies and between those societies and the colonizing power. Ancient historians, on the other hand, have over the last generation acquired a deep skepticism regarding the efficacy and reach of ancient government. This last arose at once from minimalist assessments of ancient government's infrastructural power, and also from attendant considerations regarding the material conditions under which government operated: prevailing levels of literacy were low; rural communities, where the bulk of the population lived, were remote; and so forth. Where one group has urged that law must be a principal instrument of imperial

oppression, the other has urged that it cannot have been such, in the ancient world at least.

These difficulties have been exacerbated by problems of evidence. In short, until the systematic reading of papyri began, the evidence for legal history under Rome was generated nearly wholly by Roman authorities. Not only do those sources signally fail to address practice in the provinces outside a tiny handful of references, their privileged position within European culture seemed to confirm contemporary suspicions regarding the myopia of metropolitan cultures. What is more, even as scholars discovered and began to decipher the documentary record of Roman Egypt, debates erupted about the nature of its legal culture: how Roman was it? If it was Roman, how debased? And was its legal culture unique, even as its evidentiary regime was?

The problems of evidence began to dissolve perhaps a quarter century ago. In particular, the discovery of legal documents on papyrus in the Judaeian desert and middle Euphrates utterly collapsed any argument bracketing the Egyptian evidence as somehow unique to a single province.<sup>1</sup> What is more, the new papyri occasionally reveal remarkable awareness of Roman law and astonishingly robust legal institutions. In part as a result of the excitement generated by legal-historical study of those texts, people have begun to revisit--and perchance to collate for the first time--epigraphic evidence for the nature and history of legal institutions in other provinces.<sup>2</sup>

These same handicaps to a robust legal history of the Roman empire have likewise hampered the study of the Antonine Constitution (the enactment in 212 C.E. whereby nearly all free residents of the empire were granted Roman citizenship). It had once seemed, and still might seem, a likely turning point in the history of the empire.

After all, if an empire--to be an empire--must rule over someone, then the Roman empire must have become some other sort of state at that moment when Caracalla erased the most important legal distinction between the conquerors and those once conquered. The moment seemed all the more salient when regarded in the light of the subsequent history of European empires: many of those had dissolved at just that moment when the imperial powers were confronted by demands to fulfill in some meaningful way their avowed imperial projects.

That said, at an earlier moment in the publication history of ancient papyri, and likewise before serious aggregation of epigraphic evidence in regard to non-elite nomenclature, even a superb historian could write of the Antonine Constitution that it should have been a tremendous revolution, an immense about-face ... but where was the evidence?<sup>3</sup> Echoes and reactions among contemporary writers were stunningly few. How had it not been an ideological watershed?

Here again, the gradual accumulation of epigraphic and papyrological evidence, as well as the development of social-historical frameworks for its analysis, have allowed for cautious new assessments.

It will not be possible in a single chapter to offer a comprehensive survey of all those arenas of legal, social and economic activity affected by the grant of universal citizenship. The rest of this chapter seeks instead to offer a framework for understanding the forces at work in legal history that might stand in loosely paradigmatic relation to changes in other domains. We commence with a review of the basic frameworks with which it was decided what system of law would apply in any given case in the early Principate. At issue was a fundamental expectation that political communities should

each have their own systems of law and that citizens in any given community should regulate their conduct according to its body of law. The next section considers the pressures for change that arose in actual legal practice prior to the Antonine Constitution, whereby Roman legal forms came to influence provincial life even outside the framework of citizenship. We then turn to the Antonine Constitution and its aftermath.

### **Legal pluralism and the dynamics of empire**

One might begin by sketching a basic normative framework for the separation of the empire into separate jurisdictions as the Romans themselves theorized the issue. The most famous and most concise formulation in a classical text is that provided by the jurist Gaius, the author of the only surviving textbook on law from antiquity, at the opening of his *Institutes* (Gaius's *floruit* appears to have been the two decades prior to the reign of Septimius Severus--his remarks here should therefore be taken as late, second-order observations on long-developed practice):

All peoples who are governed by statutes and customs observe partly their own peculiar law and partly the common law of all human beings. The law that a people establishes for itself is peculiar to it, and is called 'civil law' (*ius civile*), being, as it were, the special law of that *civitas*, that community of citizens, while the law that natural reason establishes among all human beings is followed by all peoples alike, and is called *ius gentium*, being, as it were, the law observed by all peoples. Thus the

Roman people observes partly its own peculiar law and partly the common law of humankind. (*Institutes* 1.1; Latin at Handout #1)

In other words, the civil law or, better yet, *a* civil law is a body of law that a political community (what Gaius calls a *civitas*, which means a collectivity of citizens) establishes for and over itself. Only the members of that community, which is to say its citizens, have *a priori* access to its legal actions. The foundation of Gaius's claim is expressed by the reflexive and distributive pronouns "each" and "for itself": the term "civil law" denotes those bodies of law that each political community makes for itself.

The term *civitas* has two valences of relevance to any effort to understand how this framework was actualized in the organization of the empire. First, *civitas* meant "citizenship" (it is an abstraction from *civis*, "citizen," and must mean "the quality that individuals share that makes them citizens"). Second, *civitas* might by common metonymy also refer to a political community, to a collectivity of citizens, and by further metonymy to the city (or city-state) that those citizens inhabited. Hence, it might be useful to consider the implications of Gaius's definition along two lines: how did one's legal status--one's citizenship--affect the body of law that one was expected to use and observe, and, second, what was the relationship between legal system and territoriality?

Let us consider first the correlation between citizenship and law. An understanding similar to that of Gaius is clearly visible in the narrative of Livy, writing under Augustus, but describing (as he thought) Roman practice in the organization of subjugated communities already in the late fourth century BC. Consider the narrative Livy provides of the aftermath of a Roman war with the Hernici in 306 BC:

Cornelius was left behind in Samnium. Marcius returned to the city in triumph over the Hernici and an equestrian statue in the forum was decreed, which was placed before the temple of Castor. To three polities of the Hernici--the Aletrinati, Verulani and Ferentinati [who had sided with Rome in the war]--because they preferred this to Roman citizenship, it was permitted that their laws should be returned to them and rights of intermarriage granted, which for a time they alone of the Hernici possessed. To the Anagnini, who had borne arms against Rome, was given citizenship without the vote: their rights of assembly and intermarriage were taken away and their magistrates forbidden any responsibility other than sacred ones. (Livy 9.43.22-24; see also Livy 9.9.6; Latin text at Handout #2)

Observe that the favored peoples were allowed to remain independent, which is to say, they did not become Roman, and in consequence they were allowed to use their own systems of law. Such is likewise the reading of this exchange provided by another actor in the narrative, the Aequi, from whom the Romans demanded satisfaction a short while later:

The Aequi responded that the demand was patently an attempt to force them under threat of war to suffer themselves to become Roman: the Hernici had shown how greatly this was to be desired, when, granted the

choice, they had preferred their own laws to Roman citizenship. To those to whom the opportunity of choosing what they wanted was not granted, citizenship would of necessity be *pro poena*, as a punishment. (Livy 9.45.6-8)

It is of course quite likely that Livy's narrative has been shaped by anachronism in ways we can no longer detect. It is therefore crucial that the same correlation between system of law and citizenship underlies the very earliest law on provincial jurisdiction for which we possess extensive testimony contemporaneous with its operation, namely, the *lex Rupilia*, the Rupilian law on the administration of Roman Sicily:

The Sicilians are subjects of law as follows: actions of a citizen with a fellow citizen are tried at home, according to their own laws. To adjudicate actions of a Sicilian with a Sicilian not of the same citizen body, the praetor [that is, the Roman governor] should appoint a judge by lot, in accordance with the decree of Publius Rupilius, which he fixed on the recommendation of the [commission of] ten legates [sent to advise him at the formal organization of the province], which decree the Sicilians call the Rupilian Law. To adjudicate suits brought by an individual against a community, or by a community against an individual, the senate of another *civitas* should be assigned, granting the possibility that a *civitas* might be rejected by each side. When a Roman citizen sues a Sicilian, a Sicilian is assigned to adjudicate; when a Sicilian sues a Roman citizen, a

Roman citizen is assigned. In all other matters judges are accustomed to be selected from among the Roman citizens resident in the assize district. Between farmers and collectors of the grain tithe, judgments are rendered according to the grain law which they call the Hieronican. (Cicero *Verr.* 2.2.32; Latin text at Handout #3)

The legal landscape of Roman Sicily is tessellated into jurisdictions, in each of which a different system of civil law is understood to obtain--that is, to use the terms employed by Gaius, a body of law generated by, and governing relations among, a political community whose membership is regulated and tracked by the polity itself. What is more, in Roman eyes, political belonging consisted nearly wholly in consent to a society's normative order: it had been this fundamental conviction that permitted early Roman society to give away the franchise on a scale--and in contexts--wholly without compare among the democratic states of the ancient Mediterranean.<sup>4</sup>

This understanding of the relationship between juridical status, the legal articulation of communal membership, and system of law gave rise to policies directed toward the maintenance of purely local legal orders. Here, it is crucial to recognize that this was not a practice peculiar to Rome, nor was the allowance that subject communities should use their own laws a major concession, or an uncommon one. Rather, international law in Greek and Roman antiquity drew a clear distinction between the independence of communities (meaning their freedom of action in foreign affairs) and autonomy, which meant nothing more and nothing less than the right to use one's own laws. Within such a framework, a community could lose its independence but retain the use of its own laws

without any dissonance. In modern terms, one might say their conception of sovereignty was not unitary but divisible.<sup>5</sup>

To situate this ancient conceptual framework distinguishing sovereignty and autonomy within a modern framework for understanding the practice of empires, one might say that being an empire (and not a national state), Rome governed through the cultivation and management of difference--and not, that is, through the universalization of some national culture (or body of law), with all that entailed. A very great deal of Roman administrative law was thus directed toward controlling geographic aspects of social and economic conduct, most notably in forbidding forms of sociality (esp. marriage) and rights of contract between individuals and groups across boundaries established by Roman agents. At a minimal level, Rome's aim was no doubt to prevent the realization of solidarity among conquered populations.

Within such a framework, the insistence that local communities should sustain discrepant systems of law (and so remain disjoined, one from another) suited provincials and Romans alike. In this way, the empire remained tessellated into as many communities as once were conquered, while the nominal persistence of pre-existing institutions in those myriad localities, under purely local leadership, was taken to conduce both a particular local and a singular imperial order. Hence the general principle declared by the emperor Trajan to Pliny when the latter was governor of Bithynia-Pontus in the early second century AD: "it is always safest, I think, for the law of any given citizen community to be observed" within its jurisdiction (Pliny *Ep.* 10.113; Latin text at Handout #4). Trajan clearly intended that it was "safest" for Rome so to act, but the right to be judged by one's own laws was nonetheless eagerly sought by provincials. For

example, in the remarkable inscription erected in Lycia celebrating that province's integration into the broader structures of empire, the self-declared "Rome-loving and Caesar-loving Lycians" thanked the emperor for having granted them "fair administration of justice and [the use of] the ancestral laws" (*SEG* 51.1832, face A, lines 13-20; Greek text at Handout #9). What is more, on those regularly irregular occasions when communities sent embassies with gifts to congratulate emperors on their accession or latest victory, the most typical request submitted with the gift was the emperor's continued support for such privileges. For example, the letter of Severus and Caracalla to Aphrodisias from 198 closes with thanks to the people of the city for their loyalty and affirms the commitment of the emperors to the city's on-going use of "its existing constitution and its own laws" (Reynolds, *Aphrodisias and Rome*, no. 18).

Three final observations regarding the legal culture of the early Roman empire deserve consideration before we turn to the historical situation immediately before and after the Antonine Constitution.

First, no evaluative framework, whether moral or ontological, is ever offered in a Roman text to adjudge between distinct bodies of civil law, because one adheres more closely to some transcendent norm or is authorized by a source of such; nor is any robust interest expressed in texts before the Antonine Constitution in their positive law content. The operative assumption seems to have been that local social orders are best secured by adherence to locally generated norms; and, as a corollary, Rome had neither an epistemic basis nor any deontological obligation to override those.

The second observation amounts in part to a caveat on the first: Numerous Romans, including senators and emperors in their capacities as rulers and authors of laws,

expressed very considerable misgivings about allowing aliens to use Roman actions. These misgivings gave rise to the clauses in the law on jurisdiction attributed to the emperor Augustus himself that restricted distinctly Roman forms of procedure to the city of Rome, for example, or the interdictions in that law and others forbidding aliens access to Roman courts or Roman legal actions.<sup>6</sup> Restricting access to Roman legal actions to Roman citizens did of course amount in the context of empire to sustaining relations not simply of difference, but hierarchical difference.

The final observation regarding Gaius's framework is as follows. In the landscape of empire as he describes it, the varied systems of civil law are conceived of as parallel or, perhaps, non-hierarchical, and as operating in non-overlapping spheres that are in the first instance defined in terms of territoriality. But parallelism is obviously not an adequate metaphor. This is so for a number of reasons, all of them effects of empire-- each likewise affecting the nature of the pluralism that we observe at the end of the second century CE.

The first reason to discount parallelism as an appropriate model for the pluralist regime of the early and high Roman empire is as follows: a principal effect of empire within the Mediterranean world of the first century BCE and first two centuries CE was greatly heightened human mobility, resulting in minority populations within civic communities of unprecedented number and prominence. What is more, because some of those individuals held Roman citizenship, Roman legal norms could be invoked in local contexts, with varied effects, including the wholesale removal of a given case to a Roman court. The most extensive documents arising from such cases are late Republican and triumviral grants of legal privilege, in which favored provincials are granted by Roman

dynasts the right to use their local court, or that of a neighboring city, or that of the Roman governor, according to their whim and perceived advantage.<sup>7</sup>

A second reason to discount parallelism is that Roman interest was perceived and understood normatively to trump both local autonomy and the Romans' own commitment to the restriction of Roman law to Roman citizens. One finds a statement of principle to this effect in a schematic account given by Cicero of the legislative powers that remained to autonomous communities within the empire:

When the Roman people enacted a law, if it was the sort of thing that it seemed it might be permitted to allied or free peoples to decide for themselves--by consulting not our interests but their own--which law they wished to use: it in that case, it might seem appropriate to inquire whether or not they bound themselves to the law. But when the matter concerned our common affairs, our empire, our wars, our victory, or our safety: in those cases, our ancestors did not want those people to have a choice.

(Cicero *Balb.* 22; Greek text at Handout #10)

Clearly, the principle that these communities could craft and employ their own laws extended only so far as Roman interest permitted, where Roman interest was defined by the Romans themselves. In practice, one witnesses Roman interference in local systems of law earliest, most systematically and nearly exclusively in criminal law, where Roman interest in social order and its desire (largely) to monopolize the use of social violence virtually required Rome to penetrate more deeply into local affairs than it might

otherwise have done. One gets a fine sense of the extent of Roman involvement in an edict of Gaius Petronius Mamertinus, prefect of Egypt from 133-137 AD. It lists the crimes that the prefect's court would investigate, in Greek terms that exactly translate fundamental categories of Roman criminal law (*SB XII 10929 = P. Yale II.162 = Handout #11*). As a corollary, Roman interference in practice in non-Roman private law was nearly non-existent, issues essential to imperial governance not being at stake.

This systematic pressure on local courts notwithstanding, the legal pluralism of the empire as a whole could still have developed into a merely hierarchical system, in which the upper and lower systems operated by and large according to utterly distinct and locally generated principles. Such systems might usefully be characterized as pluralist not simply for the obvious reason that there co-exist within the same territorial space multiple norms, and multiple sources of norms, but because there existed within many fields of law around the empire no requirement of subordination, no regular external coordination, nor perhaps even rules of recognition. Indeed, the situation called into being by Roman theory comes very close to what a modern legal theorist might call institutional or even systemic pluralism.<sup>8</sup>

But in the perspective of practice, this is not what we see. Or, one might say, systemic pluralism, if it ever came into being, did not turn out to be sustainable. Rather, the fit or relationship between legal orders--which was in theory so narrowly hierarchical that to the Romans, at least, one could legitimately characterize it as parallel--was gradually transformed, such that the various local legal orders of the empire at large, which had previously existed in a purely hierarchical relation with Roman institutions, were gradually reoriented in fractal subordination to them.

This came about in spite of the Romans' own commitment to principles that conducted at least an institutional pluralism. The next section describes two major pressures for change in the decades leading up to the Antonine Constitution: first, the widespread use of a Roman law of procedure in provincial contexts, and second, the recursive pressure on local institutions effected by the possibility of appeal to Roman courts.

### **Choice of law and legal procedure before the Antonine Constitution**

In focusing in this section on less direct modes by which Roman law spread, namely, through legal procedure and appeals to Roman courts after a local decision, I deliberately set aside the problem raised both explicitly and implicitly above, namely, that individuals granted citizenship prior to the Antonine Constitution will have found themselves serving two masters, as it were: entitled and betimes obliged to use Roman legal forms (esp. in regard to wills and testaments), and also at times constrained by the laws of the jurisdiction in which they lived. This difficulty is famously acknowledged in an inscribed copy of a citizenship grant from the reign of Marcus Aurelius preserved in North Africa, where it is said that the grant of citizenship to Aurelius Julianus and his family occurs *salvo iure gentis*, "with local law preserved" or, perhaps, "without prejudice to local law" (*IAM* 94). Although it is possible now to conjecture with some confidence at the problems newly-enfranchised Roman citizens would have encountered and the solutions Roman authorities envisaged, case law is, alas, lacking.<sup>9</sup>

The relevance of procedure to a broader history of legal change might be described as follows. One of the most important and widely acknowledged duties of Roman officials in the provinces was holding a circuit court. That is to say, an essential obligation for the Roman governor of any given province was to supervise court hearings and, what is more, to do so on a schedule that took him from city to city in a circuit around the province.<sup>10</sup> What is more, an absolutely essential component of common expectations in regard to the emperor was that he would be personally accessible to his subjects, to ensure the rule of law to all comers.<sup>11</sup> That said, we should not allow the person of the emperor to distort our perspective: the evidence of normative texts and in jurisprudence may concentrate on him, but only an infinitesimally small percentage of cases can have reached him. Such testimony as we have for the case load in assize courts, and even at Rome, suggests very heavy usage indeed.<sup>12</sup>

In the hearings conducted or supervised by Roman officials, it lay nearly wholly within the discretion of the Roman magistrate to select the legal framework he would apply or, for that matter, to choose whether to investigate and issue a decision himself or to assign the matter to others. As we have already seen, there were reasons both principled (elaborated above in a reading of Gaius) and pragmatic (elaborated in a reading of Trajan) why the Romans would tend to apply local law. But there are also reasons to think that the turn to Roman courts, and the use of Roman procedure in those courts (if not Roman substantive law), must have affected people's perception of legal institutions and the rule of law, and even their conduct. To understand how this could be so, we must first assess the limits of choice of law and the relationship between legal procedure and substantive law in Roman courts.

## CHOICE OF LAW

As regards choice of law and legal procedure in provincial contexts, it is essential that one appreciate how rapidly Roman authorities developed in provincial contexts a two-stage process whose structure mimicked the procedure of the so-called formulary system as it was practiced at Rome. That is to say, a Roman magistrate, having heard the essentials of the case, though he had the authority to render a decision, instead delegated that authority to another, delivering jurisdiction in the matter to a judge or jury along with a statement of the issues to be decided. Such a procedure is already numbered among a range of possible practices in the law of praetorian governorships of 101/100 BCE, preserved in a number of inscribed copies in Greek translation (*Lex de provinciis praetoriis*, RS 12, col. 4, lines 31-39 at 35; cf. col. 5, l. 26; translation from RS)<sup>13</sup>:

If the praetor or proconsul to whom the province of Asia or Macedonia shall have fallen abdicate from his magistracy, as described in his *mandata*, he is to have power in all matters according to his jurisdiction just as it existed in his magistracy, to punish, to coerce, to administer justice, to judge, to appoint *iudices* [lay judges] and *recuperatores* [boards of arbitrators], registrations of guarantors and securities, and emancipations, and he is to be <immune from prosecution> until he return to the city of Rome.

We witness the system in operation in practice in two responses of the emperors Severus and Caracalla from their visit to Egypt in 199/200 (I set aside here the very interesting topic of why these responses were preserved together on the same papyrus):

Imperator Caesar Lucius Septimius Severus Pius Pertinax Augustus  
 Arabicus Adiabenicus Parthicus Maximus and Imperator Caesar Marcus  
 Aurelius Antoninus Pius Augustus to Varus son of Damasaesus: If you can  
 claim the assistance due to immature age, the governor of the province  
 will decide the suit for release. Posted in Alexandria.

To Procunda daughter of Hermaeus through Epagathon, freedperson. If  
 you can claim the assistance due to immature age, the governor of the  
 province will decide the suit for fraud. Posted in Alexandria. (*P.Oxy.*  
 1020; trans. A. S. Hunt)

Observe that Severus and Caracalla do not decide either case (though of course emperors often did just that). Rather, they reduce each case to a single question, which happen in all of the cases on this papyrus to be questions of fact: in each case, whether the plaintiff is eligible for specific consideration due to age. The outcome of the case is entailed by the answer to that question. But the question, however simple it might seem, is not resolved by the emperors: rather, the case is delivered to another tribunal, with another judge, who has been given a formula for adjudicating the case at hand.

In modern terms, an essential component of the first stage in the provincial two-

stage procedure was, or might seem to be, choice of law. Our understanding of choice-of-law rules and practice in Roman antiquity is rudimentary. This is so in part because of problems of evidence: nearly the entirety of extant Roman legal texts were edited for use in practice (and not as manuals for legal history) in the fifth and sixth centuries CE, hundreds of years after the universal grant of citizenship. Such laws of procedure or jurisprudential literature that bore on questions of what we would call conflicts of law was therefore rigorously excluded. Our knowledge also remains rudimentary because, so far as I know, there is no modern study of choice of law in Roman courts, and only the merest handful of studies on international private law in antiquity. (Indeed, comparative work on the nature of pluralist regimes across imperial contexts seems also to be woefully underdeveloped as a field of study.)

As I have said, it lay nearly wholly within the power of Roman magistrates to decide what system of law to apply in cases that came before them. In remarks aimed at provincial magistrates, the jurist Julian, writing in the second quarter of the second century AD, provided a hierarchy of sources of norms they should consult in settling local disputes (the text derives from the eighty-fourth book of his *Digest*, where he probably dealt with attempts by citizens of municipalities to use Roman courts to escape local liturgies): "Regarding cases where we do not follow [local] written law, the practice established by customs and usage should be preserved. And if this is in some way insufficient, then one must adhere to whatever is most analogous to it and follows from it. If even this is obscure, then the law observed by the city of Rome should be applied" (Julian *Digest* bk. 84 frag. 819 Lenel = *Dig.* 1.3.32.*pr.*). Julian was not authorized to fix a requirement in this regard: the text should be read as describing the

position of a single jurist, albeit a highly powerful and influential jurist, as he reflected on the work of Roman magistrates in provincial contexts.

One knows that not only emperors, but also governors of provinces, continued to delegate power of judgment to others--and hence to employ a distinctively Roman procedure--in the high empire from the frequent references to such actions among the jurists. Consider, for example, the following commonsensical observation by the remarkable jurist Callistratus, whose career spanned the reigns of Severus and Caracalla:

In general, when the emperor sends cases back to the governors of provinces with a rescript to the effect that "[The appellant] can approach the person in charge of the province," to which is sometimes added, "he will judge what is within his sphere of responsibility," no necessity is laid upon the proconsul or the legate to undertake the hearing himself, even if the phrase "he will judge what is within his sphere of responsibility" is not present: rather, he ought to judge whether he should conduct the hearing himself or assign a judge.<sup>14</sup>

Callistratus's sample rescripts--invented no doubt for their brevity--are nonetheless a salutary reminder that Roman officials could and frequently did refer appeals back to lower-level officials without any response. A remarkable papyrus of the mid-third century--245 AD, to be precise--discovered by the middle Euphrates and generated by Semitic villagers newly become residents of Rome, reveals them to have traveled across the desert to seek a possessory interdict (an injunction against any change in ownership of

property until a court decision can be announced) from a Roman official with supervisory powers over the entire east: after months of waiting, he did himself receive their petition and gave the response, "(Claudius) Ariston [the local centurion] will hear your case." Below that he scrawled, "I have read." This, alas, was not what Vorodes son of Sumisbarachos and his friends had hoped for from Roman justice.<sup>15</sup>

Allow me to emphasize once again that the use of Roman procedure did not entail the use of Roman substantive law. Again, one could cite a wide range of normative claims by jurists and emperors--the affirmation of Trajan to Pliny being a case in point--as well as records of particular cases preserved on papyrus, in which in one respect or another Roman procedure was followed but local law or local custom provided the substantive law framework. Perhaps the most famous example is a petition from 186 AD, from the reign of Commodus, rehearsing a dispute between one Dionysia and her father over property, rights of marriage and divorce, and myriad other issues (*P.Oxy.* 237 = Handout #15). At several stages, a Roman magistrate concedes that, the parties being Egyptian, local Egyptian rather than Roman law should provide the norms. The hearing is postponed to allow the relevant Egyptian law to be discovered (or invented). At a later hearing, the text is read aloud, only later to be set aside by a judge who wished to reach a different conclusion! Despite the outcome in that one case, there is ample reason to believe that the system often operated precisely to steer cases to judges and arbitrators with local expertise and, indeed, a number of such experts are known from the honors granted to them by grateful localities.<sup>16</sup>

That said, Roman cultural and legal forms could and did influence local practice--could and did bring about cultural change--even when one did not use Roman substantive

law. As proof, one might adduce documents produced before as well as during the third century, which is to say, before or after the universal grant of citizenship. Consider, for example, the Tabula Contrebiensis, an inscription on bronze from Spain early in the first century BCE, recording the outcome of a case in which a Roman magistrate listened to plaintiff and defendant communities before writing a formula charging a third party to adjudicate: the formula contained a full statement of the relevant legal issues as well as a stipulation regarding the legal framework to be employed (HD000668).<sup>17</sup>

1. Let those of the Senate of Contrebia who shall be present at the time be judges. If it appears, with regard to the land that the Salluienses
2. purchased from the Sosinestani for the purpose of making a canal or channelling water, which matter is the subject of the dispute, that the Sosinestani
3. were within their rights to sell it, although the Allavonenses were unwilling, then, if it so appears, let the judges judge
4. with regard to the land which is the subject of the dispute that the Sosinestani were within their rights to sell it to the Salluienses; if it does not so appear, let them judge
5. that they were not within their rights to have sold it.
6. Let the same persons who are written above be judges. On the assumption that <there is, in fact, a Sosinestan *civitas*>,<sup>18</sup> then, in the place
- 7-8. where the Salluienses recently and officially put in stakes, which matter is the subject of this action, if it would be permissible for the

Salluienses within their rights to lead a canal within those stakes through the public land of the Sosinestani;

8-11. or if it would be permissible for the Salluienses within their rights to make a canal through the private land of the Sosinestani, in the place where a canal ought to be made, so long as the Salluienses pay the sum for which the land would be assessed, where the canal would be led; then, if it so appears, let the judges judge that it is permissible for the Salluienses within their rights to make the canal; if it does not so appear, let them judge that it is not permissible for them within their rights so to do.

12-14. If they judge that it is permissible for the Salluienses to make the canal, then let the Salluienses pay from public funds money for the private lands where the canal shall be led, on the arbitration of five men whom a magistrate of Contrebia shall appoint from his/their Senate.

14. Gaius Valerius Flaccus, son of Gaius, *imperator*, assigned jurisdiction.

15. They pronounced the opinion: Whereas right of judgement is ours, in the matter that is under dispute we judge in favor of the Salluienses.

15-18. When this matter was decided, these were the Contrebiensen magistrates: Lubbus of the Urdini, son of Letondo, praetor; Lesso of the Sirisces, son of Lubbus, praetor; Babbus of the Bolgondisces, son of Ablo, magistrate; Segilus of the Anni, son of Lubbus, magistrate; ..... of [-- Juvolices, son of Uxe[---], magistrate; Ablo of the Tindilices, son of Lubbus, magistrate.

18-20. The case for the Sallui[enses] was presented by [---]assius, son of Eihar, a Salluensian. The case for the Allavonenses was presented by Turibas, son of Teitabas, [an Allavonensian. Trans]acted at Contrebia Balaisca on the ides of May, in the year when L. Cornelius and Gnaeus Octavius were consuls (87 B.C.E.).

In this case, a Roman procedure was employed in order to empower autonomous Spanish communities to settle a dispute, apparently according to local norms. But every formal aspect of the text--the protocols, the dating formula, the medium, the language--as well as the constituents of the procedure--the formula, the delegation of jurisdiction, and the legal fiction--exists in stunning contrast to the notional autonomy of the Spanish communities as well as the nomenclature of the Spaniards at its close. The cultural prestige of Roman power must have endowed this ensemble--the legal ritual itself, as well as the textual form taken by the record--with enduring legitimacy.

(I have elsewhere argued that the *form* taken by Christian martyr acts, in mimicking the records of proceedings produced by Roman courts, strongly suggests that the Christian community possessed no mechanism, no resource, for the authentication and validation of historical memory more potent than the one granted to the culture at large by the workings of imperial government, whose own insistence on exactitude in knowledge production was consistently trumpeted by Roman legal authorities, not least in their supervision of local institutions of dispute resolution. More on this below.)

As an aside regarding the legal fiction constituting the Sosinestani as an autonomous polity, or the invocation of Egyptian law in the case of Dionysia (p. 20,

above), it merits observation that there must have been communities that were then for the first constituted as unitary communities through their interpellation by Roman agents, and there are important historical parallels for the discovery--which is to say the invention--by colonized populations of customs, law and religion in the light of such imperial epistemes.

Earlier I expressed hesitation regarding the cogency of characterizing the first stage of the provincial two-stage procedure as the choice-of-law phase. Of course, there can be no doubt that choice of law was determined at this stage, nor that from time to time and case to case, the issue was framed in just those terms. But the formula of the *Tabula Contrebiensis* urges us to place some limit on the utility of this characterization. For despite all the ways in which it and other provincial hearings might be said to differ from practice at Rome--the case decided by the *Contrebienses* is a classic instance of third-party arbitration, a common form of dispute resolution in the international arena of the ancient Mediterranean<sup>19</sup>; the Romans themselves emphatically differentiated between civil procedure at Rome, which was based on *formulae*, and that in the provinces, which they characterized as "extraordinary inquiries" (*cognitiones extra ordinem* or *extraordinariae*)--the transfer of power of judgment to the senate of Contrebia was accomplished by means of a *formula*, in which the legal and factual issues at stake were described without any reference to the legal framework being employed. What is more, the *formula* from Contrebia can be distinguished from civil-law *formulae* in neither grammar nor structure. In other words, in the international arena, in a case in which both parties were alien with respect to the Roman state, the Romans employed a (private) civil law procedure by another name.

What is more, the folding of questions of law into the *formula* at Contrebia was itself characteristic of civil law procedure, where issues procedurally and conceptually distinct in modern law were simply collapsed: "Nowadays we easily think of pleading and procedure as matters separable from the substance of the law. But under the formulary system the texts of the formulae were the foundations of substantive law, and innovation in their wording was the principal means by which that substantive law was changed."<sup>20</sup> Every (new) formula made law. That fact, like the efficacy and normative status of the decision in any given case, rested on the *iurisdictio* of the magistrate, the power at once to speak the law and also to create *iudices* and *recuperatores*: *Senatus Contrebie[n]sis quei tum aderunt iudices sunt*, "Let those of the Senate of Contrebia who shall be present at the time be judges." As regards Roman courts in provincial contexts, even those that made reference to local norms, the question that demands an answer is rather, "Whose law did they make?" That question we can answer at an empirical level nearly exclusively by reference to imperial responses to appeals, whose role in some broader history of rules of precedence and the use of analogy in Roman courts remains astonishingly underexplored.<sup>21</sup> To them we now turn.

#### THE IMPORTANCE OF APPEALS

Roman norms, of positive law *stricto sensu* as well as those of a less formal nature, also influenced local cultures and institutions of justice by virtue of the superordinate position occupied by Roman tribunals, even when such influence was not explicitly prescribed. Let me give four brief examples of the late second and early third century to illustrate

how this occurred.

An inscription from Nicomedia assigned by James H. Oliver to the reign of Hadrian but dated by Julien Fournier to the Antonine period preserves an imperial edict that makes reference to circumstances under which the governor's court will accept appeals regarding decisions previously taken at the local level (Oliver 1989, no. 94 = *TAM* IV 1, 3 = Handout #18).<sup>22</sup> (The condition of the text, alas, does not allow its full sense to be coherently reconstructed.) What is relevant at this juncture is the apparent rationale for allowing those appeals: "If the Council unfairly..." Although the context is very specific (albeit unknown), the local authorities are put on notice that their conduct should conform to Roman standards of justice--whatever these were and however they were to be known.

The desire of Roman authorities to force conformity to Roman norms was made explicit in an edict issued by Antoninus Pius as governor of the province of Asia. The text is summarized (and related material discussed) in the second book of a work *On public tribunals* by the Severan jurist Marcian (Latin text at Handout #19):

There is indeed extant a chapter of the rules that the deified [Antoninus] Pius issued under his edict when he was governor of the province of Asia, to the effect that irenarchs [local peace-keepers], when they had arrested robbers, should question them about their associates and those who harbored them, make transcripts of the interrogations, seal them, and send them to the attention of the magistrate.

Therefore, those who are sent [to court] with a report [of their interrogation] must be given a hearing from the beginning although they were sent with documentary evidence or even brought by the irenarchs. The deified Pius and other emperors have written in rescripts to this effect: that even in the case of those who are listed as wanted, if anyone appears to prosecute one [of these], the defendants should not be treated as condemned but as though a charge were being laid afresh. Accordingly, when someone carries out an examination, the irenarch should be ordered to attend and to go through what he wrote. If he does this painstakingly and faithfully, he should be commended; if with insufficient skill and not with thorough reasoning, [the judge] simply notes that the irenarch has rendered an inadequate report; but if [the judge] finds that his interrogation was in any way malicious, or that he reported things that were not said as if they had been said, he should impose an exemplary punishment, to prevent anyone else trying anything of the kind afterward.<sup>23</sup>

In this case, the standards of Roman courts are imposed upon local policing directly, because the Roman court is the court of record for criminal cases. Moreover, what is ordained is not simply some set of abstract principles, which might be realized from locality to locality in different ways, but a set of practices, by which certain rules of evidence and techniques of knowledge production are enjoined on non-Roman communities.

Roman norms also came to affect not simply the running of local institutions for the administration of justice but even individual social and economic conduct by virtue of the possibility of appealing local decisions to Roman tribunals. This option was not universally available: beyond requiring considerable energy and initiative on the part of appellants, the Romans themselves instituted various requirements aimed at discouraging an excess of appeals, whether cash deposits or thresholds regarding the value of the property at issue or the seriousness of punishment at stake.<sup>24</sup> What is more, of the tens of thousands of responses that the emperors and their legal departments must have delivered, a tiny handful survive--and crucially and sadly, many of those survive in extracts that select the substantive law content of the emperor's utterance and from which the details of the cases at hand have been systematically eliminated. Our ability to write a robust history of law in the provinces suffers accordingly.

That said, a famous and complex inscription at Athens preserves a series of responses by Marcus Aurelius to appeals from that city in what seems their original form. In two cases, Marcus turned back the appeal on the grounds that the appellant had presented documentation that was in one respect or another faulty or insufficient.

"Since he has presented neither the records of the Panhellenes nor the finding that was published, he shall plead his case before my Quintilii...."

(Oliver 1989, no. 184, plaque 2, ll. 24-26 = Handout #20)

"I have already announced that the appeals of Epigonus and Athenodorus had been set aside with notations that they were incompletely prepared."

(Oliver 1989, no. 184, plaque 2, ll. 52-53 = Handout #20)

In my view, such cases exerted pressure on future litigants, as well as non-Roman institutions, to conform their conduct outside Roman tribunals and prior to Roman action, to the formal standards observed within Roman tribunals, whenever there existed the potential that a given case could be appealed to a Roman official. We might theorize that pressure by reference to several strands in modern scholarship, according to which (subaltern) litigants came to craft their conduct so as to render it narratable and comprehensible according to those normative scripts that would set the wheels of Roman justice in motion.

We should also take note of the specifications made by Marcus Aurelius in the blanket clause that closes the omnibus rescript from Athens. In it, he establishes the procedure to be followed in all relevant cases in which he has rendered no decision, indeed, to which he has made no reply at all.

"If any other applications for trial that have depended on this session of the court have occurred about which I have made no statement, in lieu of a decision, they shall have been set aside to be examined before the special judge--even when a case is not on appeal--with exactly the same procedure with which they were going to be examined; as to whose they

may be, Ingenuus will write to me." (Oliver 1989, no. 184, plaque 2, ll. 53-56 = Handout #21)

The command operates by means of a fiction--cases not heard by Marcus are to be judged according to exactly the same procedure as they would have been if he had in fact heard them--that ordains an exact equivalence at the level of procedure between the court supervised by Marcus and the court established by him to hold jurisdiction in his stead.

Curious as it is, the fiction employed by Marcus is in fact traditional in form, being enshrined in the standard municipal charter delivered to the communities of Spain late the first century CE, at the moment when the emperor Flavian elevated those cities to the status of municipalities. There, among the clauses on jurisdiction we read (*Lex Flavia municipalis* ch. 91; translation after M. Crawford; Latin text at Handout #24)<sup>25</sup>:

Rubric. According to what law notice for the third day may be served, the day may be postponed or have been postponed, a matter may be judged, a case may be at the peril of the iudex, a matter may cease to be under trial:

... if judgment has not taken place within the time laid down in Chapter XII of the Lex Iulia that was recently passed concerning *iudicia privata* and in the decrees of the senate that relate to that chapter of the statute, so that the matter be no longer under trial; the statute and law and pleading is to be as it would be if a praetor of the Roman people had ordered the matter to be judged in the city of Rome between Roman citizens...

There thus existed within the empire a varied and complex range of pressures urging standardization or homogenization around or, if you will, accommodation to Roman norms. What is more, these intensified visibly across the second century and into the third, from the reign of Hadrian to the reign of Severus, even prior to Caracalla's grant of universal citizenship. To that act we now turn.

### **Citizenship and law in the aftermath of the Antonine Constitution**

Given the traditional doubts within the discipline regarding the social-historical effects of the Antonine Constitution, it is perhaps worth emphasizing that over the long term it effected a transformation in the legal landscape of the empire. This claim can be made with greater certainty today than a century ago in part because documentary records now available reveal its effects in a way imperceptible before, and in part because contemporary understandings of historical legal change are more nuanced.

We might begin by observing that the self-same logic that justified and sustained the legal pluralism of the early empire now urged the universalization of metropolitan law: I refer of course to the correlation between citizenship and legal system visible in Roman sources from the mid-Republic to Gaius. We can see this logic at work in a mid-third century rhetorical handbook attributed to one Menander Rhetor. As he observes, it had once been traditional in speeches of praise for cities to laud a city's adherence to the rule of law and its ability to sustain its autonomy, but such praise can no longer be made specific to a city:

[A further point about the political system] is that it is best for a city to be ruled in accordance with its own will, not against its will, and for it to observe the laws with exactness but not to need laws. This last section of praise, however, is virtually useless today, since all Roman cities are regulated by one <and the same *politeia*.> (Menander Rhetor, Treatise 1, p. 360.10-16 Spengel; trans. after Russell and Wilson)

"Nowadays the topic of laws is of no use, since we conduct public affairs by the common laws of the Romans (*tous koinous tôn Rhômaiôn nomous*)." (Menander Rhetor Treatise 1, p. 363.4-14 Spengel; trans. after Russell and Wilson)

The two assertions, which map closely onto each other, are made with different vocabulary: the one employs *politeia*, a term that can mean constitutional order but also citizenship (Latin *civitas*); the other, *nomous*, meaning "laws." Menander thus suggests, as closely as one might in Greek, a correlation between political order and legal system mapping the one we have observed in Latin Roman sources.

The connection between change in citizenship and change in legal framework is also raised in papers filed in court. So, for example, in a sadly damaged text from Oxyrhynchus in Egypt, a petition from 14 November 223 (preserved in two copies on the same papyrus), the petitioners write:

(line 27) . . . ] happened to be . . . the law of the Roma[ns . . .

(line 28) . . . ] we are (Roman) citizens, declares that all [ . . . ] the slave[s. . .<sup>26</sup>

The term that is translated "we are Roman citizens" (*politeuometha*) is a verb derived from the same root as Menander's *politeia*, and means in this form something like, "we live under such-and-such a form of government." But in this context, following so closely on the phrase "law of the Romans," it clearly amounts to an assertion of fact that indicates why the law of the Romans conditions the declaration that follows. (In both Menander's text and in the Oxyrhynchus papyrus, we are witnessing a change in Greek political vocabulary, such that they map more closely the Latinate framework that now structures life in the Greek East.)

The need these petitioners felt to assert the fact of their change in legal status, and also the causal connection between that change and the legal framework they employ a full decade after the Antonine Constitution points to a further problem, namely, that change takes time. People struggled for many years to understand, to map, and to effect the changes that the Antonine Constitution had set in motion. This much is visible even at the level of nomenclature and identity. The proper legal form of a Roman citizen's name had three parts. Greek names often had two, one's name proper and a patronymic, which is to say, the name of one's father in the genitive. The latter had no necessary place in the Roman form of one's name and, as we have seen, the individuals granted citizenship by Caracalla were supposed to take (and many did take) Roman names. But some clearly felt an anxiety that the stability of their identities was at risk, and so indicated in legal

documents both their new name and their old one. Consider for example the start of another text from Oxyrhynchus, from 216/217 AD:

Aurelius Aeluriôn, in office as *kosmêtês*,<sup>27</sup> town councilor of Athribis,  
before he obtained Roman citizenship Aeluriôn son of Zoïlus, of the tribe  
Neokosmios and the deme Althaeus. (*P.Oxy.* 1458)

Some four years had passed, and Aurelius Aeluriôn still yoked his new identity explicitly to the old. Undoubtedly one strong reason for this was that Roman nomenclature as it was expressed in Greek granted no easy means for naming one's father. The change set in motion by Caracalla urged one to efface the name of one's father--to cease to claim one's place in the world through biological kinship--in favor of a purely jural kinship with emperor and empire.

Two further aspects of the legal history of the empire after Caracalla deserve mention in this survey. Broadly understood, they indicate countervailing trends of influence and change. First, although Roman authorities wisely and inevitably grandfathered in all manner of pre-Roman forms of conduct, across the third century they insisted in more and more strident tones on adherence to Roman norms. Second, certain non-Roman customs were, by virtue of their status after 212 as customs of Romans, redescribed as Roman in legal literatures. I consider these issues in turn.

The easy way that scholars speak of a homogeneous "Graeco-Roman culture" or the ready assumptions they make of widespread bilingualism notwithstanding, Roman law differed in important ways from nearly all the other legal systems known from

antiquity on topics of relevance to wide swaths of the population, notably in family law and inheritance (including rights of women to divorce, law of dowry, rules of legitimacy, and division of estates). One could not simply on the day after the Antonine Constitution disallow all existing marriages and contracts among those who had not been Roman on the day. Indeed, ancient literature offers a number of negative judgments on the prudence and feasibility of effecting social change across too many fronts too rapidly. To the well-known verdict of Dio on Pertinax one might add the sage words attributed to the emperor Arcadius in Mark the Deacon's life of Porphyry, bishop of Gaza, in response to a request from the bishop to authorize the use of force in converting pagans to Christianity: "I know that that city is idolatrous, but it well-disposed toward the paying of taxes and contributes much. If then we afflict them suddenly with fear, they will take flight and will lose much revenue. But if it seems appropriate, good, we shall wear them down bit by bit, taking away honors from those mad for idols, and the other political offices, and we will command their temples to be shut and to give oracles no more. For when they are worn down, being altogether constrained, they will acknowledge the truth. For change that is exceedingly sudden is hard for subjects to bear" (Mark the Deacon, *Life of Porphyry* 41).

As it happens, these are issues on which there might well have existed considerable institutional memory, and there must have existed tried and tested methods for effecting a gradual reorientation to Roman norms. For not only did the Romans grant citizenship widely on *ad hoc* grounds, they had in fact given citizenship systematically to those who in certain classes of community had held a local magistracy. An immense and sophisticated body of law had clearly developed already by the end of the first century CE (and continued to develop thereafter) to guide and govern the transformation of non-

Romans into Romans, with all the effects on relations of husbands and wives, fathers and sons, and masters, slaves and ex-slaves that the transformation entailed.<sup>28</sup> Of equal importance in the aftermath, Roman lawyers had developed a number of procedural work-arounds by which to admit alien persons and things to Roman courts, and the same operations were available to naturalize foreign legal forms. Most prominent among these were fiction, analogy and substitution.<sup>29</sup> We have already witnessed the operation of one such fiction in the rescript of Marcus Aurelius: these were likely now deployed on a massive scale.

Alas, the great bulk of records available to us from the third century survive in collections edited later in antiquity so as to extract from any given document a decision-making rule that might be applied to analogous cases. Hence, we are rarely in a position to assess in detail how specific problems were treated, nor to identify significant patterns. What is broadly visible on the part of Roman authorities is just this tendency to grandfather in existing relations while simultaneously insisting that in the future, only marriages (say) conducted *iure Romano*, in accordance with Roman law, will be honored. This body of case law (such as it is) was clearly generated by petitions from below, as people sought to have their particular situation or their local custom recognized as legitimate--or at least grandfathered--by a Roman court.

When we turn to the jurisprudence generated in the aftermath of the Antonine Constitution, we confront a deeply frustrating embarrassment of riches. Two things stand out immediately. First, the literature is immense. Second, as Fergus Millar has observed most clearly, a remarkable percentage of that literature was produced (often but not wholly in Latin) by men originating in the Greek-speaking east. This in itself amounts to

a social-historical fact of immense importance.<sup>30</sup> It is very hard to explain how this generation could have come to prominence without a long history of education and institutional development in provincial contexts, nor why at this moment they turned to such massive efforts at systematization were it not for the need to make Roman law intelligible and useful to a political community of unprecedented size and diversity.

The situation is frustrating because, like the third-century responses to petitions, the overwhelming majority of Severan jurisprudence survives in codifications made under Justinian, when the Antonine Constitution lay some three hundred years in the past. Such comments as jurists might once have made about the pluralist landscape of the empire before Caracalla, or about the massive work of integration that must have occurred in the decades after, were systematically excised as irrelevant to the on-going life of the law.

Nonetheless, it is possible to envisage a route whereby, contrary to some idealization of the Romanness of Roman law, local customs would be recognized not simply as local custom or prior law, but as Roman law by Roman courts. At this juncture it is important to recognize that the Antonine Constitution had foreclosed the very means for validating local practice that had been used in the trial of Dionysia, and likewise affirmed by Trajan: namely, the citation of local law. For the extension of Roman citizenship--and the eradication of alien communities as autonomous political entities--necessarily also invalidated local codes of law.

That said, local practice remained local practice. Was there not some means by which it could be recognized and sustained in the now-Roman courts of local jurisdiction, to say nothing of courts supervised by Roman magistrates? As it happens, Roman legal

theorists had long-standing debates regarding the normative status of custom, both positive and negative--what a modern lawyer might call custom and desuetude, following the Latin terminology *consuetudo* and *desuetudo*. As one might expect, exponents of these theories argued that statute law could not cover all social conventions that a court might be called upon to regulate, and hence that custom, too, should be understood as a form of law. Next, proponents of these theories argued that even statutes on the books might become invalid through sheer lack of adherence, rather than explicit repeal. There is, however, no evidence from the classical period that any court in fact took the further step of regulating adherence to custom, and precious little evidence for the actualization of doctrines of desuetude, either. Nonetheless, these doctrines were a bombshell, waiting to be exploded.

The situation of the empire after the Antonine Constitution was ripe for the exploitation of such theories. And while it is difficult to find explicit citations of those theories, the effects visible in extracts from jurisprudence after Caracalla are fully in accord with their operation. Among other things, jurists in the decade after the Constitution refer overwhelmingly to local custom--using phrases like *mos regionis*--where an earlier jurist have cited local law. But these local customs were now the customs of citizens. Who was to say they were not law? Consider, for example, an extract from book 4 of Ulpian's commentary on the civil law as articulated in the Praetor's court. He there took up the problem of honoring non-civil-law forms of contract before the law:

(pr) In the common private law of nations, some agreements give rise to actions, some to defenses.

(2) But even if the matter does not fall under the head of another contract and yet a ground exists, Aristo [a jurist of the late first century AD] in an apt reply to Celsus states that there is an obligation (*obligatio*). Where, for example, I gave a thing to you so that you may give another thing to me, or I gave so that you may do something, Aristo says this is a *synallagma* (a transaction or contract) and hence a civil obligation arises (*civilis obligatio*). And therefore I think that Julian was rightly reproved by Mauricianus in the following case. I gave Stichus to you so that you would manumit Pamphilus; you have manumitted; Stichus is then acquired by a third party with a better title. Julian writes that an *actio in factum* is to be given by the praetor. But Mauricianus says that a civil action for an uncertain amount, that is, *praescriptis verbis*, is available. For the contract described by Aristo with the word *συνάλλαγμα* has been made and hence this action arises. (Ulpian *Ad edictum* bk. 4 fr. 242 Lenel = *Dig.* 2.14.7)

The problem before Ulpian is the need to provide a generic action for disputes arising from non-Roman forms of bilateral agreement: hence his invocation of the common private law of nations (*ius gentium*), and the preservation within the jurisprudential and textual tradition of the Greek term *synallagma*. In other words, the foreignness of the concept is marked through an insistent denotation of the foreignness of the term.

But what is striking is that the (enforceable) obligation arising from the non-Roman contract is itself said to be *civilis*, meaning in this context "a civil-law obligation." The term *civilis*, however, of course means "citizenly": it means "civil-law" only insofar as the law of a citizen body is its *ius civile*. The Greek contract is a civil-law contract perforce because it was a contract between citizens. Such was the world Caracalla made.

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<sup>1</sup> I refer above all to the texts published in *P.Euphrates*, *P.Hever* and *P.Yadin*. A useful but now dated survey may be found in Hannah Cotton, Walter Cockle and Fergus Millar, "The Papyrology of the Roman Near East. A Survey," *JRS* 95 (1995), 214–235.

<sup>2</sup> See in particular Julien Fournier, *Entre tutelle romaine et autonomie civique. L'administration judiciaire dans les provinces hellénophones de l'Empire romain (129 av. J.-C. - 235 apr. J.-C.)* (Athens: École française d'Athènes, 2010) and Georgy Kantor, *Roman and local law in Asia Minor (133 BC – AD 212)* (Oxford: Oxford University Press, forthcoming).

<sup>3</sup> Ludwig Mitteis, *Reichsrecht und Volksrecht in den östlichen Provinzen des römischen Kaiserreichs* (Leipzig: Teubner, 1891), part II, chapter 6, "Die Constitutio Antonina und ihre Wirkungen."

<sup>4</sup> On consent to law in Roman conceptions of political belonging see C. Ando, "Law and the landscape of empire," in Stéphane Benoist and Anne Daguey-Gagey, eds., *Figures d'empire, fragments de mémoire: Pouvoirs (pratiques et discours, images et représentations), et identités (sociales et religieuses) dans le monde romain impérial (I<sup>er</sup> s. av J.-C. - V<sup>e</sup> s. ap. J.-C.)* (Paris: Presses Universitaires de Septentrion, 2011), 25-47, and idem, *Law, language and empire in the Roman tradition* (Philadelphia: University of Pennsylvania Press, 2011), 3-4.

<sup>5</sup> On autonomy, freedom and sovereignty in political philosophy and legal theory in the ancient world see Ando, *Law, language*, chapter 4.

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<sup>6</sup> On the Augustan law on jurisdiction see Gaius *Inst.* 4.103-105 and *lex Flavia municipalis* ch. 91, together with Ando, "Law and the landscape of empire," 28, and idem, "Three revolutions in government," in Lucian Reinfandt, Stephan Prochazka and Sven Tost, eds., *Official epistolography and the languages of power* (Vienna: Verlag der Österreichischen Akademie der Wissenschaften, 2011).

<sup>7</sup> The two most important texts are the *Senatus consultum de Asclepiade*, *RDGE* 22, and the dossier of Seleukos of Rhosus, which was recently reedited in Andrea Raggi, "The epigraphic dossier of Seleucus of Rhosus: a revised edition," *ZPE* 147 (2004), 123-138. For a legal-historical perspective on the triumviral grants see C. Ando, "Pluralisme juridique et l'intégration de l'empire," in Stéphane Benoist, Ségolène Demougin, and Gerda de Kleijn, eds., *Impact of Empire X* (Leiden: Brill, 2012).

<sup>8</sup> On the classification of pluralist legal regimes see Nico Krisch, *Beyond Constitutionalism: The Pluralist Structure of Postnational Law* (New York: Oxford University Press, 2010).

<sup>9</sup> See esp. Jane F. Gardner, "Making citizens: the operation of the *Lex Irnitana*," in Lukas de Blois, *Administration, prosopography and appointment policies in the Roman Empire* (Amsterdam: J. C. Gieben, 2001), 215-229.

<sup>10</sup> Graham P. Burton, "Proconsuls, assizes and the administration of justice under the empire," *JRS* 65 (1975), 92-106 remains unsurpassed as a brief study.

<sup>11</sup> Fergus Millar, "Emperors at work," *Journal of Roman Studies* 57 (1967), 9-19 = Millar, *Rome, the Greek World, and the East*, 2:3-22; idem, *The Emperor in the Roman World*, 2nd edition (Ithaca: Cornell University Press, 1992), 000-000.

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<sup>12</sup> For example, Dio as consul held jurisdiction and found 3,000 cases involving adultery prosecutions alone awaiting him when he entered office (77[76].16.4). See also Ando, *Imperial Ideology*, 376-377 and idem, "The administration of the provinces," in David S. Potter, *A companion to the Roman Empire* (Oxford: Blackwell, 2006), 190.

<sup>13</sup> *Lex de provinciis praetoriis*, RS 12, col. 4, lines 31-39 (see Handout #12). See also the *lex Gabinia de insula Delo* of 58 BC (RS 22, ll. 31-35 = Handout #13).

<sup>14</sup> Callistratus *De cognitionibus* bk. 1 fr. 1 Lenel = *Dig.* 1.18.9; see also Julian *Dig.* bk. 1 fr. 5 Lenel = *Dig.* 1.18.8.

<sup>15</sup> The formal publication of *P.Euphrates* by Denis Feissel and Jacques Gascou is a monument of scholarship: "Documents d'archives romains inédits du Moyen Euphrate (III<sup>e</sup> s. après J.C.)," *Journal des Savants* 1995, 65-119; see also idem, *Journal des Savants* 1997, 3-57 and *Journal des Savants* 2000, 157-208. See also Bernard H. Stolte, "The impact of Roman law in Egypt and the Near East in the third century A.D.: the documentary evidence," in de Blois, *Administration, prosopography*, 167-179.

<sup>16</sup> Fournier, *Tutelle*, 25-40. For an example see Handout #16.

<sup>17</sup> There is a vast secondary literature, but commence with J.S. Richardson, "The Tabula Contrebiensis: Roman law in Spain in the early first century B.C.," *JRS* 73 (1983), 33-41 (see also P. Birks, A. Rodger and J. S. Richardson, "Further aspects of the *Tabula Contrebiensis*," *JRS* 74 (1984), 45-73). For the Latin text see Handout #17.

<sup>18</sup> The meaning of the text here is disputed.

<sup>19</sup> On which see Sheila Ager, Ager, Sheila. *Interstate arbitrations in the Greek world, 337-90 B.C.* (Berkeley: University of California Press, 1996). See also Louis Robert, "Les

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juges étrangers dans la cité grecque," in T. J. Panagopoulos, ed., *Xenion: Festschrift für Pan. J. Zepos* (Athens: Ch. Katsikalis, 1973), 765-82, reprinted in L. Robert, *Choix d'écrits*, ed. D. Rousset (Paris: Les Belles Lettres, 2007).

<sup>20</sup> P. Birks, A. Rodger and J. S. Richardson, "Further aspects of the *Tabula Contrebiensis*," *Journal of Roman Studies* 74 (1984), 45-73 at 60.

<sup>21</sup> For now see Clifford Ando, *Imperial ideology and provincial loyalty in the Roman empire* (Berkeley: University of California Press, 2000), XXX-XXX and idem, "Exemplum, analogy and precedent in Roman law," in progress.

<sup>22</sup> James H. Oliver, *Greek constitutions of early Roman emperors from inscriptions and papyri*, *Memoirs of the American Philosophical Society*, 178 (Philadelphia: American Philosophical Society, 1989).

<sup>23</sup> Marcian *De iudiciis publicis* bk. 2 fr. 204 Lenel = *Dig.* 48.3.6.1 (trans. O. Robinson).

<sup>24</sup> James H. Oliver, "Greek applications for Roman trials," *AJP* 100 (1979), 543-558; Fournier, *Tutelle*, 514-524.

<sup>25</sup> On this fiction see Ando, "Law and the landscape of empire," and idem, *Law, language*, 9-10, 24-26.

<sup>26</sup> *P.Oxy.* 4961, ll. 27-28 / 75-76; translation J. David Thomas.

<sup>27</sup> The term *kosmêtês* means 'director' but what Aurelius Aelurion directs is not specified.

<sup>28</sup> Again, see for now Jane F. Gardner, "Making citizens."

<sup>29</sup> Ando, *Law, language*, chapters 1-2.

<sup>30</sup> Fergus Millar, "The Greek East and Roman law: The dossier of M. Cn. Licinius Rufinus," *JRS* 89 (1999), 90-108 = Millar, *Rome, the Greek World, and the East*, 2:435-464.