

The Evolution of Roman Legal Language

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There is presently no systematic study of Roman legal language. David Daube delivered several lectures and wrote several papers which brilliantly showed how much potential this subject has to expand our knowledge of Roman law and culture; however, he did not bring these examples together in the manner of, say, Peter Tiersma, whose recent book on American legal language provides a fine model for the future of this sort of investigation. This paper does not pretend to fill this gap, but it does hope to be a beginning.

While imitating Tiersma's method and drawing often upon Daube's observations, it first isolates one example of early Roman law, in fact the earliest extant example: the code of the XII Tables (449 BC). Next, it isolates an example of very late Roman law: the Theodosian Code (438 AD). By comparing the *way* in which these two codes speak, separated as they are by almost a millennium of Roman history, it highlights their several important linguistic differences. From these linguistic differences, finally, it infers conclusions about the deeper differences of practice and culture between early and late Roman law.

Among these conclusions are the following. Early Roman legal language exhibits three main features: poetry, narrative, and simplicity. These features were probably caused by the simplicity of early Roman society, particularly its oral law, the memorability this required, and ultimately its religious origins. Correlatively, late Roman legal language exhibits three contrary features: prose, abstraction, and complexity. These features were probably caused by the sophistication of late Roman society, particularly its written law, and maybe also that law's strategic purposes: to obfuscate and overwhelm. For all these important differences, though, just as early law depended upon the sacramental use of language, late law curiously returns to it. What has changed, however, is the location of the sacred.

The XII Tables

Eleven semantic and syntactic features of the XII Tables stand out. Of poetry, there is alliteration, conjoined phrases, assonance, meter, rhyme, and aphorism; of narrative, there are conditional statements (rather than relative clauses), and the absence of action-nouns (or nominalizations); of simplicity, finally, there are short sentences, few qualifications, and verbs in the active voice and imperative mood (rather than the passive voice and subjunctive mood). Unfortunately, we don't have time now to discuss examples of each. Instead, we will examine just one or two examples of each of the major features, poetic, narrative, and simple. The hand-out lists these among several more examples.

Of the poetry of the XII Tables, the most remarkable features are alliteration, meter and rhyme. The best examples of alliteration are "**d**uplione **d**amnum **d**ecidito" (XII,3), and "**S**i servus **f**urtum **f**axsit, **n**oxiam **n**oxit . . ." (XII,2a). There are many others. For example: "Proletario iam **c**ivi **c**ui **q**uis **v**olet **v**index esto" (I,4); "Com **p**eroranto ambo **p**raesentes. **P**ost meridiem **p**raesenti litem addicito" (I,7-8); "**S**i nox **f**urtum **f**actum sit im occisit, iure caesus esto" (VIII,12).

Curiously, this device exists even in modern American law. Consider the legal phrase "rest, residue and remainder", common in wills, just as "hold harmless" is common in contracts (Tiersma, p.14). However, these devices are mostly remnants from older law, which used this device ubiquitously. For instance, here is a land grant from medieval English law:

also so it stonden
mid mete and mid manne
and mid Sake and Sokne
also ic it aihte

(as they stand
with their produce and their men
and with rights of jurisdiction
as I owned them.)

Some of these alliterations are also conjoined phrases, like "mid mete and mit manne" or "Sake and Sokne". Likewise, some of the alliterations in the XII Tables are also conjoined phrases, or at least binomial expressions: "causam coniciunto" (I,6), "iure iudicatis" (III,1), or "aeterna auctoritas" (III,7).

Meter is the most controversial such device. Early Roman meter, the so-called Saturnian meter, is little understood. But it, or some sort of meter, nonetheless seems to be present. After all, Cicero himself describes the XII Tables as a *carmen* which he learned as a boy (see X,2-3). When we read many of the sentences aloud they do have some ring to them. This becomes more obvious when we set them out in verse form, just like the medieval English land-grant we have already seen.

I,1

Si in ius vocat, ito.
Ni it, antestamino.
Igitur em capito.

VIII,2

Si membrum rupsit,
ni cum eo pacto,
talio esto.

X,2

Hoc plus ne facito.
Rogum ascea ne polito.

X,4

Mulieres genas ne radunto,

neve lessum funeris ergo habento.

XII,2a

Si servus
furtum faxsit
noxiamve noxit
...

Not exactly Horace, but we should pause to consider how those lines which rhyme also have roughly the same number of syllables. This at least suggests that there is a meter to them--maybe the Saturnian meter, whatever that might be.

Similarly there is a meter to the medieval land-grant. But we don't need to know how to scan it precisely in order to determine this; reading it aloud, even when we don't understand old English, should convince us that it has a rhythm, whatever it might be.

The above laws also furnish us with ample proof that there is rhyme in the XII Tables. In fact, most of the laws rhyme, if only because they nearly all finish with future imperatives, which end in "-ito". More on imperatives when we turn to syntactic features.

Of the narrative of the XII Tables, the most remarkable feature is the prevalence of conditionals (22 out of 43 complete sentences) are conditionals, with protases beginning with "si" or "ni" and apodoses ending with an imperative, of which there is no better example than the first law we have already seen: "Si ius vocat, ito. Ni it, antestamino."

This, according to Daube, is the usual syntax of early law, be it Roman or Jewish (1956, p.8). For a conditional, such as, "If a man does this or that' tells you a story--though of something yet to come. It puts a situation which may arise, and informs you how to meet it." (p.6). By contrast with the conditional, later law favors the use of relative clauses. And Daube theorizes that a relative clause, such as, "Whoever does this or that' refers not to a situation, but to a category, a person defined by this action . . . It is more general, abstract, detached." (p.6) "This change," he adds, "reflects an evolution

from what we might call folk-law to a legal system." The XII Tables, by his terms then, are folk-law.

Of the simplicity of the XII Tables, the most remarkable features are the short sentences with few qualifications. The shortest complete sentences are three words long. There are several, even two in the first law (I, 2). And yet the longest sentence is only seventeen words (XII,3), although it has two lacunae, which could mean, among other things, that it was originally longer, or contrarily that it comprises three separate sentence-fragments strung together. At any rate, two other sentences come close to it at sixteen words: I,3, although the Loeb editors have interpolated four words into it; and III,1, into which the editors have also interpolated four words. When we come to X,9, however, we find the longest complete sentence without emendations. It is only fifteen words long.

Whether the longest sentence is fifteen, sixteen, seventeen, or even thirty words long is not very important. Precision will be unnecessary to make our point. For the sentences of the XII Tables are short by any count. Tallying the ones we have, and including even the emendations, the average sentence is only eight words long.

The few qualifications of the language of the XII Tables becomes obvious in comparison with developed legal prose, which often exhibits two sorts of qualifications: subordinate clauses and lists of near-synonyms.

Sophisticated laws exhibit not only simple subordinate clauses--when we read the most baroque legal prose we often find subordinate clauses embedded within subordinate clauses, sometimes even several times over. This characteristic becomes most confusing when the subordinate clause stands between the main noun and verb of the sentence.

Here is an especially baroque example of the phenomenon from modern American law:

Every person who insures or receives any consideration for insuring for or against the drawing of any ticket in any lottery whatever, whether drawn or to be drawn

within this State or not, or who receives any valuable consideration upon any agreement to repay any sum, or deliver the same, or any other property, if any lottery ticket or number of any ticket in any lottery shall prove fortunate or unfortunate, or shall be drawn or not be drawn, at any particular time or in any particular order, or who promises or agrees to pay any sum of money, or to deliver any goods, things in action, or property, or to forbear to do anything for the benefit of any person, with or without consideration, upon any event or contingency dependent on the drawing of any ticket in any lottery, or who publishes any notice or proposal of any of the purposes aforesaid, is guilty of a misdemeanor. (quoted in Tiersma, p.57)

The subject of this sentence is "Every person"; the verb phrase: "is guilty of a misdemeanor." To this extent it is quite simple. In between, however, come four relative clauses. The first one has an indefinite subordinate clause; the second has a number of disjunctions, and subordinate conditional clause, which itself has a number of disjunctions; the third also has some disjunctions, as well two disjunctive prepositional phrases; the fourth, finally, has one last disjunction. (Notice how it takes almost as much complexity to describe such a sentence as the sentence itself exhibited!)

This syntactic complexity is the antithesis of the XII Tables' simplicity. Its sentences exhibit few qualifications. In fact, of our forty-three complete sentences, only eight have subordinate clauses (I,3, I,4, III,1, V,4, VII,7, VIII,16, X,9, XII,3). With these eight sentences, moreover, the subject and verb are never separated. And of them all, only the last two have an embedded subordinate clause. In these instances, as we have seen, the sentence is never very long, and so with them the reader can hold both clauses and the subject and verb in mind at once, a feat which only a genius, an idiot savante, or a lawyer could accomplish for the sentence above.

As we saw, that sentence had many disjunctions, and these are the other sort of qualification exhibited by legal prose. Often these qualifications add little information, since they are characteristically near-synonyms. Consider, for example, the injunction against anyone who "publishes any notice or proposal", as if there were a legally important distinction between notices and proposals. Unfortunately, the sad legal truth is

that there probably is. Whoever wrote this law probably foresaw someone mounting a legal defense on the ground that he published a *proposal*, not a *notice*. Such is human nature. And so whoever wrote this law probably added the disjunction, along with many of the others that stack near-synonyms, in order to postpone the inevitable suit. We see how more and more sophisticated legislators, then, will produce more and more qualified laws.

Hopefully it has become apparent how the characteristic language of the XII Tables may be more easily appreciated by contrast with another sort of language, that sort typified by the Theodosian Code. To that end let us focus now on it.

The Theodosian Code

The Theodosian Code comes almost a millenium after the XII Tables. Whereas that early code stood at the beginning of Roman legal history, this late one stands at the end; and the difference is evident. It shows the sophistication characteristic of law that has been developed through a long tradition. This sophistication shines through its language, as we will soon see.

Among other things, it is both more comprehensive and more detailed. Not surprisingly, then, it is much longer. As a result, we cannot here survey it all, as we did with the XII Tables. Again, this paper is only meant as an introduction to the evolution of Roman legal language. For our purposes it will suffice to pick a representative passage, one short enough for thorough treatment.

No passage could be more representative of this code than that of VI,8,1: *De Praepositis Sacri Cubiculi*. The full text of the law can be found on the hand-out. However, here is a summary of its content. It concerns the so-called Praepositus Sacri Cubiculi, that officer in charge of the "sacred bedroom". He is, in short, the imperial chambermaid. Seriously, this office was available only to a man, a eunuch in fact. And

although it may have begun as an appointment in interior decoration, by the time of our law it is obviously a position of great power. We can easily imagine how such a change could have happened: the emperor's interior decorator becomes his confidant, and then eventually his advisor. The story of Sejanus and Tiberius might offer us an analogy.

At any rate, once the Praepositus has acquired his power, it becomes important in court politics to specify his precise rank: whom may he precede in procession? where shall he sit at royal occasions? etc. According to this law--which is so flatulently worded that it takes close scrutiny to discover even what it is really saying--the Praepositi are to hold the same dignity as Praetors, Urban Prefects, and other powerful military officers. Consequently, they merit the same rank at royal audiences, solemn festivities, assemblies, and the like. Furthermore, among these equally ranked officers themselves, he holds a higher rank who has seniority; whereas he who was appointed more recently must follow in line, or sit further from the Emperor at feasts, etc.

Now, the patent difference between this law and those of the XII Tables is its content. That is to say its fastidious concern with posturing. True, the XII Tables have no interest in court politics; however, they do have amusing provisions of their own. Consider the sacred law of Table X, specifically the funeral prohibition against costly burials, and especially the exception that someone with gold cavity fillings may still be buried with them (X,9).

The difference between the two codes is certainly stark, in content but also in language. And it is the language which interests us here. For when we evaluate this excerpt from the Theodosian Code in the light of our findings about the XII Tables, we discover that the Theodosian Code differs on most points. The early code featured poetry, narrative, and simplicity; the later one prose, abstraction, and complexity.

Although the Theodosian Code is obviously written in prose, it has some alliteration: "**Q**ui sacri cubiculi"; "**ad ad**scendendi"; "**m**ilitarem **m**agisteriam" (and later, **m**ilitare

magisterium); "adoraturi admittuntur"; "praecesserit potioem"; "nec praeferri se postulent his, qui praetorianam vel urbanam praefecturam".

These instances may very well be intentional. It is hard to say. They may be due simply to the morphology of the relative pronoun (**q** with hard **c**) or the repetition of a popular prefix (**ad**). But this does not account for all the instances. After all, "militarem magisterium" has weight, and is reminiscent of Virgil's weighty use of **m** in the phrase "murmure montis" (especially at Aeneid Bk. 2, 55, a spondaic line). So too does the list of offices, with its prodigious use of **p**, pile on the prestige.

Thus, either alliteration is indeed endemic to Latin, or it was intended even in a pompous law like this one. If the latter, maybe it was intended here precisely because it is pompous: rather than marvelling at the piquancy of Theodosian prose, we instead labor under the burden of its lists. And this may be the point. If so, although the later code exhibits the same device as the early code, it does so for a different reason. In any case, the alliteration of the XII Tables is more pronounced--remember "duplione damnum decidito".

As for meter and rhyme, there is not much to be said here. Neither stands out, although a diligent reader may find both. In other words, seek and ye shall find. According to Tiersma, "Brenda Danet has identified features such as alliteration, assonance, rhythm, and rhyme in a contemporary bank promissory note." (p.27)

There is plenty of abstraction in our short excerpt. A majority of the sentences in the XII Tables, remember, were conditional statements. Despite its length, there are only two sentences in our excerpt, so it is hard to make generalizations about the prevalence of sentences beginning with, by contrast, a relative pronoun. But still, of the two sentences there is one--the first--that does. The second does not, but it begins with "sed", and introduces details to qualify the first sentence, as well as a persuasive argument to bolster its injunction. Neither sentence, therefore, begins with the protasis of a conditional, the "si" which was so common among the sentences of the XII Tables. We cannot make

generalizations, then, but we can note how this one excerpt has fulfilled Daube's observation. Rather than telling a story of the sort "if you do so-and-so, you will experience such-and-such" it begins by characterizing a legal type, an office, and proposing a general feature of it. That is, the Praepositus, and his right to the formal dignities of other powerful offices.

In XII Tables, moreover, there is nothing like this second sentence, with its attempt to persuade subjects of the justice of the first sentence by citing the precedent of Macrobius, *vir inlustris*. From what we read in this law, he seems to have been an earlier Praepositus, likely a diligent one, who ascended the court ranks in due time. The writer of this law enjoins others to emulate him, doubtlessly adding the honorific as an incentive to the disgruntled.

Now, the XII Tables never sought to persuade; they simply told it the way it was. Ironically, we should expect a later law like this one--the pronouncement of Honorius and Theodosius, who as Dominate emperors were effectively oriental despots--to rival or surpass the early code in confidence. However, there seems to be a little insecurity here, as if telling it the way it is no longer earns unquestioned obedience. The persuasion of precedent has crept in, reminding us perhaps of Cicero's forensics. Moreover, we find here emphatic adverbs (*certe, videlicet, manifeste*), the cajoling subjunctive *laetentur*, and flattering titles like "eminētissimam praetorianam", none of which had any place in the austere and bold XII Tables. This point must not be exaggerated, of course. The thrust of the second sentence adds detail and qualification to the first--Macrobius gets mentioned while the writers are elaborating their command. And while it insists and cajoles it nevertheless speaks calmly and authoritatively. Yet this authority no longer seems self-warranting. Still a looker, late law must nevertheless wear make-up to turn heads.

Of complexity, this excerpt provides ample evidence. First of all, its long sentences. The first has 103 words; the second, 90. That makes an average of about 96

words per sentence. The average for the XII Tables, remember, was 8. This length follows from this excerpts many qualifications. We saw earlier how developed legal prose often exhibits two sorts of qualifications: subordinate clauses and lists of near-synonyms. Our example of these qualifications came from American law, but this excerpt from late Roman law proves to be even more baroque.

To begin with, the first sentence has seven subordinate clauses, the last of which has another embedded within it. And the second sentence also has seven subordinate clauses, the first of which has another embedded within it, as do the second and the fifth. Why so many and so deep? We have already considered how qualifications may be added to stop up gaps, to anticipate captious suits. This may have been a motive here. Similarly, an American patent application must be stated in one sentence; "an extra sentence might be cause for rejection" (Tiersma, p.55). So too must a decision of the French *Cour de Cassation*. The official reason for these strict demands is that ambiguity may result when qualifications are placed in separate sentences. "Legal drafters," writes Tiersma, "seem to fear that if they place a condition on a rule in a separate sentence directly following the statement of the rule, some lawyer will be free to argue that the condition does not apply." We can imagine a cavilling Praepositus, budding ahead of an Urban Prefect who was appointed before him. The emperors who drafted the law may have anticipated just this sort of thing.

But other motives are possible. It may just be that middle Roman law developed this bloated style--we have already seen the Lex Aquilia adding near-synonyms--and it became the standard for legal prose, imitated by later generations without a thought to its economy or transparency. Something like this has happened in our own times. But we are also familiar with politicians who answer a controversial question with a reply so complex that no one can understand it. They seek to hide their answers from a public who expect insipid leaders. And something like this spirit must have animated many of

Cicero's periods. Here too? Perhaps, if Honorius and Theodosius were as insecure as their prose earlier suggested.

More likely is the motive to overwhelm. Consider how you feel before the byzantine prose of a modern contract, insurance policy, or hospital admission form. In the last case, the combination of foreign terms, opaque grammar, and frenzied activity by people in a bizarre assortment of costumes, all make a new patient feel overwhelmed by an institutional power beyond his control or even comprehension. As theologian Stanley Hauerwas has written, "the hierarchical politics of such medical centers are enough to make the description 'Byzantine' inadequate. Medicine, in fact, has become more powerful and pervasive in our lives than the church ever was" (p.168). Feeling overwhelmed like this, the patient more readily surrenders his will; and after all this is precisely what both the doctors and the emperors seek.

Returning to the syntax of our excerpt, the qualifying subordinate clauses often sit between the subject and the verb, making it impossible to hold the whole sentence in mind at once (just like the American statute quote earlier). If we remove them, however, we get this leaner version of the first sentence: "Qui sacri cubiculi nostri fuere praepositi . . . ea dignitate fungantur . . . ut in sedibus et consessu is eis ordo servetur". Lean enough to get your hands around. Yet even this version could stand to diet. The near-synonyms *sedibus* and *consessu* have already reminded us of the near-synonyms of the American law. But there are many other such redundancies here.

First of all, there are the obvious and gratuitous lists of occasions and offices, rounded out by a hedge reminiscent of Roman prayers: "vel quaelibet alia officia". Also, there are the tedious lists of tenses. Thus, the law begins by addressing three types of Praepositus: those who have already been appointed, those who are just now beginning, and those whom "postea sors ad adscendendi huius gradum fastigii devocarit". Without rivalling this bombast, the law's peroration finishes the same way, addressing "quisque provectus est vel fuerit provehendus", encouraging them "suae locum vindicet dignitatis".

Causes

In their language, the XII Tables and the Theodosian Code have differed in three main ways: the first was more poetic than the second; the first favored narrative while the second favored abstraction; and the first was syntactically much simpler than the second. While examining a few examples of these differences we have occasionally paused to speculate why they might have arisen. In the second half of the full version of this paper, a more systematic diagnosis of the causes is offered. Unfortunately there isn't time for that here. Allow me, however, to finish by quickly presenting the conclusions of that second half.

The XII Tables

If Warde Fowler is right, and the *ius civile* and the *ius divinum* were originally administered by the same people, the Pontifices, we should expect the laws of the XII Tables to resemble prayers. And to some extent, isn't this what we have found? The prevalence of alliteration, conjoined phrases, assonance, meter and rhyme all contributed to the poetic and liturgical sound. In the least, the fact that early Roman law was mostly an oral practice would explain the need for this sound. As we have already speculated, each of these poetic devices makes legal rules more memorable. Moreover, the resonant language of poetry marks a ritual boundary which helps to distinguish legal events from everyday life, warning those who cross it to beware what they say and do, as everything here has well-defined consequences.

However, one additional fact must not be forgotten. This is the peculiar insistence of early law on the exact repetition of formulae. Take the procedure of *mancipatio* for example. Besides involving a purely symbolic transfer of bronze (Nicholas, p.63), it

required the exact repetition of a formula. Other ancient procedures are similar: e.g., *in iure cessio* (with its more elaborate formula of *vindicatio*), and *sponsio* (Nicholas, p.193). Indeed, this peculiar insistence continued through the classical period of Roman law in the guise of the formulary system.

All the while, though, it bears a striking resemblance to the insistence of Roman religion upon the exact repetition of prayers. In Roman prayers, the prayer had to be incanted precisely as prescribed; for if there were any mistake, the prayer had to be repeated from the beginning (Fowler, p.188). In some cases of early law, moreover, were the plaintiff to utter the correct formula and oath, he would thereby win his case (Crook, pp.68-97). Implied by this procedure is a belief not only that certain formulae are needed to engage justice, but also that the gods safeguard the sanctity of oaths. Both beliefs invest words with talismanic power.

The narrative style of the XII Tables is also fruitful soil for suggestions. We saw earlier the contrast highlighted by Daube between early law, on the one hand, which favors conditional statements and eschews action-nouns, and late law, on the other, which favors both relative pronouns and action-nouns. The reason he adduced for this contrast was the difference between a simple and a complex legal culture. In this way, both the narrative and syntactic simplicity of the XII Tables were probably caused by the simplicity of early Rome itself.

Primitive cultures favor laws with conditional statements rather than relative clauses; this much seems clear. Besides the XII Tables, we know that the laws of the German tribes, "were mostly straightforward *if-then* statements: *Gif thuman ofaslaeh, XX scill--*'if somebody cuts off someone else's thumb, then he shall pay 20 shillings compensation.'" (Tiersma, p.15) The reasons, however, are more murky.

Following Daube, we might argue that the greater cohesion of primitive cultures produces a greater moral consensus. With this consensus as a background, they do not need laws telling them what can and cannot be done; none of their citizens disagrees

about this. Instead they require only laws that tell them which consequences follow from which actions. And this information is better expressed in a conditional mode: do this and you will suffer that.

By contrast, when societies grow and become more sophisticated, there is less moral consensus. Therefore, their citizens need laws to tell them what can and cannot be done, as well as what follows when they break these prescriptions and proscriptions. And this information is better expressed in an indefinite and relative clause: no one should do this; whoever does will suffer that. As an argument, it is at least possible, though much anthropology would be needed to confirm it.

More prosaically, conditional statements are easier to remember than relative clauses defining types and categories, just as stories are more memorable than theories. If so, conditional statements may be favored by early law because, like poetry, they are more memorable.

As for those elements of syntactic simplicity that we noticed--short sentences, few qualifications, and verbs in the active voice and imperative mood--these are easily and quickly explained by a combination of the above suggestions. If our suggestion about the poetry of the XII Tables was right--that it arose from the oral, therefore memorable, and maybe even religious origins of early law--then it is self-evident why the laws had to have short sentences. Likewise for few qualifications, if not also because the XII Tables stood at the beginning rather than the end of the legal tradition whose quibbles would add innumerable accretions to the simplicity of early law. And finally, active and imperative verbs would have been the natural complement of narrative, let alone the requirement of divine command.

The Theodosian Code

This brings us to the Theodosian Code, and just as we had to keep in mind the primitive Rome which produced its ancestor, the XII Tables, so too we must keep in mind the sophisticated, although degenerate Rome which produced it. For this sophistication, at least, goes a long way toward explaining the prose, abstraction, and complexity of the Theodosian Code.

To begin with, the preference for prose, rather than poetry, is easily explained by the introduction and later domination of writing in Roman legal culture. By 438 AD, to be sure, Roman law was no longer the mostly oral tradition it had been in the time of the XII Tables. Even in the first century BC, for instance, Cicero spoke loosely of the *stipulatio* as a written act (Nicholas, p.194). Originally, however, it had been an oral promise with sacramental overtones: one party asked whether the other would promise with these words and these words only: "spondesne?"; if the other party wished to promise he had to say "spondeo". As Nicholas writes, "if the promisor, for example, answered *promitto* to the promisee's question *spondesne?* there was no contract." (p.193) When there was a contract, though, more than just the contracting parties may have become involved. Like the solemn words of the original *mancipatio*, these words of the original stipulation seemed to engage a relationship supervised by the gods.

But as Greek law, with its written tradition, gradually influenced Roman law, sacramental rituals like these gave way to documents. This written influence accelerated after the the *constitutio Antoniana* in AD 212, which granted Roman citizenship to thousands of subjects who had formerly followed the Greek practice of writing. Earlier Romans, like Cicero, may have spoken loosely of their rituals as written act, since documents often served as evidence of ritual; indeed, early Romans probably often took the shortcut and let a document serve as a substitute for ritual. Even still, the ritual remained normative. But these new Romans later forsook the ritual altogether and simply added the stipulation as a vestigial phrase to the end of their written contracts. In this

way, by the time of Justinian, we find even the established legal authorities of the Emperor saying that the exact form of the promise is irrelevant:

In hac re olim talia verba tradita fuerunt: spondes? spondeo, promittis? promitto, fidepromittis? fidepromitto, fideiubes? fideiubeo, dabis? dabo, facies? faciam. utrum autem Latina an Graeca vel qua alia lingua stipulatio concipiantur, nihil interest, scilicet si uterque stipulantium intellectum huius linguae habeat: nec necesse est eadem lingua utrumque uti, sed sufficit congruenter ad interrogatum respondere . . . (Justinian, 3.15.1; see also 2.10, where testamentary rules are very liberal, so much so that a testator can make a mistake in the names of his legatees without costing them their inheritance, as long as his intent is clear.)

Now that writing has superseded ritual, and now that any form of words will serve to initiate a binding contract, the earlier need to memorize exact formulae has vanished. This is what our earlier conclusions should have led us to expect. For if the function of poetry in early law had been to facilitate memorization, and perhaps also to resemble religious incantations, we should expect later written law to abandon poetry in favor of prose. Not surprisingly, Anglo-Saxon law experienced the same evolution. In the fifteenth century, lawyers began to treat descriptions of court proceedings as authoritative--that is, more than interesting or educational news--by printing abridgments much like today's digests (Tiersma, p.37). By the sixteenth and seventeenth centuries, in fact, the written document had prevailed to the extent that "anything the parties said regarding the transaction became legally irrelevant" (Tiersma, p.37). Just as English law had by then abandoned its earlier poetry, so too had Roman law abandoned its own. There was no more need.

But furthermore, written prose became more useful on its own merits. Roman society was now immeasurably more complex. Roman law therefore had to adapt and become more complex itself. As we have seen, this complexity was not only a matter of content but also of syntax. Written prose allowed this, and even promoted it.

Sitting down with a quill and parchment, everyone from legislators to soldiers can be more deliberate--crafting more individual laws and contracts--than they can be in a spoken declaration or agreement. Readers can also parse more complex sentences, and writers, anticipating this, add subordinate clauses with less worry. Writing can always be read over if the reader cannot understand what he has read the first, or second, or (as in the case of our excerpt from the Theodosian code) third time.

Needless to say, the XII Tables themselves were written, but they emerged from an oral tradition of even earlier law. Consequently they bear few of these hallmarks of writing. The Theodosian Code, by contrast, is both written and born of writing--centuries of legal writing, in fact, with all the accretions such a tradition inevitably adds. For as Tiersma argues, written law is inherently conservative: for instance, only with writing can a doctrine of precedent arise.

There is no mention in the XII Tables of earlier decisions or laws. Of course, the XII Tables were the fruit of a sort of social revolution, the plebeian demands to have the secrets of the law revealed to them. Nevertheless, the Roman state after the XII Tables was continuous with the Roman state before them. Compare this conspicuous absence with the presence in our excerpt of the precedent of Macrobius. Or consider the conservative Law of Citations of the same period (426 AD), which not only singled out as authoritative the writings of Papinian, Paul, Ulpian, Modestinus, and Gaius, but also added an elaborate algorithm for deciding among them when they disagreed. This degree of conservatism, one should say fundamentalism, would have been impossible without writing.

Such conservatism, combined with the precision afforded by the written word, partly explains why the prose of the Theodosian Code became so complex. For likewise in England during the sixteenth and seventeenth centuries, "the rules regarding the language of pleadings became highly technical." (Tiersma, p.40) This technicality resulted from the adversarial forum into which legal documents were being dropped.

When traditional and sacramental forms of oral law yield to new and secular forms of written law, the meanings of these forms are no longer obvious. Competing lawyers naturally feed on such ambiguities, and the result is an ever more complex law.

Take, for instance, the *stipulatio* discussed above. In early law it had the rigidity of a sacrament. Once it had been engaged, there was no question of its meaning. Thus, if you said "spondesne?", and I replied "spondeo", I would have entered a well-defined contract with you, and maybe also the gods. There is no room to cavil. However, if we may enter a stipulation by the numerous and varied words listed in the *Institutes* (3.15.1), it may sometimes become unclear whether we have entered anything at all. For if you say "facies?" and I reply "faciam" but do nothing afterwards, you will claim that I stipulated, while I, being habitually lazy, may cavil that in my personal lexicon "faciam" is less a promise and more a hope.

Here we see the advantage of distinctly marking the beginning of legally binding relationships with some unequivocal formality; like *spondere*, bronze scales, or a clod of dirt. When these formalities lose their appeal, lawyers gain theirs. Once contracts and laws are written and assume individual forms, parties may mold their subsequent shapes by enlisting captious lawyers to argue the precise meaning of words. This point requires no explanation; we are more than familiar with this phenomenon in our own time. But we should notice how quickly legislators and contractors will anticipate it, qualifying their documents with subordinate clauses and lists of near-synonyms, hoping thereby to stop up all the gaps.

Written law not only allows the proliferation of these complexities, its inherent conservatism preserves them, stacking them up throughout a long tradition. This is one explanation, then, of the syntactic complexity of the Theodosian Code. A second is simply the complexity of the sophisticated society which late Roman law needed to manage. Such cultural complexity helps explain the abstraction of late laws. As we saw, these devices allow legislators, like philosophers, to make more detailed distinctions, and

thus specify legal categories more finely. A society as intricate as the late Roman empire, like our own, needs these very specific legal categories. Indeed, it thrives on them.

But a third explanation is somewhat more ambitious. It concedes that the development of writing sufficiently explains the supersession of prose over poetry; however, it thinks that this development, even when conjoined with the cultural complexity of the late Roman empire, is insufficient to explain the inflation of that prose with both abstraction and syntactic complexity. After all, complex ideas can be stated with simple syntax: St. Thomas's *Summa* is an enduring example of this ideal. And although a more precise law will indeed need action-nouns to make finer distinctions, many of the action-nouns in our excerpt seem superfluous.

Administratio, for example. It arises in the phrase "ex huius administrationis exordio"--from the beginning of this administration. This could have been less pompously and more forcefully written as: when we assumed power; or, when we began to rule. Many of the other action-noun phrases deflate in the same way. In other words, words more like those of late Roman law, the other phrases in which action-nouns occur are similarly susceptible of deflation. And this is the point of the third explanation: that which could be said simply assumes grandiloquence.

Although this abstraction and complexity may have been due in part to written law, and in part to the precise demands of a complex society, it was also due to the strategic effect of overwhelming prose. By writing in a way which none can understand immediately, and which few will have the patience to penetrate, the legislator can achieve two strategic goals.

First of all, he can obfuscate an unpopular provision; or secondly, he can cow the average subject into obedience by placing before him a law that is beyond not only his control but also his comprehension. On the one hand, complex syntax achieves this by embedding subordinate clauses, placing them between subject and verb, and lengthening

sentences to the point where no one can keep any single one in mind at once. On the other, action-nouns achieve this by reifying processes and making the agent disappear.

As we saw above, *administratio* obviates any mention of the Emperors. This effect is doubled, moreover, by the bombastic titles which replace any explicit mention of the Emperors: *nostra liberalitas*, and *imperium nostrae serenitatis*. Now the subject stands before a noumenal government, one which distributes *provectiones* from the recesses of a *sacrum cubiculum* in a Sibylline prose designed to provoke awe and compel obedience. Or so this third explanation would suggest.

An irony speaks in its favor. We saw earlier how the archaic oral law required rituals to initiate its legal relationships: bronze scales were needed to signal the beginning of a *mancipatio*, the verb *spondere* was needed to signal the beginning of a *stipulatio*, etc. If we take the authors of the *Institutes* at their word, however, late Roman law contemptuously dispenses with such rituals. To them, it no longer matters what words are used: subjects initiate legal relationships so long as they share the same intentions. This may be true of contracts, but not of laws. After all, here among the laws of the Theodosian Code we have found an elaborate, pretentious, and apparently liturgical language.

To mention just the most outstanding rituals: officers must be flattered with the right adjectives, commands must be qualified with an exhaustive list of verb tenses, the passive voice and subjunctive mood must be used to pacify objectors and occlude the activity of the Emperors. Most striking of all: these Emperors must be given the right titles. For now they resemble the gods of Roman prayer, they who must be addressed properly lest they ignore suppliants. Accordingly, late legal language assumes a new sacramental dimension. Early contracts failed if they used the wrong verb or flouted traditional ceremony. Late laws fails if they misname the Emperor or flout these other major rituals.

If this third explanation is correct, then, abstract and complex prose have been used by late law to distinctly mark a ritual entry into the presence of the sacred. Should this be correct, notice, the basic cause of the unique characteristics of late legal language would not differ much from those of early legal language. Each would stem from a sacramental impulse; they would differ only inasmuch as they disagree about the holy.

Conclusion

Let us briefly enumerate our conclusions. Early Roman legal language exhibits three main features: poetry, narrative, and simplicity. These features were probably caused by the simplicity of early Roman society, particularly its oral law, the memorability this required, and maybe even its religious origins. Correlatively, late Roman legal language exhibits three main features: prose, abstraction, and complexity. These features were probably caused by the sophistication of late Roman society, particularly its written law, and maybe also its strategic purposes: to obfuscate and overwhelm.

Ironically, the means it uses to effect this strategy may be a return to the sacramental dimension of language more palpable in early law. Despite this deep resemblance, however, there is still another, elemental difference: the focal point of the sacred is no longer some faraway mountain, but instead the *sacrum cubiculum* of the imperial palace.

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