

**ROMAN LAW**  
**PROCEDURE OUTLINE (cont'd); SOURCES OF LAW OUTLINE**

I. Procedure: The Formula as a Device for Expanding the Law

1. The basic idea of a formula, using the formula for the *actio certae creditae pecuniae*, the action for a money debt of a fixed amount:

“Let Octavius be judge (*Octavius iudex esto*).” This clause is called the ‘nomination’ (*nominatio*).

“If it appears that N.N. [the Roman equivalent of our ‘D(efendant)’] ought to give 10,000 sesterces [a Roman coin and unit of account, close to \$10,000 worth of silver in modern values] to A.A. [the Roman equivalent of our ‘P(laintiff)’] (*Si paret Numerium Negidium [NmNm] Aulo Agerio [A°A°] HS X milia dare oportere*).” This clause is called the ‘claim’ (*intentio*).

“Let the judge condemn N.N. [to pay] A.A. 10,000 sesterces; if it does not appear let him absolve (*Iudex NmNm A°A° HS X milia condemnato; si non paret absolvito*).” This clause is called the ‘condemnation’ (*condemnatio*).

The possible formulae were not without limit. They had to be contained in the edict of the praetor, which he announced when he took office. Each praetor’s edict tended to follow that of previous praetors, and the edict developed over time. Its contents were finally fixed in the reign of Hadrian, probably in 131 AD, when it became known as the ‘perpetual edict’.

2. The formula as a mechanism for legal development. Expanding by pleading, once more the *actio certae creditae pecuniae*:

“Let Octavius be judge (*Octavius iudex esto*) [Nomination (*nominatio*)].

“If it appears that N.N. ought to give 10,000 sesterces to A.A. (*Si paret Numerium Negidium [NmNm] Aulo Agerio [A°A°] HS X milia dare oportere*) [Claim (*intentio*).]

“If A.A. and N.N. did not agree that the money would not be sought within a year (*Si inter AmAm et NmNm non convenit ne ea pecunia intra annum peteretur*) [Exception of pact (*exceptio pacti*)]

“Or if anything was done by N.N.’s fraud (*Aut si quid dolo malo NiNi factum est*) [Replication of fraud (*replicatio doli*)]

“Let the judge condemn N.N. [to pay] A.A. 10,000 sesterces; if it does not appear let him absolve (*Iudex NmNm A°A° HS X milia condemnato; si non paret absolvito*). Condemnation (*condemnatio*).”

What this does is add to two pleadings to the plaintiff’s basic claim: an exception of pact (*exceptio pacti*) and a replication of fraud (*exceptio doli*). It is reminiscent of common-law pleading. What seems to have distinguished Roman-law pleadings from their common-law counterparts is that at common law the object seems to have been narrow the issues. At common law this case would go to jury on the assumption that the money was owed and an agreement had been made not to sue on it for a year, and the only issue for the jury to decide would be whether that agreement had been induced by fraud. In Roman law, however, the purpose of these pleadings seems to have been to expand the issues. The judge still had to determine whether the money was owed, but also whether the parties had agreed that the debt would not be sued on for a year and whether that agreement was induced by fraud. A negative

finding on the first issue would, of course, defeat the plaintiff's claim, and no further inquiry would be necessary. Similarly, a finding on the replication would only be necessary if there were affirmative findings on the claim and the exception.

The implications of what the praetor has done to substantive law are pretty clear. Although pacts were not in the form that allowed a direct action them, the praetor was saying that a pact not to sue would be allowed as a defense in the basic debt action. (And the substantive issue would be raised [and would be discussed by the jurists], whether it would be allowed in other actions as well, and if so in which ones.) Similarly, the praetor has allowed a defense of fraud to the exception of pact, and the question becomes in what other actions or exceptions such a defense would be allowed. Ultimately, both of these pleas were allowed in a great many actions.

3. The formula as a mechanism for legal development. Changing the nature of the formula:

a. Fiction

If A.A. were heir to L. Titius, then if it appears that N.N. ought to pay A.A. 10,000 sesterces, the judge, etc. (*Si AsAs L. Titio heres esset, tum si paret NmNm A°A° HS X milia dare oportere, iudex [etc.]*) [Fictitious formula (*formula fictitia*)].

This possibility is quite radical, because by fictions one can totally upset anything. The praetors were quite cautious about using fictions. The one here is based on a statute (*lex Cornelia de captivis*) that treated the wills of Roman citizens who had died in captivity, and hence were technically not Roman citizens, as if they were Roman citizens so that the will was effective to institute an heir.

b. *Bona fides*

"Whereas A.A. sold N.N. the Cornelian land which is the subject of the litigation (*Quod AsAs NoNo fundum Cornelianum, quo de agitur, vendidit*)" [Demonstration (*demonstratio*)]

"Whatever it appears N.N. ought to give [or] do in good faith (*Quidquid paret ob eam rem NmNm dare facere oportere ex fide bona*)" [Claim (*intentio*)]

"With respect to that let the judge condemn N.N. [to pay] A.A.; if it does not appear, let him absolve (*Eius iudex NmNm AoAo condemnato; si non paret absolvito*)" [Condemnatio (*condemnatio*)].

There are two elements in this formula that are not present in the ones that we have looked at before. First, before the statement of the claim (*intentio*), there is a 'whereas' clause, known as a demonstration (*demonstratio*), that states the facts on which the claim is based. This clause is found in all formulae where the condemnation clause was not for a fixed amount (*condemnatio incerta*). The judge needed to know the cause of the obligation if he was going to fix the amount of the award rather than simply taking figure from the formula. The second difference is more innovative. The praetor has stuck 'in good faith' (*ex fide bona*) after 'ought to give or do'. The phrase turned out to have a number of meanings. In bona fide cases, the defendant could, for example, admit that owed the owed money for the sale but allege that plaintiff owed him money on another transaction that should be offset from the amount owed on the sale. More broadly, explicit exceptions of fraud are never found in bona fide actions. Freedom from fraud was incorporated in the idea of *ex fide bona*.

- c. Action on the facts (*actio in factum concepta*) or ‘useful action’ (*actio utilis*)
- “If it appears that A.A. deposited a silver table with N.N. and it was not returned to A.A. by the fraud of N.N., whatever the thing shall be worth, etc.” (Si paret AmAm apud NmNm mensam argenteam deposuisse eamque dolo malo NiNi AoAo redditam nonesse, quanti ea res erit, [etc.])” (Formula ‘on the facts’ (*Formula in factum concepta*))
- This one looks quite straightforward. It is not. All the other formulae that we have seen have the phrase ‘ought to give or do’ (*dare facere oportere*) in them. This marks the action as one that was thought to be based on the civil law. There was no civil-law action on a deposit, an arrangement in which the owner of the goods stored them with another person and where the person with whom the goods were stored got no benefit from the goods. The civil law probably thought of this as an arrangement between friends that should not give rise to a lawsuit. The praetor was probably thinking of the same kind of arrangement but thought it particularly egregious if the friend then refused for no good reason or for a bad one to return the goods.
4. *Materials*, p. 35 contains five examples of formulae (numbered a–e), four of which we have already seen. (The exception is no. c, a *rei vindicatio*, literally ‘vindication of a thing’, a real action, while all the rest are personal actions.) Armed with that knowledge, see if you can see why the following terminology is applied to the indicated actions. (Hint: the trickiest to see are why no. c is said to be a *formula arbitraria* and why nos. c and d are not *intentiones incertae*.)
- a. *actio civilis* = a, c, e
  - b. *actio fictitia* = b
  - c. *actio honoraria* = d
  - d. *intentio certa* = a, b
  - e. *intentio incerta* = e
  - f. *formula arbitraria* = c with *litis aestimatio*
  - g. *actio in rem* = c
  - h. *actio in personam* = a, b, d, e
  - i. *bonae fidei iudicia* = e
  - j. *demonstratio* = e
  - k. *actio utilis, actio in factum concepta* = d
5. Sources of Law
1. Gaius on sources of law (G.I. 1.1–7; *Materials*, p. 132): “1. Every people that is governed by statutes and customs observes partly its own peculiar law and partly the common law [*ius commune*] of all mankind. The law which a people establishes for itself is peculiar to it, and is called civil law (*ius civile*) as begin the special law of that city-state (*civitas*), while the law that natural reason establishes among all mankind is followed by all peoples alike, and is called law of nations (*ius gentium*) as being the law observed by all mankind. Thus

the Roman people observes partly its own peculiar law and partly the common law of all mankind. This distinction we shall apply in detail at the proper places.

There are two words for ‘law’ in Latin and in all the modern European languages except for English and the Scandinavian languages. In Latin the words are *ius* and *lex*. *Ius* is the word for law in general; it is also the word for ‘right’. This is the word that Gaius uses when he is defining *ius civile* and *ius gentium*. *Lex* (plural, *leges*) is the word for a specific law, and is frequently best translated ‘statute’.

*Ius gentium* sometimes means something close to what we call ‘international law’, the law that governs the relationship between states. It clearly does not mean that here. Rather, what Gaius seems to mean is something close to what is sometimes called ‘natural law’ (*ius naturale* or *ius naturae*). He says that *ius gentium* is the law ‘that natural reason establishes among all mankind’. Some of the Roman jurists did use the term ‘natural law’. The relationship between *ius gentium* and *ius naturale* is a topic to which we will have to return.

2. “2. The laws of the Roman people consist of comitial enactments (*leges*), plebiscites, senatusconsults (*senatusconsulta*), imperial constitutions, edicts of those possessing the right to issue them, and answers of the learned (*responsa prudentium*).
3. Cicero, *Topica* 5.28 (c. 44 BC): “. . . the civil law is that which is made up of statutes, decrees of the Senate, matters adjudged by the authority of those learned in the law, edicts of magistrates, custom, and equity.”

The topic that is being discussed here is definition by partition, of which this is an example. Hence, it is not clear that Cicero gave much thought to whether the definition offered here is correct. Also, Cicero was not a jurist, and what he thought the parts of the civil law were may not be the same as what a jurist of his day might have thought. It is nonetheless striking both what he includes that Gaius includes, statutes (*leges*), senatusconsults, and edicts of the magistrates, and what he includes that Gaius does not, equity and custom. The middle term, ‘matters adjudged by the authority of those learned in the law’, pretty clearly corresponds to Gaius’ ‘answers of the learned’. There may be two sources here: ‘matters adjudged’, and ‘opinions of those learned in the law’. If that is right, then there is a third source of law not mentioned in Gaius, ‘matters adjudged’ or, more loosely, ‘precedent’. Gaius’ ‘imperial constitutions’ is, of course, not in Cicero, there being no emperor when Cicero wrote.

#### 4. Sketch of Sources of Law

Date	<i>leges</i>	<i>plebiscita</i>	<i>SC.</i>	<i>edicta</i>	<i>const.</i>	<i>responsa</i>
450 BC						
		287	:	367		
			:			100
1			:			
				138		
						240
565 AD						

Neither *leges* nor *plebiscita* disappeared entirely in the Year 1. The colons on senatusconsults (SC.) in the Republican period indicate that they did not technically have the force of law in

the period but can hardly do justice to the complicated process by which they acquired it in the Principate. The text of the praetor's edict became fixed shortly before the end of the reign of Hadrian in 138AD, but it remained very much a source of law at least until the end of the classical period.

*Ius civile* ('civil law') vs. *ius honorarium* ('honorary law', 'law based on office'). The *ius civile* was thought to be based on statute, particularly the XII Tables, though it was recognized that *interpretatio*, 'interpretation', could carry the words of the statute far beyond their literal meaning. Hence, *interpretatio* is sometimes thought of as a separate source of law, particularly in the Republic. The *ius honorarium*, however, was an expression of the fact that the magistrates, particularly the praetor, could create law, even if that law that could not be grounded in the words of any statute.

Beginning in the 4th century AD, Roman writers, not just jurists, came to recognize that something happened to the sources of law between the Republic and the Principate. They began to call law that dated from the Principate and beyond *ius novum*, 'new law', and law that dated from Republic (and was still in many cases in effect), *ius vetus* or *ius antiquum*, 'old law' or 'ancient law'.

5. "3. A *lex* is a command and ordinance of the *populus* ('people'). A plebiscite is a command or ordinance of the *plebs*. The *plebs* differs from the *populus* in that the term *populus* designates all citizens including patricians, while the term *plebs* designates all citizens excepting patricians. Hence in former times the patricians used to maintain that they were not bound by plebiscites, these having been made without their authorization. But later a *lex Hortensia* [287 B.C.] was passed, which provided that plebiscites should bind the entire *populus*. Thereby plebiscites were equated to *leges*."

Much Republican constitutional history and considerable Republican constitutional conflict is hidden in this bland account. That this was long over by Gaius' time is indicated by the fact that the *lex Aquilia*, an important Republican statute on damage to property, is always called *lex*, despite the fact that was technically not a *lex* but a plebiscite.

Statutes and plebiscites are not particularly important for the history of Roman private law. There may be as many as two or three dozen that deal with private law at all:

- a. By far the most important is the XII Tables of 451–450 BC, but here *interpretatio* is more important than the words of the tables themselves.
- b. The *lex Aquilia* of c. 200 B.C., just mentioned, is probably the most important statute about private law after the XII Tables.
- c. There is also important legislation in the late Republic and the Augustan period dealing:
  - i. with the manumission of slaves,
  - ii. with legacies in testaments, and
  - iii. with marriage.

Of these, the Augustan marriage legislation seems to have been the most comprehensive.

6. "4. A *senatusconsult* is a command and ordinance of the senate; it has the force of *lex* though this has been questioned."

The *senatusconsultum* (SC) until quite late is in form advice to a magistrate. Even the *senatusconsulta* (SCC) of the early Principate were all incorporated in someone's edict. It is not until Hadrian that we have a SC Tertullianum on intestate succession by mothers which we know was not simply advice. Turning the SCC into formal law was probably necessitated by the fact that Hadrian had the praetorian edicts consolidated, and the text fixed. By the end of the Principate, SCC are called *orationes*, i.e., 'speeches' of the *princeps* to the Senate, which then adopts them as law.

7. "5. An imperial constitution is what the emperor by decree, edict, or letter ordains; it has never been doubted that this has the force of *lex*, seeing that the emperor himself receives his *imperium* through a *lex*."

Any time a lawyer says "it has never been doubted," look to your wallet. It was probably not until the reign of Hadrian (d. 138 AD) that it became clear that an imperial constitution could have the force of a *lex*. Some imperial constitutions clearly had the force of a *lex* in Gaius' time. We will deal with them in more detail in the next class.

8. "6. The right of issuing edicts is possessed by magistrates of the Roman people. Very extensive law is contained in the edicts of the two praetors, the urban and the peregrine, whose jurisdiction is possessed in the provinces by the provincial governors; also in the edicts of the curule aediles, whose jurisdiction is possessed in the provinces of the Roman people by quaestors; no quaestors are sent to the provinces of Caesar, and consequently the aedilician edict is not published there."

It is characteristic of Roman jurists generally that they don't tell us much about what was going on in the provinces, and when they tell us something, that don't tell us as much as we would like to know. If the provincial governors had the jurisdiction of the praetors in the provinces does that mean that they issued formulae to *iudices* as the praetors did in Rome? Or, as is sometimes suspected, did they employ a version of the *extraordinaria cognitio*? If the aedilician edict was not issued in imperial provinces, what, if anything, took its place?

There were four relevant edicts, that of the urban and peregrine praetors, the curule aedile, and the provincial governors. The Roman jurist Salvius Julianus consolidated that of the urban and probably the peregrine praetors in the time of Hadrian. His consolidation was adopted by the senate as the perpetual edict in 131 AD. The contents of the perpetual edict can be reconstructed with some confidence because many extracts from commentaries on it survive in Justinian's Digest. The edict contained a collection of two different sorts of texts (1) promises to make a lawsuit possible and (2) formulae. It was, as Gaius says, an important source of law. How this came is outlined above under 'I. Procedure'.

9. "7. The answers of the learned are the decisions and opinions of those who are authorized to lay down the law. If the decisions of all of them agree, what they so hold has the force of *lex*, but if they disagree, the judge is at liberty to follow whichever decision he pleases. This is declared by a rescript of the late emperor Hadrian."

'The learned' are, of course, the jurists, and the fact that their *responsa* served, at least under some circumstances, as a source of law was noted by Cicero already in the late Republic. Let us try to get some understanding of them, beginning with an attempt to make sense of what Gaius means when he says 'authorized to lay down the law' and an attempt to determine to what he might be referring when speaks of a rescript of Hadrian's.

In 426 AD, the western emperor Valentinian III (actually his mother and guardian, Galla Placidia) issued a rescript that has since been known as ‘the law of citations’ (CTh.1.4.3). That rescript applies a rather mechanical rule of authority: The late classical jurists Papinian, Paul, Ulpian, Modestinus, together with Gaius, were to be regarded as the prime authorities. If they disagreed, the majority should prevail; if they were tied, the opinion of Papinian was to prevail; otherwise, if they were tied even counting Papinian as two, the *iudex* could follow whichever opinion he deemed best. There are certainly anticipations of this in what Gaius says, so much so that some have thought that Gaius’ text is a later interpolation. There is nothing else that suggests this was the rule in Gaius’ time, but there is remarkably little in the classical period on the binding authority of juristic opinions.

Digest 1.2.2 contains 54 paragraphs from a one-book handbook written by the jurist Pomponius, a contemporary of Gaius, in the mid-2d century. The following puzzling passage is contained in paragraphs 48–50 (*Materials*, p. 18). The ‘dissensions’ that Pomponius refers to at the beginning have to do with the development of ‘schools’ of jurists beginning in the time of Augustus, or shortly before, and continuing, to some extent, to Pomponius’ own day:

“[1] And so MASSURIUS SABINUS succeeded Ateius Capito, NERVA Labeo, who then increased these dissensions. This Nerva was very intimate with the emperor. [2] Massurius Sabinus was in the equestrian order and was the first to respond publicly; afterwards, this privilege began to be given, which, however, had been granted to him by Tiberius Caesar. [Repeated in last para., contradicts next para.] [3] And as we may observe in passing, before the time of Augustus the right of responding publicly (*ius respondendi publice*) was not given by the emperors, but he who had confidence in his studies responded to his consultants; nor were *responsa* always given under seal, but often they themselves wrote to the *iudices* or were testified to by those who consulted them. (Slide 1) Divus Augustus was the first to decree, in order to ensure greater authority to the law, that they might respond upon his authority; and from that time on, this began to be sought as a favor. [Contradicts (2).] [4] And therefore [why, “therefore”?] the excellent emperor Hadrian, when praetorian men sought to be allowed to respond, rescripted that this was by custom not merely begged for but earned, and he (Hadrian) would accordingly be delighted if whoever had faith in himself would prepare himself for giving opinions to the people.<sup>1</sup> [back to 1] Accordingly, it was conceded to Sabinus by Tiberius Caesar that he might respond to the people; Sabinus was received into the equestrian order when advanced in age, in fact about fifty years old. He did not have ample means but for the most part was supported by his students.”

One scholar has suggested that there are four different hands at work in this passage, marked by the numbers in square brackets in the text. Most scholars today do not believe that there was as much changing of the texts in the Digest as this suggestion requires. The compilers did shorten the texts. This one may not have been, to start off with, the best piece of writing that Pomponius did. Shorten it, and it is likely to end up even more jerky and incoherent. What appears to be the major contradiction in the text can be resolved if we assume that Augustus was the first to grant the *ius publice respondendi* (‘right to respond publicly’) but that Sabinus was the first equestrian to receive it, all the Augustan ones being of senatorial rank.

What can be reasonably sure of about the *ius publice respondendi*?

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<sup>1</sup> Translation here differs from that in the *Materials*.

- a. A *ius respondendi* did exist from Augustus to Hadrian, but perhaps not after Hadrian. If that is the case we have to puzzle about what Gaius meant when he spoke of jurists ‘authorized to lay down the law’ (*quibus permissum est iura condere*), and whether he was referring to the same rescript of Hadrian’s that Pomponius was or to a different one.
  - b. Labeo refused to become consul, and kept his distance from Augustus. Augustus may have trying to create a class of senatorial jurists, beginning with Nerva, Labeo’s student, to whom he may have given the *ius respondendi*.
  - c. Aristo in the time of Trajan probably didn’t have the *ius respondendi*, and he gave a lot of *responsa*. The only jurists that we know for a fact had it are Sabinus and Innocentius, an otherwise unknown jurist in the time Diocletian.
  - d. The effective cooptation of the jurists came in the 2d century when the emperor gave them jobs in the imperial bureaucracy.
10. That brings us to the problem of the schools, which Pomponius starts discussing in the paragraph just before the one quoted above.

“47. After him [Tubero, a Republican jurist] of greatest authority were ATEIUS CAPITO, who followed Ofilius [another Republican jurist], and ANTISTYLUS LABEO, who listened to all these, but was instructed by Trebatius [yet another Republican jurist]. Of these Ateius was consul; Labeo, when the consulate was offered to him by Augustus, by which he would have become interim consul (*suffectus*), refused to take the office but gave his attention in the main to his studies. . . . These two founded, as it were, respective schools; for Ateius Capito continued in those things which had been handed down to him; Labeo, by the quality of his originality and the faith of his own learning, having paid attention to other branches of knowledge, endeavored to innovate many things.”

This begins in Pomponius’ text a chain of teachers and pupils, called Sabinians and Proculeans, or Cassians and Proculeans. Capito (a Sabinian) vs. Labeo (a Proculean), Sabinus (obviously a Sabinian) vs. Nerva (a Proculean), Cassius (a Sabinian) vs Proculus (obviously a Proculean), extending all the way to beginning of the second century with Julian (a Sabinian) vs. Celsus (known as ‘the definer’, a Proculean). Even in the mid-2d century, Gaius identifies himself as a Sabinian, and refers to opinions of ‘the other school’.

What were the debates between the schools all about? Some of the debates almost certainly have no principle behind them at all. Also the schools can cross. In GI.3.140 (below) Labeo and Cassius, say that a third-party cannot fix the price in a sales contract (they should be on opposite sides) whereas Ofilius (a late Republican jurist not associated with the schools) and Proculus (who should be with Labeo) say that a third party can fix the price in a sales contract. GI.3.140, *Materials*, p. 175: “140. The price must be definite. Thus, if we agree that the thing be bought at the value to be put on it by Titius, Labeo said that this transaction was of no effect, and Cassius approves his view. But Ofilius thought it was a sale, and Proculus followed his view.”

The following, however, are three differences between the schools that may be used to derive a principled difference between the schools:

- a. Does barter equal sale? The Sabinians (of which Gaius was one) say that it does, citing *vetustas* (literally ‘oldness’ or ‘antiquity’) and quoting Homer. The Proculeans say ‘no’; in barter you can’t determine who is the buyer and who is the seller. GI.3.141, *Materials*, p. 175: “141. There is much question . . . whether the price [in a sales



contract] can consist of other things [than money], for example a slave or a robe or land can be the price of something else. Our teachers [the Sabinians] hold that it can consist of another thing. Hence their opinion commonly is that the by exchange of things a sale is contracted and that this is the most ancient [*vetustissimam*] form of sale. [Quoting *Iliad*, 7.472–5.] The other school [Proculeans] dissent, holding that exchange or barter is one thing and sale another; for if not, so they argue, one cannot, when things are exchanged, determine which is thing sold and which that given as price . . . .”

- b. If a defendant pays a plaintiff after the joinder of issue in a case but before the judge renders his judgment, may the judge absolve the defendant? The Sabinians hold that he may in all actions. The Proculeans hold that he may in *bonae fidei* actions but not in *stricti iuris* actions. GI.4.114, *Materials*, p. 46: “It remains to consider what course befits the office of the *iudex* in a case where the defendant satisfies the plaintiff after joinder of issue, but before judgment—whether he should absolve the defendant, or rather condemn him on the ground that at the time of joinder of issue his position required his condemnation. Our teachers hold that he ought to absolve, irrespectively of the nature of the action; and this is expressed by the common saying that according to Sabinus and Cassius all actions contain the possibility of an absolution. The authorities of the other school dissent in regard to strict actions, but agree in regard to *bonae fidei* actions, because in these the discretion of the *iudex* is unfettered.”
- c. Everyone agrees that a legacy or a manumission of a slave made before the institution of an heir in a testament is void. The Sabinians hold that the appointment of a tutor made before the institution of an heir is void too, but Labeo and Proculus hold it is o.k. because nothing is taken out of the inheritance. GI.2.229–231, *Materials*, p. 161: “**229.** A legacy preceding the institution an heir [in a will] is void, for the simple reason that wills derive their whole efficacy from the institution of an heir, and on this account the institution of an heir is reckoned to be, as it were, the source and foundation of the whole will. **230.** On the same ground also liberty cannot be conferred before the institution of an heir. **231.** Our teachers hold that tutors too cannot be appointed in that place. But Labeo and Proculus hold that this can be done, because by the appointment of a tutor nothing is taken out of the inheritance.”

Clearly as simple dichotomy between strict and loose will not account for the divergences. The Proculeans are strict in barter and absolution where payment has been made, loose in tutors in testaments; the Sabinians are loose in the former two, strict in the last. Nor does a distinction between policy-oriented and formalism solve the problem. In barter it’s hard to see the policy on either side. In absolution it looks as if the Sabinians have policy on their side (though they don’t cite it). In testaments the Proculeans have policy on their side, and they do cite it.

Does anything account for these divergences? Some years ago, one scholar came up with this suggestion.<sup>2</sup> In grammar Labeo (P) was an analogist (Aulus Gellius, *Noctes atticae*, 13.10.1) in the interpretation of words he was strict. The combination of the two leads to his search for *ratio* and for system. Capito (S) may have been an anomalist.

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<sup>2</sup> Stein’s suggestion, 31 [1972B] *Camb. L. J.* 8–31.

- a. Thus the Proculeans hold that barter does not equal sale because *emptio/venditio* [sale] is not *permutatio* [barter], and the formula requires that one identify the *emptor* and the *venditor*, the buyer and the seller, while the Sabinians hold that it does citing *vetustas* and *auctoritas* — typically anomalist arguments.
  - b. Similarly in a *stricti iuris* action the Proculeans hold that judge cannot absolve the defendant who pays in advance because the formula does not allow him to do so. The Sabinians side with common sense: Why should judge rendered a judgment to pay what has already been paid?
  - c. On the other hand, where the words do not bind, the Proculeans look to purpose. The rule is that you can't grant a legacy or make a manumission before the institution of the heir. There is no reason why this should apply to appointment of a tutor because that does not take anything out of the inheritance, and the other two do. Here the Sabinians are strict, because that's just not the way that we have traditionally made a testament.
11. Now let's go back to a story that Pomponius tells about the very origins of the juristic profession:

“41. . . . QUINTUS MUCIUS, *pontifex maximus*, son of Publius [c. 140 BC to 82 BC],<sup>3</sup> was the first to compile the *ius civile*, which he arranged in titles (*generatim*) in eighteen books. . . .

“43. SERVIUS SULPICIUS, when he held the chief place in pleading cases, or at least second to Marcus Tullius (Cicero), is said to have gone to Quintus Mucius to gain advice on the case of a friend of his, and when the latter had responded to him on the law, Servius understood little; again he asked Quintus, and he was answered by Quintus Mucius, nor did he yet understand, and so he was reproached by Quintus Mucius; for he said that it was disgraceful that a patrician and a noble and a pleader of cases was ignorant of the law in which he was employed. Servius, struck by this insult, we may say, paid attention to the *ius civile* and received a great deal of instruction from those we have mentioned, taught by Balbus Lucilius, instructed most, however, by Gallus Aquilius . . . .”

Although some of the people mentioned in Pomponius' account prior to Quintus certainly existed, and were almost certainly specialists in the law in some sense, Quintus Mucius is thought to have founded a new approach, one more open to Greek science than his predecessors had been. By the time we reach Cicero and his contemporary and correspondent Servius Sulpicius, who were about two generations younger than Quintus Mucius, something was clearly happening to professional roles of which they all were conscious. The profession of rhetorician was dividing from the profession of jurist.

Cicero's *Topics* 12.51 is frequently used to explain the distinction: “Our friend Gallus [Aquilius] used to say ‘This is not a matter for the law but for Cicero’ when any one brought to him a case that turned on a question of fact.” The quotation makes the law/fact distinction and assigns the former to the jurist and the latter to the rhetorician. The same distinction can be seen in the distinction between proceedings *in iure* and those *apud iudicem*. The jurists gave advice about the former both to the praetors and to private clients; they even drafted formulae for private clients. After the Republic they never, so far as we are aware, appeared on behalf of clients in court. That made them to us rather odd lawyers, more like academic lawyers than practicing lawyers.

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<sup>3</sup> He seems to have been killed as he was about to join Sulla.

But that analogy is not quite right either. Although some jurists later on became like our academic lawyers, men who taught and wrote but did not practice – Gaius was one such jurist – neither teaching nor writing books about law was originally part of the jurist’s professional function, though some of them did one or the other or both. Their professional function was to give advice both to litigants and to the praetors at the initial stage of litigation. They also engaged widely in what is sometimes called ‘cautulatory jurisprudence’, advising people about how to avoid litigation. They gave advice about how to write testaments; they gave opinions on the interpretation of testaments. There are hundreds, perhaps thousands, of such opinions in the Digest, and we must imagine that the vast majority of such cases never went to court. The parties simply accepted the jurists’ advice and acted accordingly.

The juristic profession changed in the Principate, perhaps rather slowly. The references to ‘schools’ in the first century of our era suggests as much. As noted before, Sabinus is said to have been supported by his students, and that is the first jurist that we know of whom that was said. It came to be expected that a jurist would write books, sometimes general treatises or, at least, collections his *responsa*. Finally, and perhaps most important, many jurists came to work for the emperor. Some of them were quite deeply involved in politics, not unheard of among lawyers today, but a more dangerous undertaking at the time. Many of them served in an administrative capacity, also something that lawyers do today. Many of them also served in the active-duty military, and that is not something that find lawyers today doing often.

12. The Digest contains the names of about 200 jurists and extracts from the writing of about 100. Here are some names that stand out in the different periods:
  - a. Late Republican jurists – when the influence of Greek dialectic and Greek rhetoric began to be felt: Quintus Mucius the first to compile the *ius civile* which he arranged in titles, the first to arrange the law *generatim* by genus; Servius Sulpicius Rufus, the friend of Cicero’s who was shamed into becoming a jurist by Quintus Mucius; Gallus Aquilius, also a contemporary of Cicero’s, though perhaps slightly older, who ultimately taught Servius Sulpicius.
  - b. Jurists of the 1st century AD: The period begins with Labeo of the old school who distances himself from the emperor. The problem of the *ius respondendi* dates from this period. The Augustan period seems to be marked by a decline of equestrian jurists and increase of senatorial. The debates between the schools, Sabinians vs. Proculians, dates from this period, perhaps somewhat later in the period. The former school is named after Massurius Sabinus, who wrote a well-known treatise on the *ius civile*, which was the subject of much comment in the later periods. The latter was named after Proculus, whose gentile name may have been Sempronius, and whose 11 books of letters of which there are some 34 extracts in Justinian’s Digest, seem to reflect both his teaching and his practice. This period also sees the beginnings of the bureaucratization of the jurists. Javolenus Priscus moved from the traditional republican magistracies to imperial service as a soldier and *iuridicus* in Britain ending up as a member of the imperial council under the Flavian emperors.
  - c. Middle period classical jurists (2d century): Celsus, the definer, Aristo a giver of many *responsa*, Scaevola also a giver of many *responsa*, Julian treasurer under Hadrian who consolidated the edict. All these were active practical lawyers. Pomponius and Gaius, on

the other hand, are writers, commentators, sometimes called the “academics”. Pomponius in his handbook mentions Celsus and Julian, but none of the others.

- d. Late period classical jurists (late 2d and early 3d centuries): They all were active in the Severan period. Papinian, Paul and Ulpian were all prefects of the praetorian guard, Modestinus was prefect of the watch. Papinian was also secretary *a libellis* and was executed by Caracalla. Ulpian was murdered by the praetorian guard. These men are important because they are responsible for well over half the Digest. Ulpian alone is responsible for almost 1/3 of it, Paul for 1/6. They are hard to characterize. They are all encyclopedic. Papinian may be the most balanced, Paul the most original, Ulpian the most comprehensive. Ulpian’s most recent biographer claims that Ulpian anticipates modern ideas of human rights.<sup>4</sup> Modestinus is the least distinguished; he is the only jurist whom we know of who writes about law in Greek. He dies c. 244 and is regarded as the last of the classical jurists.

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<sup>4</sup> Tony Honoré, *Ulpian: Pioneer of Human Rights* (Oxford 2002).