The character and workings of the laws issued by the ‘barbarian’ kings who replaced the Roman authorities in the western provinces in the fifth and early sixth centuries have long been the subject of debate. Although the topic has until recently been almost exclusively the preserve of legal historians, and the literature is both technical and inaccessible, it is intimately connected with the wider question of the way in which the world of antiquity was transformed into that of the early middle ages. If the laws of the ‘barbarian’ kings represent Germanic tribal custom, their promulgation in territories previously subject to Roman law would suggest that the empire had ‘fallen’ and that Roman traditions counted for little. If, on the other hand, those same laws were at least in part derived from Roman customs, a very different picture of the end of the empire would be suggested: rather than a simple confrontation between Roman and ‘barbarian’, there would have been an accommodation between the two, leading to a more gradual (though still ultimately fundamental) transition from the empire to the successor kingdoms. That transition did, of course, involve much more than the law — there are many other administrative, economic, social and religious dimensions to the question — but legal development is a crucial aspect of the subject, as it touches not only upon the activities of the elite who made and administered the law, but also on the lives of all those subject to its provisions.

One of the main problems faced by legal historians of the period is that for some kingdoms two kinds of law-code were provided: one — exemplified by the *Lex Romana Visigothorum*, or *Breviary* (issued by Alaric II of the Aquitanian Visigoths in 506), and the near-contemporary *Lex Romana Burgundionum* (for the Burgundian

*An earlier version of this article was given at the 1998 Leeds International Medieval Congress, a discussion which assisted in clarifying my thoughts. The article has also benefited greatly from constructive criticism by Judith Herrin, Janet Nelson and, particularly, Chris Wickham. Both the views expressed and any remaining infelicities are my sole responsibility.*
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consists of extracts from, or summaries of, Roman law; the other contains provisions such as trial by ordeal and scales of compensation for crimes (swergilds), which appear remote from anything documented in the Roman empire. Until recently, the most frequently encountered explanation for the duality was that one set of laws was Roman and the other Germanic, the law by which a man lived being determined not by his place of residence but by his race — in other words, law was personal rather than territorial. An alternative is to see the apparently Germanic laws as being applied to the entire population, with Roman law only surviving in learned, rather than judicial, circles. Although widely held, neither of these views has ever been universally accepted, and the first, in particular, has in recent times been subject to increased scrutiny. Hence, for example, it has been questioned whether the Germanic peoples, who had migrated to and through the empire for generations before they were settled, would still have had a coherent body of Germanic law by the mid- to late fifth century. There is also a debate concerning the nature of Roman law itself, and evidence has been found which suggests that a poorly documented layer of Roman provincial law formed the basis of the apparently Germanic codes in the post-Roman period, though without ruling out the possibility of some Germanic influence. The principal difficulty in resolving these issues is an acute poverty of evidence, and it will never be possible to determine the precise origin of each individual norm in the ‘barbarian’ laws, but it may be possible to make some further suggestions concerning the likelihood of a general continuity from the Roman period. The following discussion, parts of which are necessarily speculative, focuses on four main areas: the lack of evidence for ‘barbarians’ maintaining their own laws when settled within the empire during the fifth century and earlier; the character of Roman law and its administration, with an exploration of some of the evidence for largely undocumented provincial law; aspects of law in the ‘barbarian’ kingdoms (with particular reference to Gaul, and especially to the early sixth-century Burgundian kingdom); and the possible relationship between Roman and post-Roman legal systems and the evolution of legal administration from the fourth to the sixth century.

I

Although it is often asserted that the ‘barbarians’ who were settled in the western provinces of the empire during the fifth century
retained their own laws, there is little beyond the apparently un-Roman nature of many of the provisions of their early law-codes to demonstrate that such was the case. Of all the accounts of ‘barbarian’ settlements, both during the fourth and fifth centuries and earlier, almost the only one which comes near to an explicit statement that a group was allowed to retain its own laws is a passage which refers to the settlement of the Tervingi (Visigoths) in the Balkans in 382, found in a near-contemporary treatise on the characteristics of an ideal Roman emperor, written by Synesius of Cyrene. The passage concerned is not, however, objective, as it takes the form of an attack on the group of Goths led by Alaric, and might therefore seek to suggest that the consequences of the settlement of the Goths were more harmful to the empire than they really were. Suspicion is heightened by the fact that it contains an apparent contradiction, in that it refers to the Goths as having been thought worthy of citizenship — a concept which usually involved access to Roman law.

Interpretation is rendered even more problematic by the fact that Jordanes, writing in the sixth century with the intention of associating the Goths with Roman history (in other words, the opposite of Synesius’ bias), recorded that a few years earlier the Visigoths had actually offered to live under the law of the empire. The nature and concerns of these reports, and their conflicting testimony, mean that they cannot be taken as conclusive either way.

1 For one of the most recent examples, see Lucio de Giovanni, Introduzione allo studio del diritto romano tardoantico (Naples, 1997), 179; see also, for example, the more circumspect view of Herwig Wolfram, History of the Goths (Berkeley, 1988), 194–6, on the legal consequences of the 418 settlement of the Visigoths in Aquitaine.


The evidence for other peoples is very sparse, but apparently less contradictory. Zosimus, writing in the early sixth century, reported that in 277–8, the Bastarnae, having been subdued by the Emperor Probus, were settled in Thrace, where they lived according to Roman laws. Evidence from the fourth century, contemporary with the events it describes, records that, under Emperor Maximian, Franks who had been ‘admitted’ to Roman laws were settled in the north of Gaul, and that, towards the end of the century, Emperor Honorius and his general Stilicho imposed laws (presumably of Roman character) on the Chauci and Suevi across the Rhine. Later, in the sixth century, the Byzantine historian Agathias observed that the Franks of his own time had laws modelled upon the Roman pattern.

A second factor which must be considered is that the ‘barbarian’ peoples who were settled in the west in the fifth century were not long-established political and ethnic groups, but relatively recent confederations, some still in the process of formation. The Visigoths who occupied Aquitaine in 418, for example, contained members of between six and ten tribal groups, and the Burgundians were of similarly varied origin. All those groups had migrated within the empire for some generations, and even

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5 Zosimus, Historia nova, i.71 (ed. Ludwig Mendelssohn, Leipzig, 1887).
before that most had lived on the frontiers, where they had been influenced by Roman law and the Roman way of life. Further, they had been in even more intimate contact with Roman society and law for a considerable time before codifying their laws, since the codes as they are preserved were almost always written down two or more generations after the settlements of the peoples with whom they were associated. Finally, there is explicit evidence that Romans advised kings on legal matters in the period following the settlements: even if such advice were limited to cases involving Roman law, it is unlikely that the principles encapsulated therein would not have come to exercise more general influence upon the law of the relevant kingdoms, and on its application.

Two imperial laws issued during the first half of the fifth century give more direct evidence of the status of ‘barbarians’ in relation to Roman law. The first dates from 405 and may only relate to Africa: it states that appeals from foreigners settled within the empire (gentiles), or from the prefects who ruled them, were to be heard by the proconsul of Africa acting in his capacity as the emperor’s deputy or vicar: this implies that in at least some circumstances non-Romans were subject to Roman legal forms.

Of greater significance is a law issued by Theodosius II in 439,
which states that the 'barbarian people' who had been delivered to the emperor’s sovereignty would appreciate the fruits of his victories only if the regulations of the laws were extended to them, and proceeds to set out rules for the making of wills.\textsuperscript{14}

This, combined with the evidence presented above, strongly suggests that 'barbarians' within the empire lived according to Roman laws or, at the very least, that their legal system was rapidly influenced by that of the empire.

II

Theodosius II's provisions for the making of wills reveal something of the complexity of Roman law, for they refer to two legal systems — Civil and praetorian law — which contained different procedures and regulations, the one largely involving the use of written instruments, and the other an oral procedure (nuncupation).\textsuperscript{15} In order to determine the significance of this pronouncement in relation to post-Roman law, it is necessary to understand something of the nature and development of Roman law as a whole.\textsuperscript{16}

What is now generally recognized to be Roman law represents only one part of the legal system of the empire, and is best referred to as Civil Law: this was originally the law of the city of Rome itself, but its application was gradually extended to encompass Roman citizens who resided in the provinces. Such citizens, however, originally formed only a small minority of the provincial population, as most conquered peoples were not accorded full Roman rights and were therefore subject to a variety of other forms of law. As citizenship was gradually extended to ever increasing numbers of provincials, culminating by the early third century in being made almost universal, so the older forms of provincial law slowly disappeared — though some of their

\textsuperscript{14} Nouellae Theodosii II, 16.1, in Leges novellae ad Theodosianum pertinentes, ed. Paul M. Meyer (Berlin, 1905).

\textsuperscript{15} See also the Interpretation to CTh, iv.4.3 (ed. Mommsen); cf. iv.4.7; and Nouellae Valentiniani III, 21.1, in Leges novellae ad Theodosianum pertinentes, ed. Meyer. For the complexity of late Roman provisions relating to wills, see W. W. Buckland, A Textbook of Roman Law from Augustus to Justinian, 2nd edn (Cambridge, 1932), 285–8; and Edouard Cuq, Manuel des institutions juridiques des Romains, 2nd edn (Paris, 1928), 688–9.

\textsuperscript{16} The following, much simplified, account is almost entirely derivative: for a convenient discussion, see H. F. Jolowicz and Barry Nicholas, Historical Introduction to Roman Law, 3rd edn (Cambridge, 1972).
provisions were absorbed into Civil Law as the sphere in which it was applied became broader. This law developed cumulatively, both by imperial enactments and by the interpretation of jurists, most notably (in the imperial period) by the praetorian prefects, who formed a judicial college; it was nowhere codified and, by the late empire, formed a confusing and unwieldy mass of often contradictory provisions and authorities. From the time of Diocletian (284–305) onwards attempts were made to rationalize the opinions of the most important jurists, though it is not certain that the resulting codifications were officially inspired, particularly since they bear the names of private individuals (such as Gregory and Hermoginian) rather than of emperors. Imperial enactments, by contrast, were not codified and systematized for a further century and a quarter, when they were gathered together in the Theodosian Code of 438. Although it was at that time intended to provide a similar official collection of the interpretations of the jurists (including those of the praetorian prefects), that goal was not realized until the sixth century, when Justinian produced his great systematization of Roman law, and even then imperial enactments and juristic interpretations remained in separate volumes.

Alongside the Civil Law was praetorian law (also known as *ius honorarium* from *honor*, meaning ‘magistracy’), the origins of which lay in the ability of senior magistrates — particularly the Roman (urban) and provincial (peregrine) praetors — to issue edicts (it was from these praetors, rather than from the later praetorian prefects, that the praetorian edict took its name). It came to be customary for the praetor, who was appointed annually, to reissue the whole of his predecessor’s edict, merely adding provisions of his own, so that the enactments were cumulative, like those of Civil Law. These edicts did not, strictly, have the same force as law, but indicated how the praetor would act in certain types of case, and were particularly important in laying down the kinds of procedure and remedy which might be sought within the general principles and rights conveyed by Civil Law (though there were some instances in which it came to influence

18 *CTh*, i.1.5 (ed. Mommsen); cf. its preface, the *Gesta senatus*, 4.
19 It was not until the late ninth century that something akin to a full rationalization of the kind envisaged by Theodosius II was completed, in the *Basilica* of Basil I and his son Leo VI (the Wise).
Civil Law). Before the end of the second century AD the form of praetorian law was largely fossilized, the last of the cumulative edicts simply remaining in force, though its application and meaning could be modified by imperial enactment or juristical interpretation, particularly by the praetorian prefects.

The praetorian prefects had a much wider sphere of competence than that relating to the edict alone, for they issued interpretations (edicts, or *formae*) of both praetorian and Civil law, which were valid as long as they did not contradict the law itself.20 Until the fourth century AD the only judges below them in the provinces were the provincial governors (generically termed 'ordinary judges', or *iudices ordinarii*); appeals from their courts went to the praetorian prefects (who formed a judicial college) at Rome, and, ultimately, to the emperor. These administrative arrangements changed during the early fourth century, as the praetorian prefects ceased to form a college but were instead each placed in charge of a large region of the empire (a group of provinces, or prefecture), and were given deputies (vicars, in charge of dioceses), so that the courts they and their vicars administered formed a higher level of regional jurisdiction. The provision of a single judge per province was adequate in the days when few citizens lived in the provinces, and when most of those who did would regularly have been in the provincial capital, but, as the number of citizens expanded, most provincials must have found it difficult, if not impossible, to obtain justice. Nevertheless, the only increase in the number of judges came as late as the third quarter of the fourth century, when *defensores*, with power to resolve relatively minor cases, were established in the cities.21

It will be clear from this summary account that by the later empire the law of Rome was complex, technical, unwieldy, confusing and inaccessible,22 and it has been wondered to what extent it was of any relevance to the daily realities of life in the provinces.


22 On the hazards of litigation, see the eloquent description in Jones, *Later Roman Empire*, i, 470–1, 520–2.
where both courts and highly trained lawyers were relatively few. In view of this, it has been suggested that alongside Civil and praetorian law there was a body of simpler provincial law, much of it sanctioned by long usage, or custom, and which could even have varied between provinces. While this is uncontroversial in the eastern part of the empire and in Egypt, where pre-Roman Hellenistic and Ptolemaic law (sometimes described as *Volksrecht*) seems to have survived, the question of provincial law in the west is an area of considerable debate and uncertainty, not helped by the way in which legal historians have argued over the precise meaning of terms, especially the phrase ‘vulgar law’ (*Vulgarrecht*). For some, this has been synonymous with ‘provincial law’ and is used to designate a body of relatively simple, perhaps customary, law which was not written down, and which governed everyday legal business in the provinces; only more major cases reached the courts which dealt in Civil Law. This kind of law will be described hereafter as ‘custom’ or as ‘provincial law’. For other historians, however, ‘vulgar’ has a very different significance, and refers to late-Roman Civil Law. The reasoning behind this is that Civil Law gradually came to take account of, and to be influenced by, custom or provincial practice (which these historians do not call ‘vulgar law’); it thereby lost its classical ‘purity’ and became ‘vulgarized’. It is in this sense that the term is used hereafter.

23 The fundamental work on the east remains Ludwig Mitteis, *Reichsrecht und Volksrecht in den östlichen Provinzen des römischen Kaiserreichs: Mit Beiträge zur Kenntniss des griechischen Rechts und der spätromischen Rechtsentwicklung* (Leipzig, 1891). For provincial law in late antique Egypt, see Traianos Gagos and Peter van Minnen, *Settling a Dispute: Toward a Legal Anthropology of Late Antique Egypt* (Ann Arbor, 1994). I am grateful to Chris Wickham for this reference.


26 This represents a shift from the assumptions underlying P. S. Barnwell, *Emperor, Prefects and Kings: The Roman West*, 395–565 (London, 1992), passim, but esp. 74–6;
Even without terminological complexities, the question of custom can only be approached tentatively since it only rarely features in the kind of documents Civil Law produced. The position of custom in the legal system up to the end of the third century is particularly obscure, but from the early fourth century onwards it seems to have been recognized as a valid source of Civil Law, first appearing as such in an imperial enactment in 319\(^27\) — though references to it are seldom more than allusive. One of the clearest indications of its place comes rather later, from a measure of Justinian, dated 534, in which the emperor decreed that the written laws were to be obeyed everywhere, but went on to make an exception for rural places in which there were no literate men: there, ‘ancient custom’ could prevail, provided that there were seven witnesses or, in the smallest of places, five.\(^28\)

Careful reading between the lines of imperial and juristical writings may, however, provide glimpses of the kind of practice which custom sanctioned. One example relates to the question of compensation for injury. It was a leading principle of Civil Law that the body of a freeman could not have a value placed upon it — that is, injury to it (including murder) was not susceptible to monetary compensation;\(^29\) accordingly, the second-century jurist, Gaius, stated that the compensation which was payable for injury to a freeman was only to cover medical treatment and loss of income\(^30\) — it was not placing a value on the injury itself.

\(^{27}\) CI, viii.52.2 (ed. Krüger). For a detailed discussion, see Burkhart Schmiedel, *Consuetudo in klassischen und nachklassischen römischen Recht* (Graz, 1966), who demonstrates that earlier references to custom are to administrative practice. Other significant contributions are Jean Gaudemet, ‘La Coutume au bas-empire: rôle pratique et notion théorique’, *Laboe*, ii (1956); and J. A. C. Thomas, ‘Custom and Roman Law’, *Tijdschrift voor Rechtsgeschiedenis*, xxxi (1963), which suggests (42–4) that custom may have been of importance earlier than is often recognized.

\(^{28}\) CI, vi.23.3 (ed. Krüger); it is perhaps from this that the decree of the Frankish king, Childebert II, vii.7 (ed. Alfred Boretius, MGH, Leges, sectio II, i, Capitularia regum Francorum, Hanover, 1883, 16), derived the ability of five or seven men of good faith to declare a man a criminal; though Wood, ‘Disputes in Late Fifth- and Sixth-Century Gaul’, 19, sees this as related to the numbers of witnesses required for wills in Civil and praetorian law.


Notwithstanding this, compensation had been payable for injuries ever since the first codification of Roman law (the Twelve Tables), in the fifth century BC: at first it was in specified amounts (300 *asses* for a freeman’s broken bone; 150 for that of a slave; 25 for all other injuries), but later there was a more elaborate procedure under which arbitrators were appointed to assess the amount, taking into account the circumstances of the injury and the rank of the victim.\(^\text{31}\) The regulations surrounding penalties for murdering a freeman are more complex. The fundamental rule was that the penalty was death. However, in the early third-century juridical work on the provincial edict written by Ulpian, an example (presumably enshrining a general principle) is given of a situation in which the manslaughter of a freeman incurred a penalty of 50 *aurei*; the same document goes on to state that when a freeman (as opposed to property) was harmed the amount was not to be doubled, because, unlike property, no valuation of his body was possible.\(^\text{32}\) Following the logic of Gaius in relation to injury, it may be that the compensation payable to the relatives was theoretically for consequent costs and loss of income. If this is correct, the second of Ulpian’s statements could contain an interesting further hint as to common practice, for it suggests that, in other circumstances, compensation for injury to freemen was double that for slaves (as in the Twelve Tables).

It may be legitimate to wonder to what extent the nice distinction between compensation for expenses or loss of earnings and compensation for the injury itself was understood or able to be applied in the kind of place Justinian had in mind when he referred to procedures suitable for locations where there were no literate men — presumably relatively small, rural, communities. Further, even though the mature form of the Civil Law procedure involved arbitrators making assessments of the amount due in each case, it is likely that their decisions would have been informed by precedent, and that the compensation due for a particular type of injury to a man of a given social class gradually


\(^{32}\) Justinian, *Digest*, ix.3.1.1, 1.5 (ed. Mommsen and Krüger).
became predictable, if not fixed or customary. These two factors could well have combined in such a way that local communities came to have a scale of tariffs for injury not very dissimilar from those encountered in the 'barbarian' laws of the fifth century and later, though they would not have been written down and may have been subject to considerable local variation, as were the tariffs of the later 'barbarian' codes. Such unofficial scales of compensation could therefore conceivably lie behind those in the post-Roman laws, such as that in the early sixth-century Frankish *Pactus legis Salicae*, which stipulates that compensation for cutting off a man's second finger (the one used for firing arrows) required a payment of 35 *solidi*, while amputation of other fingers (in varying combinations) necessitated payments ranging from 45 *solidi* (for three fingers) to 9.33

It is not only in relation to the penal content of the law that such an interpretation is possible: the same logic can be applied, more tentatively, to some aspects of procedure such as the means of proof. The most frequently mentioned method of ensuring a proof in the Roman world was torture. It had long been known that the procedure was unreliable, and both the act of torturing and the interpretation of the results required skilled operators of a kind probably unusual in many provincial areas.34 An alternative, which would have been simpler to administer, and the results of which would have been easier to verify, could have been the use of oaths. Despite a widely held view that oaths were Germanic rather than Roman, there is positive evidence for the use of oaths in a Roman context.35 Most tellingly, an imperial law of 421 concerning the testing of witnesses' statements reveals that in some contexts the taking of an oath was, at least by that date, seen as the equivalent of undergoing torture, the latter being used to test the evidence of men of lower social standing than the former.36 It may, therefore, be that oaths and torture were also equivalent in other circumstances and, perhaps, at an earlier

36 *CTh*, ii.27.1 (ed. Mommsen).
date, one being used in small rural communities and the other in cases dealt with in full Civil Law courts. 37

Whatever the means of proof, the remedies envisaged by custom did not necessarily involve expensive lawyers or lengthy and uncertain litigation, and could certainly be arrived at without recourse to officials courts in distant towns: to that extent the system can be considered ‘unofficial’ or ‘extra-judicial’. 38 One of the main mechanisms involved in resolving cases at the local level was the pact. This had a long tradition in Roman law, extending back to the Twelve Tables, which envisaged it as a suitable way of terminating claims for personal injury and stipulated that the conclusion of a pact debarred further legal proceedings. 39 That principle was later extended by the praetorian edict, and its continued application in the fifth century is clear from a document known as the Consultatio ueteris cuiusdam iurisconsultion 40 which discusses pacts at length, with particular reference to family law. Such pacts not only lay outside the judicial system of Civil Law, but their composition did not necessarily have to involve lawyers of any kind. The potency, importance and respectability of this system is established by the fact that Sidonius Apollinaris, one of the leading aristocrats of mid-fifth-century Gaul and former prefect of the City of Rome, twice seems to have resorted to pacts in dealing with cases which affected his household: on one occasion he suggested what was probably a compensation-based pact to resolve a potentially capital case, 41 and in the other he negotiated an unofficial settlement to a dispute concerning the illicit union of servants, specifically in order to avoid a criminal case. 42

37 For a similar suggestion concerning the reservation of torture to higher courts — though for a very much earlier period — see A. G. McDowell, Village Life in Ancient Egypt: Laundry Lists and Love Songs (Oxford, 1999), 168–9, referring to the New Kingdom (c.1570 – c.1070 BC).


39 Buckland, Textbook of Roman Law, 527–9, citing ‘Twelve Tables’, vii.2, in FIRA, ed. Riccobono et al.; later, the jurists recognized the pact: see Paul, Sententiae, i.1, in ibid., for a list of types of case in which pact was admissible.


41 Sidonius Apollinaris, Epistolae, vi.4 (ed. Loyen); see C. E. Stevens, Sidonius Apollinaris and his Age (Oxford, 1933), 118–19; and Jill Harries, Sidonius Apollinaris and the Fall of Rome (Oxford, 1994), 211–13.

The provisions of pacts of this nature were legally enforceable as long as they were not contrary to the public good, presumably indicating that they should conform to the law. Perhaps because they lay outside the scope of official judicial procedures, their contents are very rarely written down (or written in a form which has survived) in the western empire, so that much concerning this layer of legal activity is obscure; however, in places such as Egypt, where traditions of literacy were longer established, pacts and their terms are well documented.

III

The legal system which the ‘barbarian’ kings found in the provinces they came to occupy during the course of the fifth century was, therefore, one of considerable complexity, with most cases probably remaining outside the control of the courts and of Civil Law, at least in the more rural areas, and the details of ‘unofficial’ practice possibly varying from place to place. It is against this background that the earliest post-Roman laws must be viewed. They will be discussed here with particular reference to the relatively compact, but important, body of legislation produced in the Burgundian kingdom during the first two decades of the sixth century: the *Lex Romana Burgundionum* and the *Book of Constitutions*.

The *Lex Romana* consists of an anthology of imperial constitutions and juristical writings, arranged by subject. Much remains uncertain about the circumstances in which it was produced: it is not clear whether it was an official compilation or a private work like the Gregorian and Hermoginian codes of the late third century; the date of its composition is unknown both in absolute terms and in relation to the *Book of Constitutions*; and its relationship to the *Book* has never been fully elucidated, though the two

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43 *CTh*, ii.9.3 (ed. Mommsen); cf. *CI*, ii.4.41 (ed. Krüger); and *Consultatio ueteris cuiusdam iurisconsulti*, i.12, vii.7, in *FIRA*, ed. Riccobono et al.


45 See, for example, the document edited and translated in Gagos and van Minnen, *Settling a Dispute*.

46 It therefore fulfilled, on a reduced scale, something akin to the aspirations of Theodosius II: see above at nn. 18, 19.

texts are complementary, much of their content treating the same subjects in the same order. Whatever the resolutions of these issues, the *Lex Romana* provides evidence that imperial and juristic texts were easily accessible in the learned circles of the Burgundian kingdom, for its author did not always trouble to quote or summarize their provisions directly, sometimes electing instead to refer the reader to the relevant passage for further details. Furthermore, the text does not rely on the other great ‘barbarian’ collection of Roman law, the *Breviary (Lex Romana Visigothorum)*, since the Burgundian version includes provisions not incorporated in the Visigothic text, so that it is clear that there was independent survival of a substantial body of Roman legal material in the Burgundian kingdom.

The *Book of Constitutions*, compiled on royal initiative in 517, is of different character, containing few references to specifically Roman (or Civil) law, and prescribing measures (such as proof by ordeal and punishment by payment of compensation) which seem very un-Roman. Despite this, the *Book* is not a statement of custom, two chapters explicitly stating that they were replacing custom with new measures. Its provisions were largely intended to modify or clarify existing practice, often having been enacted in response to specific cases where existing penalties or procedures had been shown to be unsatisfactory or unclear: some fifteen paragraphs contain an explicit statement that they were being added to the law so that they could be treated as precedents with a wide application. Other constitutions retain the prologues and dating clauses with which they were furnished when originally issued as individual edicts, indicating that they too were added

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49 The clearest examples are in *Lex Romana Burgundionum* (hereafter *LRB*), 1.3, 32.2 (ed. L. R. de Salis, MGH, Leges, sectio 1, ii, pt i, Leges Burgundionum, Hanover, 1892); but see also, e.g., ibid., 31.5, 39.2. These passages led Brunner, *Deutsche Rechtsgeschichte*, i, 355, and Adolphe Tardif, *Histoire des sources du droit français: origines romaines* (Paris, 1890), 124–5, to the conclusion that the *LRB* is less of a law-code than a handbook to living law.

50 These include references to imperial constitutions and juridical writings which are no longer extant: *LRB*, 3.2, 6.2, 14.1–3, 14.6–7, 23.2, 31.4–5, 35.6, 38.2–3, 39.2, 44 (ed. de Salis).

51 *Liber constitutionum*, 18.1, 77.3 (ed. de Salis).

52 Ibid., 42.1, 43.1, 47.1, 48.1, 49.1, 49.4, 50.1, 51.1, 52.1, 53.1, 60.1, 74.1, 75.1, 80.1, *constitutiones extravagantes*, 21; cf. 1.1, 1.3, 2.2.
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Making it clear that legislation was incremental, later provisions supplementing, modifying or superseding earlier ones: chapter 77.3, for example, refers to and builds upon an earlier measure, contained in chapter 7, concerning crimes committed by slaves. There is much in common between this and Roman imperial law, in which individual enactments (rescripts), of the kind gathered together in the Theodosian Code, were often issued in response to specific referrals by the praetorian prefects and other high-ranking officials, and to which new measures (Novels) were added by successive emperors, all in an incremental fashion.

As noted earlier, the existence of two such different legal compilations in the Burgundian kingdom has sometimes led to the view that each was intended to serve a particular section of society, the *Lex Romana* being used in cases involving Romans, and the *Book* for the Germanic population whose (modified) custom it could be thought to contain. However, while it is clear that there were circumstances in which Romans and Burgundians were treated differently at law, the relationship between the two texts is more complex, and cannot simply be explained by assigning the laws an ethnic significance. One of the clearest indications that law was not ‘personal’ in that sense is found in a provision in the prologue (the ‘First Constitution’) to the *Book*, which suggests that the primary purpose of the compilation was to regulate relations between Romans and ‘barbarians’. This means that members of both communities must have been subject to the *Book* — though not necessarily to all of its content, as ten chapters specifically envisage incidents in which the main actor

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53 This is commonplace after the first forty-one titles, e.g. *ibid.*, 42, 43, 45, 47, 48, 50, 52, 53, 54, 74, 75, 76, 79, 80, 81, 89, *constitutiones extrauagantes*, 20, 21.

54 H. Nehlsen, ‘Lex Burgundionum’, in Adalbert Erler, Ekkehard Kaufmann and Ruth Schmidt-Wiegand (eds.), *Handwörterbuch zur deutschen Rechtsgeschichte*, 5 vols. (Berlin, 1971–), ii, cols. 1912–13; citing *Liber constitutionum*, *prima constitutio*, 8 (Romans were to be judged by Roman, written, laws), and *constitutiones extrauagantes*, 20 (the rules of Roman law were to be observed among Romans, but litigation between Burgundians and Romans was to be concluded as ordained by the king).


was not Roman, and one clause a case in which he was Roman. There are also several clauses which explicitly mention both Burgundians and Romans; some of these refer to ‘native freemen’ as being of either nation, making it possible to suggest that the numerous other provisions which refer to the main actors as ‘native freemen’ without ethnic label also applied to all those living within the kingdom. It may — though less certainly — follow from this that other clauses, which begin with the general phrase ‘if anyone’ (si quis), were of similarly universal application. Even without this last suggestion, it seems clear that the Book was intended to serve both Romans and Burgundians, and the content of many of the indisputably universally applicable chapters demonstrates both that Romans were subject to measures alien to Roman Civil Law and that ‘barbarians’ were expected to follow some apparently Roman practices.

These issues may be explored further by examining a number of the clauses relating to personal injury. In its twenty-sixth chapter, the Book establishes the level of compensation for the knocking out of teeth: if anyone (si quis) knocked out the teeth of either a Burgundian of the highest class or a Roman noble, the payment was to be 15 solidi — there were lower payments for men of inferior status. That this could apply to both Roman and Burgundian defendants may be suggested not only by the lack of any ethnic qualifier, but also by comparison with the more complex regulations for homicide. Both the Book and the Lex Romana state that the penalty for murdering a freeman was death, but there agreement ends. The Lex Romana deals in a coherent and unified way both with the manslaughter of freemen and slaves, for which pardon could be sought from imperial judges, and with the rights of those who committed homicide and subsequently sought sanctuary in churches, allowing, in the latter

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57 Liber constitutionum, 14.1, 17.2, 17.4, 24.1–5, 40.1, 55.5, 57.1, 60.1, 61.1, 101.1 (ed. de Salis); 55.5 and 61.1 refer to ‘barbarians’ rather than ‘Burgundians’, but the meaning is the same: see Wood, ‘Ethnicity and the Ethnogenesis of the Burgundians’, 61.

58 Liber constitutionum, 17.5 (ed. de Salis).

59 Ibid., prima constitutio, 3, 5, 11, 13; chs. 4.1, 6.3, 7.1, 8.1, 9.1, 10.1, 13.1, 15.1, 21.1, 22.1, 26.1–3, 28.1, 31.1, 38.5, 44.1, 47.1–3, 50.1, 54.1, 55.1–4, 55.1–3, 84.1–3, 96.1, 100.1; constituciones extraneagantes, 18.1, 20.1, 21.11–12.

60 On the basis of the arguments presented above, Romans were presumably also included in the provisions of Liber constitutionum, 5 (ed. de Salis), where some of the victims of various injuries are described as native freemen, and perhaps also in 11 and 48, where no particular type of victim is envisaged.
case, the payment of compensation. Interestingly, the levels of payment had been ordained by the king because, as specifically noted, Roman law did not contain them: a man who sought sanctuary after killing a freeman would pay half his goods to the victim’s heirs and the other half to his own heirs, while compensation for killing a slave was to be paid on a sliding scale according to the type of slave involved. By contrast, the Book, perhaps reflecting the more ad hoc and reactive nature of its composition, deals with the subject in a disjointed fashion, spread across three widely separated chapters: chapter 2 prescribes payment of half the *avergild* in the case of the manslaughter of a freeman, though this is partially modified by chapter 46; the killing of slaves is treated in a third chapter (10), which contains a table of compensation virtually identical to that in the *Lex Romana*.

A traditional resolution of this confused picture might be to think that compensation, at least for homicide, was Germanic. In that case, the inclusion of a scale of compensation in the *Lex Romana* would be indicative of a process of ‘barbarization’ of Roman law, or at least of the conditions in which the Romans lived. However, given what was argued earlier concerning compensation in the Roman world, this may not necessarily be the case; rather, it is possible that the process was one of ‘vulgarization’ — that is, of the incorporation of the principles of provincial custom into Civil Law. A reading of this kind would suggest that many of the measures could long have formed part of the custom, or unofficial law, of the Roman world, with the Germanic kings being the first lawmakers to write down customs and fixed scales of compensation.

The same kind of interpretation can also be applied to certain aspects of procedure, though the fact that there is rather less evidence makes the argument more tentative. It was noted earlier that proof by oath, advocated in the *Book of Constitutions*, may have antecedents in the Roman world. It is also conceivable that some kinds of ordeal were familiar to the Romans, though the first firm evidence for Romans being subjected to the procedure does not appear until the early sixth-century Frankish code, the

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61 *LRB*, 2 (ed. de Salis).
Pactus legis Salicae,64 and trial by battle seems to have been specifically associated with the Burgundians, perhaps indicating that this particular form of ordeal was of Germanic origin.65 Slightly less problematic is other procedural evidence in the Pactus such as that concerning a ritual used during the transmission of property, whereby the donor threw a stick (festuca) into the lap of the recipient.66 Although much remains obscure about the precise significance of the Frankish procedure,67 the stick seems to have been used as a symbol of the property being transferred. While at first sight this seems very un-Roman (an impression enhanced by the obscure language in which it is described), and it may in fact be of Germanic origin, it could be related to a ritual with a Roman ancestry, which involved claiming property by touching it with a stick (uirga).68 Whatever its origin, this is a procedural device of a character well suited to the kind of place with no literate people that Justinian had in mind when he referred to the making of wills without recourse to written instruments.

There is in fact one legal document from the eastern part of the empire which deals with a community of this kind — the so-called Farmer’s Law.69 Although the date and origin of the text have been debated, it is probable that it was drawn up in the late seventh or early eighth century, incorporating provisions of the mid-sixth century, if not earlier.70 Eighty-five chapters

64 Pactus legis Salicae, 14.2 (ed. Eckhardt); cf. ibid., 14.3, 16.5. See Wood, ‘Disputes in Late Fifth- and Sixth-Century Gaul’, 18–19. Later in the sixth century Gregory of Tours did not pass adverse comment on the use of ordeal by Romans: see Luce Pietri, ‘Grégoire de Tours et la justice dans la royaume des Francs’, in La giustizia nell’alto medioevo, i, 494–8. Robert Bartlett, Trial by Fire and Water: The Medieval Fudicial Ordeal (Oxford, 1986), 4–9, uses the first appearance of ordeal in the Pactus positivisically to indicate that its origins were Frankish.

65 Wood, ‘Ethnicity and the Ethnogenesis of the Burgundians’, 53–5; the key text is Liber constitutionum, 45 (ed. de Salis).

66 Pactus legis Salicae, 46 (ed. Eckhardt).


68 Gaius, Institutiones, iv.16, in FIRA, ed. Riccobono et al.


regulate relations in an exclusively agricultural community, dealing in simple punishments (such as flogging or the cutting off of hands) and referring to oaths as means of proof,\textsuperscript{71} and as a result the document has been considered a practical guide for rustic judges.\textsuperscript{72} A further parallel with the ‘barbarian’ law-codes is that the last nineteen chapters appear to represent additions to an earlier version, indicating that the compilation was incremental, new norms being added from time to time as they came to be required. Even though some of its content may have been influenced by the Slavs who settled in the Balkans (where it originated) during the seventh century, so many are borrowed from Civil Law\textsuperscript{73} that its content must be essentially Roman. This, combined with the similarity to the ‘barbarian’ laws of the west, suggests that both the Farmer’s Law and the western texts drew on a common, Roman, ancestry.

The line of reasoning pursued so far, combined with the evidence of the Farmer’s Law, suggests that many of the apparently un-Roman elements encountered in the ‘barbarian’ laws do in fact have antecedents in the Roman world, but in provincial custom rather than in Civil Law. This is not altogether surprising, for, even leaving aside the long migration of the ‘barbarians’ through the empire, long contact had led to many similarities between life in the provinces and that immediately beyond the frontiers.\textsuperscript{74} Given the sparseness of what is known of Roman provincial custom, and the even greater poverty of evidence for what might be considered ‘pure’ Germanic law, it is probably not possible to determine whether particular principles or individual norms were of ultimately Roman or Germanic origin, or whether, indeed, there was a common body of Indo-European custom upon which they drew.\textsuperscript{75} Furthermore, there is also no reason to suppose that provincial custom was necessarily uniform throughout the western empire, as it could have been influenced by pre-Roman traditions (as in the east) and other factors specific

\textsuperscript{71} ‘Farmer’s Law’, 26–8, 73, ed. Ashburner.
\textsuperscript{72} Paul Lemerle, ‘Esquisse pour une histoire agraire de Byzance: les sources et les problèmes’, Revue historique, ccxix (1958), 55.
\textsuperscript{74} See Whittaker, Frontiers of the Roman Empire; and Steven K. Drummond and Lynn H. Nelson, The Western Frontiers of Imperial Rome (Armonk, NY, 1994).
\textsuperscript{75} As suggested by Patrick Wormald in an intervention after the delivery of Ennio Cortese, ‘Il processo longobardo tra romanità e germanesimo’, in La giustizia nell’alto medioevo, i, 650.
to individual provinces; such lack of uniformity is at least as likely an explanation of variations between the ‘barbarian’ codes as different Germanic tribal origins. What the recognition of the existence of Roman custom may more positively do, however, is remove a significant obstacle to seeing the ‘barbarian’ laws as being of territorial application, for, even if individual measures (such as the apparently Germanic ordeal by battle) were not those already practised in the provinces, the principles which governed them were already familiar to the Roman population.

IV

Viewed against this background, it is possible to see the earliest post-Roman legislative activity as part of a slow process of evolution rather than as marking both a break with Roman traditions and a process of ‘barbarization’. It was noted earlier that the first reference to custom as a valid source of Roman law dates from 319 — that is, very late in the long history of Roman law. One explanation sometimes advanced for this suggests that the proper administration of law was interrupted during the turbulent years of the third century, and that, even when relative order was restored, lasting damage had been done: custom had filled the vacuum created by the weakness of the central, imperial, authorities, which were no longer able to impose high legal standards.76

This kind of interpretation often takes as its background a model of the ‘decline and fall’ of the empire which has of late largely fallen from favour. An alternative explanation for the apparent rise of custom is that, once the praetorian edict had become fossilized in the second century, and as the power of local officials to interpret and develop the law had simultaneously been curtailed, the importance of custom as a medium through which developments in legal practice could take place was enhanced.77

There may also be a third possibility, which is the direct opposite of the first, and would suggest that the recognition of custom was a sign of growing strength on the part of the central authorities. Absorbing parts of provincial practice into Civil Law — the process of ‘vulgarization’ — circumscribed the sphere in which custom could operate unfettered and gave the official

76 See Calasso, Medio evo del diritto, i, 51–3.
77 Jean Gaudemet, La Formation du droit séculier et du droit de l’église aux iv° et v° siècles (Sirey, 1957), 106–7.
system greater control over it. This process was continued later in the fourth century with the establishment of the city *defensores*, which, by increasing the number of official judges in the provinces, reduced the need to resort to custom. Perhaps significantly, the Theodosian Code, compiled later, in the 430s, did not list custom along with the other sources of law in Book I, but referred to it in Book V, after a collection of texts concerning great estates and their inhabitants: the implication could be that custom was by then primarily rural in application and was administered by estate authorities (as, increasingly, was taxation).

Taking control of custom may also have been an effect of the regionalization of the authority of the praetorian prefects in the early fourth century: before then, the prefects had been jointly responsible for the interpretation and administration of law across the whole empire, thereby ensuring some degree of consistency between the provinces. The later, regional, prefects may have been effective in taking control of local customs, by virtue of increased proximity to, and familiarity with, their provinces. However, at the same time, there was a risk that consistency between provinces, ensured by the earlier operation of the prefects as a judicial college, would be lost on account of the creation of discrete geographical spheres of prefectal jurisdiction. There is in fact little direct evidence for legal regionalization in the fourth- and fifth-century empire, but it is not possible to be certain that it did not happen, as there is no historical source which would reveal it: the only western legal enactments to survive are those of the central imperial authorities, the prefects’ judgements and interpretations being lost.

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78 Ibid., 110–12; and his *La Coutume au bas-empire*, 152.
79 One hint that something of the kind may have occurred is contained in the first appendix to the *Lex Romana Visigothorum*, 453 (ed. Haenel), where an otherwise unknown statement, attributed to the fourth book of Paul’s *Sententiae*, contains a provision made “according to Gallic law” (*ure gallicf1*). The appendix, however, only occurs in manuscripts produced in Frankish areas in the ninth century or later, making it possible that the phrase was added. Opinion on the matter is divided: Paul Krüger, *Collectio librorum iuris anteustiniani*, 3 vols. (Berlin, 1878–90), ii, 101, thought it was an interpolation; followed by Max Conrat, *Geschichte der Quellen und Literatur des römischen Rechts im früheren Mittelalter* (Leipzig, 1891), 142; this was the view of Ph. Edward Huschke, *Inrisprudentiae anteustiniani quae supersunt*, 6th edn, 2 vols. (Leipzig, 1911), ii, 104, though he had earlier (2nd edn, Leipzig, 1867, 421–2) accepted it as Roman; as, more recently, has Jean Gaudemet, *Le Breviaire d’Aetaric et les épitomes* (*Ius Romanum Medii Aevi*, pt i, 2 b, aa, β, Milan, 1965), 19.
80 Krüger, *Geschichte der Quellen und Literatur des römischen Rechts*, 277; and Jones, *Later Roman Empire*, i, 473, both of which cite a few surviving prefectal enactments from the east.
Because the ‘barbarian’ kingdoms were smaller than the prefectures, the tendencies towards both regionalization and controlling custom may have been strengthened by their establishment, particularly since the ‘barbarians’ were predominantly settled in rural areas where, as suggested above, custom may have been at its strongest: it is this combination of the nature of custom with the distribution of settlement which gives the ‘barbarian’ laws a predominantly rural aspect.\(^81\) Building upon the powers of the praetorian prefects to make legal pronouncements, the kings issued statements and clarifications of, and amendments to, both law and custom. Some edicts may have been aimed at reconciling Germanic and Roman practices; others at regulating the new conditions engendered by the act of settlement.\(^82\) On other occasions, the purpose may have been to try to increase royal control,\(^83\) perhaps partly in order for the king to acquire the profits of justice. It may be, for example, that kings sought to encourage would-be litigants to seek royal justice\(^84\) by guaranteeing levels of compensation, or even (as is explicit in the seventh-century Edict of the Lombard king, Rothari) increasing them.\(^85\)

Eventually, still developing administrative traditions inherited from the praetorian prefects (which extended well beyond the legal sphere\(^86\)), kings published collections of their edicts: it is those collections which form the basis of the *leges barbarorum*,\(^87\) and this process which accounts for the often disjointed and *ad hoc* nature of the ‘barbarian’ codes, as well as, perhaps, the delay of one or two generations between the settlement of a people and

\(^82\) Magnou-Nortier, ‘Remarques sur la genèse du *Pactus legis Salicæ*', 506–13; Anderson, ‘Roman Military Colonies in Gaul’; Amory, ‘Meaning and Purpose of Ethnic Terminology’, 17; cf. 22–5, where it is argued that the use of the terms ‘Roman’ and ‘Burgundian’ does not denote ethnicity but the functions of host and guest established by the settlement.
\(^85\) *Edictus Rothari*, 74 (ed. Friderich Bluhme, MGH, Leges in folio, iv, Hanover, 1868).
the issuing of its first known law-code. This is not to suggest that the post-Roman kings succeeded in taking total control of the ‘extra-judicial’ systems (for there is evidence that the process was still at work in the seventh-century Frankish kingdom, and pacts are still recognized legal remedies), but that their legislative activity marked a significant step along a way already charted in the late-Roman period. Similarly, Civil Law continued to be of importance, being used in some royal courts and in ecclesiastical contexts, and possibly still providing part of the framework which regulated custom and informed new, royal, legislative activity (as also some new imperial legislation from Byzantium continued to do): certainly the Breviary and its later epitomes were widely copied in Frankish Gaul, often being found in the same manuscripts as the more custom-based codes, especially the Pactus legis Salicae and the Pactus legis Alamannorum. In all of this, as in almost every other aspect of their administration, the ‘barbarian’ kings, having originally been fitted into an evolving provincial situation, continued to respect and develop the traditions they inherited, adapting them according to circumstance in the same way as had the Roman emperors, prefects, jurists and judges before them.

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91 Barnwell, *Emperor, Prefects and Kings*; Barnwell, *Kings, Courtiers and Imperium*. 