Law and History Review (2023), 1–25
doi:10.1017/S0738248023000500

ASLH AMERICAN SOCIETY FOR LEGAL HISTORY
CAMBRIDGE UNIVERSITY PRESS

ORIGINAL ARTICLE

The Edicts of the Praetors: Law, Time, and Revolution in Ancient Rome

Lisa Pilar Eberle

University of Tuebingen, Tuebingen, Germany
Email: lisa.eberle@uni-tuebingen.de

Abstract

This paper revises current understandings of judicial edicts in ancient Rome—the annually published texts in which Roman magistrates set out the *formulae* according to which they would institute trials during their year in office. While standard accounts see these edicts as the work of legal specialists, heretofore neglected sources for how contemporaries talked about these texts suggest that they were indeed the work of the magistrates that issued them. At times these magistrates formulated new provisions; for the most part they selectively drew on past edicts, not least to accommodate the demands of their friends and clients. These patterns in compositional practice can only be understood within the framework of Roman political culture. More importantly, in their annually changing published form judicial edicts emerge as crucial objects in the construction of time in ancient Rome. Arguably, they constituted a legal practice that could encompass revolution—at least for a year.

In 74 BCE Gaius Verres, an aspiring member of Rome's office-holding elite, reached an important milestone in his political career: he became *praetor urbanus*, or urban praetor, the main judicial magistrate in the city of Rome. Holders of the office were expected to publish an edict, in which they laid out the legal remedies that they would grant during their year of tenure. Verres did not disappoint. As praetor-elect the composition of his edict seems to have been his main preoccupation. Its clauses were the subject of negotiation between him and various potentially affected parties. As Cicero outlined in impressive detail, Verres organized a veritable marketplace for legal remedies, in which the highest bidders had their way.[1]

This is the most elaborate description of how a *praetor urbanus* composed his edict that has been preserved. In its outlines and assumptions, it contradicts

[1] Cic. *Verr.* 2.1.104–19 with the image of a market at 119. References to ancient sources follow the conventions of the *Oxford Classical Dictionary*.

the history of the urban praetor's edict, a key source of private law in ancient Rome, as it has usually been told. Magistrates, as the general consensus seems to have it, did not concern themselves with judicial edicts but simply took over those of their predecessors; if any changes had to be made, legal specialists would adjust the edict's text accordingly.[2] We might explain this contrast between Verres's edictal marketplace and the story that Romanists commonly tell about the praetorian edict with reference to the fact that the former stems from a courtroom speech that was part of Verres's prosecution for corruption. In this speech the edictal marketplace was one among many vignettes designed to highlight Verres's greed and the outrageous things it led him to do. And yet, we might also ask just what aspect of the story was meant to scandalize Cicero's audience. Verres's supposed sale of legal remedies? His alleged conversations with potentially affected parties? Or his ostensible involvement in the composition of his own edict? In this paper, I will suggest that Cicero's contemporaries probably only would have taken issue with the marketplace element of Cicero's portrayal.

A scatter of largely neglected evidence for how Roman magistrates composed judicial edicts, ranging across Cicero's letters, his court speeches, and historiographical accounts of debt revolts in Rome, shows that Roman magistrates did not only concern themselves with composing such edicts; contemporaries also held them responsible for their content—at times with fatal consequences. Magistrates did not simply take over their predecessors' edicts; they selectively chose provisions from the edicts of past magistrates, and they also created new ones. Meanwhile potentially affected parties also tried to shape their choices, with varying success. Altogether these dynamics encourage us to think of judicial edicts not so much as instantiations of one stable text, "the praetorian edict," which can be cordoned off into the histories of legal doctrine and jurisprudential expertise. Instead, we should see them as the "edicts of the praetors," the pronouncements of the magistrates that issued them. On one level, then, judicial edicts and their history must be understood within the framework of Rome's political culture. At the same time, these edicts were crucial objects in the construction of time in ancient Rome. Putting these two perspectives together, the edicts of the praetors arguably constituted a legal practice that could encompass revolution.

[2] Recent examples include David Johnston, *Roman Law in Context*, 2nd Ed. (Cambridge: Cambridge University Press, 2022), 4–5; Frederic Vervaet, "Magistrates Who Made and Applied the Law," in *The Oxford Handbook of Roman Law and Society*, eds. Paul du Plessis, Clifford Ando and Kaius Tuori (Oxford: Oxford University Press, 2016), 219–34; Luigi Capogrossi-Colognesi, *Law and Power in the Making of the Roman Common-Wealth* (Cambridge: Cambridge University Press, 2014), 137; Aldo Schiavone, *The Invention of Law in the West* (Cambridge, MA: Harvard University Press, 2012), 141; Wolfgang Kunkel and Martin Schermaier, *Römische Rechtsgeschichte* (Stuttgart: UTB, 2010), 119–20. For elaborately argued articulations see Franz Wieacker, *Römische Rechtsgeschichte. Einleitung, Quellenkunde, Frühzeit und Republik* (Munich: Beck, 1988), 462–64 and Dario Mantovani, "Praetoris partes. La iurisdictio e i suoi vincoli nel processo formulare: un percorso negli studi," in *Il diritto fra scoperta e creazione*, ed. Maria Gigliola di Renzo Villata (Naples: Jovene, 2003), 60–64. Corey Brennan, *The Praetorship in the Roman Republic, Vol. II* (Oxford: Oxford University Press, 2000), 463 is an outlier.

https://doi.org/10.1017/S0738248023000500 Published online by Cambridge University Press

My argument proceeds in four parts. First, I critically examine the evidentiary basis for the current consensus. Second, I analyze a set of passages from Cicero's letters about how Roman magistrates in the provinces composed their judicial edicts. In the third section I turn to Cicero's court speeches and historical accounts of debt revolts in Rome to suggest that analogous dynamics were at play there. In the fourth and final part I build on these arguments to reflect on the relationship between law and time, both in the historiography of judicial edicts and in Roman political culture more generally.

Defamiliarizing Judicial Edicts: Rhetoric, Materiality, and the Myth of the Jurists

The English term "edict" derives from the Latin *edictum*. *Edicere*, the verb from which this term is formed, singled out the speech in which members of Rome's political elite engaged as officeholders.[3] At least by their name, then, judicial edicts were intimately tied to the magistrates that published them. The fact that judicial edicts repeatedly used verbs in the first person singular, mostly in the future tense, further supports this idea.[4] Examples include *iubebo* ("I will order"), *dabo* ("I will give"), *cogam* ("I will force"). These personal pronouncements by magistrates were read out aloud, and they were also written up and displayed publicly.[5] In their written form they also had a distinct aesthetic: black letters on whitened wooden boards with section headings outlined in red.[6] *Album* (white board) was another way to refer to a judicial edict; *rubricae* (red letters) was the name of the subsections. Even jurists used this terminology.[7] In the middle of the first-century CE Seneca records how men with juridical expertise sat by the published version of the urban praetor's edict, waiting to give advice to potential clients.[8] On the whole, then, people in the ancient world seem to have engaged with the edicts of Roman magistrates in their annually published form. As a result, it should not come as a surprise that edicts have been understood as programmatic statements on the part of officeholders.[9] Indeed, in his magisterial two-volume outline of Roman legal history Franz Wieacker admits as much.[10] Two pages later, however, he

[3] *Oxford Latin Dictionary*, s.v. "edico." For a more detailed analysis see now Thibaud Lanfranchi, "Edicts and Decrees during the Republic: A Reappraisal," *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte, Romanistische Abteilung* 136 (2019): 48–83.

[4] Walter Selb, "Das prätorische Edikt: vom rechtspolitischen Programm zur Norm," in *Juris professio: Festgabe für Max Kaser zum 80. Geburtstag*, ed. Hans-Peter Benöhr (Wien: Böhlau, 1986), 259–72 gathers all the attested instances.

[5] For people hearing the edict see *Dig.* 3.1.1.3. Rudolf Haensch, "Das Statthalterarchiv," *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte, Romanistische Abteilung* 100 (1992): 209–13 and Richard Neudecker, "The Forum of Augustus in Rome," in *Spaces of Justice in the Roman World*, ed. Francesco De Angelis (Leiden: Brill, 2010), 171–88 discuss places of publication.

[6] Wieacker, *Römische Rechtsgeschichte*, 462–63.

[7] Cf. *Dig.* 2.1.9 (Ulpian), 43.1.2.3 (Paul).

[8] Sen. *Ep.* 5.48.10.

[9] Selb, "Das prätorische Edikt," 272.

[10] Wieacker, *Römische Rechtsgeschichte*, 462.

https://doi.org/10.1017/S0738248023000500 Published online by Cambridge University Press

explains at some length that no Roman praetor ever treated his edict as program; instead, each praetor took over the edict of his predecessor. This was a technical necessity because Roman magistrates lacked the time and expertise to compose their own edicts. Wieacker imagines a closed and continuous group of jurists and/or *scribae* (secretary-archivists) who were behind the text of the praetor's edict and made improvements as necessary.

This account seems to lack evidentiary support. I have not been able to find any evidence connecting *scribae* with judicial edicts. *Scribae* were the keepers of public writing in ancient Rome, but in its archival and non-published form. Their work was associated with wax tablets and incising and not whiteboards and painting, the materials and practices with which judicial edicts were intertwined.[11] To be sure, *scribae* might have made copies of judicial edicts, and yes, some of them also proudly advertised their legal learning.[12] Quite likely they also aided in drafting individual provisions. However, nothing in our evidence would seem to support the idea that *scribae* were behind the judicial edicts of Roman magistrates. In relation to Roman jurists, an analogous point can be made.

I have not been able to find direct evidence for Roman magistrates consulting with jurists as they were composing their edicts. The arguments that scholars have made in support of this view are circumstantial at best. Because of their quality only legal experts can have composed the provisions in judicial edicts, and jurists were demonstrably members of magistrates' *consilia*, of their advisory boards.[13] Even if that were so—and there has been debate about the role of jurists in *consilia*[14]—there is no reason to think that jurists, as a group, somehow would have worked to keep the text of the edict stable. The past few decades have seen a growing skepticism vis-à-vis the conception of jurisprudence as an autonomous and internally consistent field, especially in the period under consideration.[15] Claims to legal expertise were widely distributed across Roman society, and jurists' authority does not seem to have relied on a monopoly on legal knowledge but on the invocation of other sources of prestige.[16] That being said, some magistrates quite likely did consult with jurists as they were composing their edicts, and such consultations might

[11] Benjamin Hartmann, *The Scribes of Rome: A Cultural and Social History of the Scribae* (Cambridge: Cambridge University Press, 2020), 40–41.

[12] *CIL* VI 1819, 1853.

[13] Otto Karlowa, *Römische Rechtsgeschichte. Staatsrecht und Rechtsquellen* (Leipzig: Veit & Co., 1886), 191–92, 497; Paul Joers, *Römische Rechtswissenschaft zur Zeit der Republik* (Berlin: Franz Vahlen, 1888), 241; Fritz Schulz, *History of Roman Legal Science* (Oxford: Clarendon Press, 1946), 52–53.

[14] Olga Tellegen-Couperus, "The So-Called Consilium of the Praetor and the Development of Roman Law," *Tijdschrift voor Rechtsgeschiedenis* 69 (2001): 11–20.

[15] Kaius Tuori, *Ancient Roman Lawyers and Modern Legal Ideals. Studies on the Impact of Contemporary Concerns in the Interpretation of Ancient Roman Legal History* (Frankfurt a. M.: Klostermann, 2007), 21–134 discusses the importance of autonomy in the Roman tradition.

[16] Jill Harries, *Cicero and the Jurists. From Citizens' Law to the Lawful State* (London: Duckworth, 2006); Christine Lehne-Gstreinthaler, *Iurisperiti et Oratores. Eine Studie zu den römischen Juristen der Republik* (Köln: Böhlau, 2019); Dario Mantovani, "L'auctoritas des juristes romains mise en cause. Esquisse d'une théorie rhétorique," in *L'auctoritas à Rom. Une notion constitutive de la culture politique*, eds. Jean-Michel David and Frédéric Hurlet (Bordeaux: Ausonius), 271–314.

https://doi.org/10.1017/S0738248023000500 Published online by Cambridge University Press

have led to the inclusion of certain provisions associated with individual jurists that we know from the edicts of late republican praetors.[17] However, there appears to be no evidence that jurists somehow were behind the text of any magistrate's edict—let alone the texts of all such edicts.

How come a position without evidence to support it has become so widespread? Judicial edicts have not been the subject of much scholarship.[18] Savigny and the Historical School, their preferences for "Juristenrecht," and their contempt for enactments of law might be to blame for this comparative disregard.[19] At the same time, the early twentieth century witnessed the rise of the powerful idea that Roman private law was the sole creation of jurists, that the Romans were not a "people of laws (*leges*)," but a "people of law (*ius*)."[20] While this idea has come under attack recently, it might have helped entrench the idea of jurists' control of judicial edicts, which, after all, were an important source of private law in Rome.[21] More generally, it seems worth noting that jurists' and *scribae*'s supposed control over the praetorian edict helped keep Roman law familiar. Franz Wieacker recognized that judicial edicts held the potential for what he called "extravagant or revolutionary experimenters in senatorial togas"—that they held the potential for a world in which the legal remedies on offer might be different each year.[22] The prevailing accounts of how judicial edicts were composed close the door on this possibility, allowing us to imagine something resembling the rule of law in ancient Rome. My goal in this paper is to crack open that door—not to reveal some previously neglected revolutionary tendencies among Roman republican magistrates, but to suggest that a certain degree of otherness in Roman legal culture would seem difficult to deny.[23]

[17] Bruce Frier, *The Rise of the Roman Jurists* (Princeton, NJ: Princeton University Press, 1985), 262 discusses the attested instances.

[18] In addition to the works already cited see Heinrich Dernburg,"Untersuchungen über das Alter der Satzungen des prätorischen Edikts," in *Festgabe August Wilhelm Heffter* (Berlin: Weidmann, 1873), 93–132; Max Kaser, "Zum Ediktstil," in *Festschrift Fritz Schulz*, eds. Hans Niedermeyer und Werner Flume (Weimar: Böhlau, 1951), 21–70; John M. Kelly, "The Growth Pattern of the Praetor's Edict," *Irish Jurist* 1, no. 2 (1966): 341–55; Alan Watson, *Law Making in the Later Roman Republic* (Oxford: Clarendon Press, 1974), 31–62; Antonio Guarino, "La formazione dell'editto perpetuo," *Aufstieg und Niedergang der römischen Welt* 2, no. 13 (1980): 62–102; Marie Theres Fögen, *Römische Rechtsgeschichten. Über Ursprung und Evolution eines sozialen Systems* (Göttingen: Vandenhoeck & Ruprecht, 2002), 190–99.

[19] Dario Mantovani, "More than Codes," in *The Oxford Handbook of Roman Law and Society*, eds. Paul J. du Plessis, Clifford Ando and Kaius Tuori (Oxford: Oxford University Press, 2016), 15.

[20] Giovanni Rotondi, *Leges publicae populi Romani: elenco cronologico con una introduzione sull'attività legislativa dei comizi romani* (Milan: Società Editrice Libraria, 1912) and Schulz, *History of Roman* are key.

[21] Dario Mantovani, "Legum multitudo e diritto private. Revisione critica della tesi di Giovanni Rotondi," in *Leges publicae. Le legge nell'esperienza guiridica romana*, ed. Jean-Luis Ferrary (Pavia: IUSS Press, 2012), 707–68.

[22] Wieacker, *Römische Rechtsgeschichte*, 464: "extravagante oder revolutionäre Experimentatoren in der Amtstoga."

[23] For a different take on this otherness see also Andrew Pettinger, "The Praetor's Edict and the Rule of Law," in *The Rule of Law in Ancient Rome*, eds. Eleanor Cowan et al. (Oxford: Oxford University Press, *forthcoming*).

https://doi.org/10.1017/S0738248023000500 Published online by Cambridge University Press

Judicial Edicts in the Provinces

While the edict of the *praetor urbanus* tends to take center stage in discussions of judicial edicts in Rome, Roman magistrates that left the city every year to govern Roman provinces also issued such edicts. Cicero's letters from his time as governor of *Cilicia* in 51/50 BCE are a most revealing source for how contemporaries thought about judicial edicts and how they were composed. As has long been recognized, these letters show a very different composition process from the one that is usually postulated for the edict of the urban praetor in Rome; above all, Cicero's discretion in composing his own edict is difficult to deny.[24] To begin with, Cicero did not simply take over the edict of his predecessor Appius Claudius Pulcher: the tax farmers of *Cilicia* asked him to include a set of provisions from Appius's edict in his own.[25] At the very least, then, Cicero was selective in relation to his predecessor's edict. Furthermore, Cicero saw himself as the author of his edict: *Romae composui*, I put it together in Rome, he writes in the same letter. Cicero also took great pride in the innovative structure of his edict, and he reveled in how carefully certain clauses in it were written: *diligentissime scriptum est*.[26] Overall, then, we seem to be a far cry away from a world in which magistrates left the business of putting together their judicial edicts to legal specialists and *scribae*. Cicero and his interlocutors thought that decisions about the content and style of these texts lay with the magistrates in whose voice they were written.[27] Cicero's letters also give some insight into his composition process.

Cicero consulted past edicts, selectively adopting clauses from some while also purposefully deviating from others. Most famously, Cicero looked to the edict of Quintus Mucius Scaevola, a well-known exemplary governor of *Asia* in the 90s BCE.[28] As Cicero tells his friend Atticus, he adopted one *exceptio*, a provision on foreign judges, as well as "many other things" from Scaevola's edict.[29] Cicero also consulted the edict of Servilius Isauricus, a past governor of *Cilicia* who also had model status, only to decide that in relation to the validity of tax farmers' agreements he could do one better than a man who was widely considered an exemplary governor.[30] Before Cicero left Italy for *Cilicia* he sought to get hold of another edict, most likely that of Licinius Crassus Mucianus, *pontifex maximus* and governor of the province of *Asia* in

[24] Alejandro Díaz Fernández, "Retratos del mando provincial en la República romana: Cicerón, Escévola y el denominado edictum prouinciale," in *Autorretratos: la creación de la imagen personal en la Antigüedad*, eds. Francisco Marco Simón, Francisco Pina Polo and José Remesal Rodríguez (Barcelona: Universitat de Barcelona Edicions), 70–77 summarizes the prevailing opinion and literature.

[25] *Fam.* 3.8.4.

[26] *Att.* 6.1.15, 3.8.4. For the historical context of Cicero's efforts as systematization see Leo Peppe, "Note sull'editto di Cicérone in Cilicia," *Labeo* 37 (1991): 81–93.

[27] Cf. *Att.* 5.4.2, 6.1.15; *Fam.* 3.8.4.

[28] On Scaevola as Cicero's role model in *Cilicia* see Henriette van der Blom, *Cicero's Role Models. The Political Strategies of a Newcomer* (Oxford: Oxford University Press, 2010), 238–41 and Díaz Fernández, "Retratos del mando provincial," 77–83.

[29] *Att.* 6.1.15, 6.2.4.

[30] *Att.* 6.1.16; for his exemplary status by the late 70s BCE see Cic. *Verr.* 2.1.56.

https://doi.org/10.1017/S0738248023000500 Published online by Cambridge University Press

131/0 BCE.[31] At around the same time Cicero contemplated including a certain *exceptio* in his edict; the edict of an otherwise unknown Sicinius provided him with some guidance.[32] Later on, during his journey to *Cilicia*, the tax farmers confronted Cicero with Appius's edict and the provisions they contained.[33] Lastly, Cicero capped interest rates at 12%. This was the rate that Lucullus adopted in the province of *Asia* to ease the pain of the Sullan settlement after the Mithridatic war; quite likely, then, Lucullan edictal provisions also left a trace in Cicero's composition.[34] Beyond revealing these concrete acts of consultation and selection, Cicero's letters also show him talking about this very process in more abstract terms.

In his exchange with his predecessor Appius Cicero described a clause in his edict as *tralaticium*, as having been taken over from other edicts, and in a letter to his friend Atticus he spoke of another provision as being in his *edictum tralaticium*.[35] While this second passage is often interpreted to show that there was something like a customary core to judicial edicts—that large parts of the edict were somehow "tralatician"—the use of the adjective *tralaticium* is the first passage suggests that this is not the only possible meaning of this word. In the letter to Appius the context precludes a translation of the term as "customary." In the passage Cicero tries to defend himself against Appius's accusation that he, Cicero, had included the provision in his edict to hurt his predecessor. As a result, the provision cannot be "customary" because in that case Appius should have recognized it as such. Instead, *tralaticium* here has its literal meaning, which is how I rendered it earlier: Cicero had taken over the provision from another edict, most likely not from his predecessor's, because in that case Appius would be accusing Cicero of including a provision that he himself had also featured in his edict. As a result, the second passage might also be read to suggest that Cicero saw parts of his edict as being compiled from previous edicts. Other parts, by implication, will have been new. In a letter to his predecessor Cicero confirms that this was indeed the case: Cicero's edict contained provisions that he claimed to be *nova*, new.[36] His innovations pertained to the expenses of local communities, and Cicero hoped that they would help restore depleted civic budgets throughout his province. Improving the financial health of local communities was one of his chief priorities as governor of *Cilicia*.[37] He rejoiced in these clauses as a great achievement: *magno opere delector*. For Cicero, then, these provisions

[31] *Att.* 5.3.2. The manuscript tradition is corrupt in relation to the name of the magistrate that issued the edict. I follow the reading of David R. Shackleton-Bailey, *Letters to Atticus, Volume III* (Cambridge, MA: Harvard, 1999), 194; for alternatives see Peppe, "Note sull'editto," 20.

[32] *Att.* 5.4.3; for this reading of the passage see Michael Crawford, "Origini e sviluppo des sistema provinciale romano," in *Storia di Roma 2.1*, ed. Arnaldo Momigliano (Turin: Einaudi, 1990), 119n132.

[33] *Fam.* 3.8.4.

[34] Giovanni Pugliese, "Riflessioni sull'editto di Cicérone in Cilicia," in *Synteleia V. Arangio Ruiz 2*, ed. Antonio Guarino (Naples: Jovene, 1964), 986.

[35] *Fam.* 3.8.4; *Att.* 5.21.11.

[36] *Fam.* 3.8.4.

[37] *Att.* 5.16.2-3.

https://doi.org/10.1017/S0738248023000500 Published online by Cambridge University Press

were not only new; they were also intimately connected to his person and performance as governor of the province.

So far, we have seen that Cicero selectively adopted provisions from past, often model edicts, while also formulating some new provisions of his own, not least in areas that pertained to his larger agenda as governor of *Cilicia*. Crucially, his own concerns as governor were not the only interests that left a mark in his edict. The tax farmers of *Cilicia* asked Cicero to include certain provisions from his predecessor's edict in his own.[38] They came to meet the future governor on the island of Samos, which lay en route to *Cilicia*—and they were not alone in approaching Cicero there. Cicero proudly reported to his friend Atticus that many people came to greet him on the island.[39] While we have no information about the details of any of these other interactions, the tax farmers were probably not alone in broaching the topic of Cicero's edict.

For one, Cicero openly recounts his interaction with the tax farmers to Appius Claudius, a fellow senator, and his predecessor in the province, with whom he had a fraught relationship.[40] Cicero does not contextualize the tax farmers' demands either. Both he and Appius arguably lived in a world in which potentially affected parties could and did consult with magistrates about the content of their respective edicts. Moreover, both men expected magistrates to use their judicial edicts to hurt their enemies and benefit—or at least not hurt—their friends. Appius accused Cicero of including some provisions in his edict to injure him personally.[41] Such an accusation is predicated on the assumption that magistrates could and did use their judicial edicts for this purpose. Cicero himself also thought along these lines. When thinking about whether to include a certain *exceptio* in his edict, it was important to Cicero that the clause did not hurt anyone who had bestowed a benefit on him in the past: *modo ne illa exceptio in aliquem incurrat bene de nobis meritum*.[42]

While we do not know how the tax farmers approached Cicero on Samos, it seems likely that they appealed to the world of Roman patronage and friendship, to which Cicero's talk of benefits and favors belonged. People in the provinces—especially Roman citizens and their dependents, including, of course, tax farmers and the members of the companies they ran—continually appealed to governors based on such reciprocal relationships.[43] Cicero and Appius thought that the provisions of judicial edicts could and should be the result of personal relationships, both friendly and hostile, and so it is likely that at least some of the people who approached (prospective) Roman governors on

[38] *Fam.* 3.8.4.

[39] *Att.* 5.13.1.

[40] For the details of this relationship see Catherine Steel, *Cicero, Rhetoric, and Empire* (Oxford: Oxford University Press, 2001), 199–200 and Eleanor Winsor Leach, "Cicero's Cilician Correspondence: Space and *Auctoritas*," *Arethusa* 49, no. 3 (2016): 503–17.

[41] *Fam.* 3.8.4.

[42] *Att.* 5.4.3.

[43] Elizabeth Déniaux, *Clientèles et pouvoir à l'époque de Cicéron* (Rome: École française de Rome, 1993); David Braund, "Function and Dysfunction: Personal Patronage in Roman Imperialism," in *Patronage in Ancient Society*, ed. Andrew Wallace-Hadrill (London: Routledge, 1989), 141–45.

https://doi.org/10.1017/S0738248023000500 Published online by Cambridge University Press

the basis of patronage—appeals that already happened in Rome before the magistrates set out to their respective provinces[44]—also had ideas and demands regarding the clauses that the magistrates in question might include in their respective edicts. How individual magistrates responded to these requests was up to them. Cicero granted the tax farmers what they had asked for. The fact that the tax farmers could point to a past edict in which the provisions that they wanted had already featured quite likely helped their case considerably.

Arguments about precedent play an important but also puzzling role in how Cicero, Appius, and Atticus talked about judicial edicts. When Appius accused Cicero of including a provision in his edict with the goal of hurting him, Cicero mounted the following defense: the provision in question was not new but *tralaticium*; Cicero had adopted it from another edict.[45] On one level, we can see how this argument might work. Cicero was claiming that he had not thought up something new just to hurt Appius. At the same time, the argument does not appear fully conclusive. Appealing to precedent does not get to the core of Appius's charge. The provision might have featured in previous edicts, but Cicero might also have picked it precisely because he knew that it would hurt Appius. Crucially, this letter is not the only occasion on which Cicero appealed to the "not newness" of an edictal provision to defend it against criticism. The second example stems from a letter to Atticus, in which Cicero sought to counter the charges that his friend had leveled against a clause in the edict of Bibulus, who was governor of *Syria* at the time.[46] According to Atticus, this clause, an *exceptio*, was excessively severe in its attitude toward "our order," most likely the equestrians.[47] Cicero tried to allay Atticus's concerns: he himself had included a clause with the same force in his edict; it was simply more guardedly phrased and originally stemmed from Scaevola's edict.[48] Again, one might wonder what the "not newness" of a certain provision had to do with the way in which it affected a certain group of people. The details of the exchange between Cicero and Atticus can help address this question.

In their discussion of Bibulus's edict Cicero and Atticus focused on the one aspect of Bibulus's edict that was supposedly new: the *exceptio* mentioned earlier.[49]

[44] *Fam.* 13.6, 72.

[45] *Fam.* 3.8.4. Dario Mantovani, "Gli esordi del genere letterario ad edictum," in *Per la storia del pensiero giuridico romano: del'etá dei pontefici alla scuola die Servio*, ed. Dario Mantovani (Turin: Giappichelli, 1996), 91n109 notes this pattern in the argumentation without commenting on it further.

[46] *Att.* 6.1.15.

[47] For this understanding of *ordo noster* see Peppe, "Note sull'editto," 28. For the possible content of this *exceptio* see Peppe, "Note sull'editto," 32–41 and Dario Mantovani, "L'editto come codice e da altri punti di vista," in *La codificazione del diritto dall'antico al moderno*, ed. Elio Dovere (Naples: Jovene, 1998), 174–77 with note 122 for further bibliography on the question.

[48] *Att.* 6.1.15.

[49] Peppe, "Note sull'editto," 30–32 reads the Latin *nihil novi* as "I knew nothing." I prefer "nothing new" because it sets up more elegantly Cicero's suggestion that while the provision might look like a dangerous *praeiudicium* against the equestrian order, it was tantamount to an already existing clause dressed up in slightly more aggressive language.

https://doi.org/10.1017/S0738248023000500 Published online by Cambridge University Press

Atticus worried that this new clause might constitute a *praeiudicium* against the equestrian order. Various translations of this word are possible. It can mean something like prejudgment or attitude, which is how I have rendered it earlier. Much more frequently, though, *praeiudicium* is translated as "precedent." Possibly, then, Atticus did not simply worry about Bibulus's attitude to the equestrian order, but also about the provision's potential for setting a precedent; he might have worried about the possibility that once that clause had indeed featured in an edict, it would be much easier for future magistrates to include it in their own. On this reading Cicero's comparison of Bibulus's clause with a provision from his own edict also begins to make sense. Bibulus's *exceptio*, so Cicero suggested, did not introduce anything more injurious to the equestrian order into Rome's legal reservoir than what was already in it. The legal content in question could also be found in one of the most prominent texts in this reservoir: in the provincial edict of Quintus Mucius Scaevola, a widely recognized model governor.

In relation to the exchange between Atticus and Cicero about Bibulus's edict two more points might be made. One, Bibulus, quite likely, would have disagreed with Cicero's assessment of his innovation. We have no direct evidence for what he sought to accomplish by introducing this new *exceptio*. It seems probable, though, that Bibulus chose an innovative formulation on purpose. We might readily see his *exceptio* as the equivalent of the new provisions that Cicero introduced in his own edict: it was a great source of pride for him and intimately connected to his agenda as governor. More particularly, the new clause was a way for Bibulus to leave his legal and political mark by giving substance to how he thought the problems of imperial governance should be addressed. In 51/50 BCE the Parthian threat loomed large over Rome's eastern provinces. As Kit Morrell has argued, this context prompted various attempts at provincial reform to keep these regions of the empire loyal.[50] Both Cicero's provisions concerning the expenses of local communities and Bibulus's attempt to curb the ways in which Roman citizens might exploit and displace local populations, can readily be seen as part of such efforts.

Two, Atticus's concerns regarding Bibulus's *exceptio* and Appius's reaction to Cicero's handling of local expenses show that edictal innovations not only promised rewards but also came with distinct risks. As Atticus's analysis suggests, legal provisions could be treated as a political barometer, a way of assessing where a man stood vis-à-vis the interests of certain individuals and groups. And of course, those whom new provisions affected negatively might also take offense at these effects, as Cicero's predecessor Appius did. After all, such provisions determined what would be just—for one year, and possibly beyond. This was a great responsibility. Provincial governors like Cicero and Bibulus seem to have found two strategies for dealing with this responsibility and the opportunities and risks attendant upon it. On one level, they connected their innovations with goals that were difficult to politicize such as the maintenance of imperial rule. At the same time, they also repeated provisions from previous edicts that were already part of Rome's legal tradition. Selectively choosing

[50] Kit Morrell, *Pompey, Cato, and the Governance of the Roman Empire* (Oxford: Oxford University Press, 2017), 177–203.

https://doi.org/10.1017/S0738248023000500 Published online by Cambridge University Press

from a range of different edicts allowed them to shift the focus away from their own authorship while still being able to pursue their own agendas, not least by negotiating over provisions with potentially affected parties, especially those with whom the bonds of reciprocity and patronage connected them.

To be sure, both *Cilicia* and *Syria* were not only comparatively new provinces in the late 50s BCE; Crassus's death at the hands of Parthian forces and the threat of a looming Parthian invasion also meant that Roman rule in these regions was exceedingly tenuous at the time. The perceived fragility of Roman rule in the region seems to have spurred both Bibulus and Cicero to essay various forms of legal innovation, and so we may wonder if under different geopolitical circumstances different considerations will have led governors to formulate new provisions—ethical concerns, designs on exemplarity, claims to juristic expertise, the demands of powerful litigants? By contrast, the relatively short history of both provinces does not appear to have left its trace in their composition processes, and we should not expect it to have done so. From everything I have been able to see, Cicero and his interlocutors did not consider a *provincia* a legal silo, in which a particular legal tradition was to hold sway. The legal reservoir on which they drew was circumscribed by (Roman) exemplarity that could manifest anywhere across the Mediterranean.

In the city of Rome itself age and tradition did not curb magisterial discretion either. As I will show in the following part of this paper, in first-century BCE Rome analogous dynamics were at work to the ones that Cicero's letters reveal for the provinces. The edicts of the urban praetors, to which the evidence preserved speaks best, were also considered the work of the magistrates that issued them, and their provisions could and did also vary from year to year, depending on the compositional choices of these magistrates. Crucially, the same tension between magisterial authorship and the avoidance of responsibility that we have seen in the provinces marked their composition. Also in Rome, newness aroused suspicion, and Rome's past served as a legal reservoir that could be used to deflect responsibility—at least in some cases.

Judicial Edicts in the City of Rome

"What kind of man does the make-up of his edict reveal Verres to be?" This rhetorical question stands at the beginning of the fifteen paragraphs in the Verrines, in which Cicero lays out Verres's edictal marketplace in lurid and suggestive detail.[51] For Cicero and his audience, then, the edict of an urban praetor and that man's personality were inextricably intertwined. Cicero also showed Verres "writing" and "composing" the provisions in his edict.[52] *Scribere* and *componere*—the verbs in question—are exactly those that Cicero would use in relation to his own edict as governor of the province of *Cilicia* more than twenty years later. More generally, Cicero and his audience seem

[51] *Verr.* 2.1.104–18.
[52] *Verr.* 2.1.119.

https://doi.org/10.1017/S0738248023000500 Published online by Cambridge University Press

to have expected urban praetors to use at least some of the time between their election and the moment they entered office—a period that could last up to half a year—to involve themselves in the composition of their respective edicts.[53] The language and assumptions with which a trial audience in the city of Rome could think about judicial edicts there thus show clear parallels with the ways in which Cicero and his elite Roman friends talked about judicial edicts in the provinces. However, our evidence for how magistrates in Rome composed their edicts differs radically.

Instead of private letters, a set of court speeches from the late 70s BCE—Cicero's *Pro Tullio*, his *Pro Caecina*, and the Verrines—provide glimpses of various provisions that urban praetors included in their edicts during those years. Bruce Frier has used this exceptional clustering of evidence to demonstrate the high degree of annual variation in edictal provisions with which Roman citizens in Rome had to contend.[54] To illustrate, just consider the difference in provisions relating to the protection of possession lost through violence in 73/2 and 69/8 respectively.[55] In the earlier year claimants seeking to regain possession had to show that they had lost that possession through *vis* (force) and through *dolus malus*—something akin to malice aforethought—of the new possessor. Four years later simple evidence for the use of violence by the new possessor or a member of his family, including slaves, was enough. It should be clear that in these two years rather different claimants had a chance of winning their case. In what follows I will analyze some of the same evidence as Frier, but with a different methodology. Analyzing not just the content of edictal provisions, but also how contemporaries talked about them—just as I did for the provinces—can help excavate the logics that governed and circumscribed this variation. As I will show, the evidence for the city of Rome points to the same combination of selective conservatism with guarded innovation that Cicero's letters reveal for the provinces.

To begin with, Cicero and his audience expected judicial magistrates in Rome to make conscious choices about the provisions of their edicts. Cicero's discussion of the edicts of Lucius Metellus in the Verrines is a case in point.[56] Metellus had been *praetor urbanus* in Rome in 71 BCE, and he then succeeded Verres as governor of *Sicily*, where, on Cicero's account, his time was mainly taken up with managing the fallout from Verres's disastrous three years in the province. According to Cicero, Metellus featured the *formula Octaviana*, which concerned extortion from private citizens, as part of both his edicts: in Rome and in *Sicily*.[57] A certain Gnaeus Octavius, probably the urban

[53] *Verr.* 2.1.116, 119. On the timing of elections and the Roman calendar more generally see Agnes Michels, *The Calendar of the Roman Republic* (Princeton, NJ: Princeton University Press, 1967), esp. 58–59. For the dates on which consuls entered office see Robert Broughton, *The Magistrates of the Roman Republic, Volume II* (New York: American Philological Association, 1952), 637–39.

[54] Frier, *The Rise*, 42–57.

[55] *Tull.* 29; *Caec.* 37, 41, 55, 49, 87–88. Frier, *The Rise*, 53–55 reconstructs the formulae.

[56] Cic. *Verr.* 2.3.152.

[57] For the content of the *formula Octaviana* see *Verr.* 2.3.152 and *Q fr.* 1.1.21.

https://doi.org/10.1017/S0738248023000500 Published online by Cambridge University Press

praetor of 79 BCE, had first introduced the *formula*.[58] The way in which Cicero talks about this provision and its inclusion in the edicts of Metellus assumes a conscious choice on his part: Metellus "had" (*habere*) the *formula Octaviana*, both in Rome and in the province. Cicero thus did not think that a *formula* would feature in all edicts after a magistrate had introduced it. Metellus had decided to include it, but others might not have. Indeed, the *formula Octaviana* does not appear in the Hadrianic version of the edict on which later jurists then commented.[59] The latter group won the day.

Crucially, some new provisions only had a very short life. As Cicero was keen to point out, the two innovative clauses that Verres featured in his edict as *praetor urbanus* in 74 BCE found no imitators.[60] In the Verrines Cicero interpreted this short life of Verres's provisions as sign of their author's venality, as evidence of them being designed with the needs of the highest bidder in mind. However, the details of Cicero's attack on Verres also allow for a different explanation. Cicero recalls some jokes that contemporaries made about Verres already during his praetorship. These jokes turn on the semantic relationship between the cognomen "Verres" and the word for hog—*verres*—and the double meaning of *ius*: law and soup. *Ius verrinum*—"hog's law," or rather "hog's soup"—was of course poor stuff. And Verres's predecessor, Sacerdos, or "Mr. Priest," was blamed for having left behind a miserable hog, an animal that as priest he should have sacrificed.[61] Crucially, these jokes did not hinge on Verres's supposed venality, his greed, or his corruption. Instead, both appealed to the concept of *nequam*, which is a combination of *ne* (not) and *aequus* (fair, equitable).[62] Arguably, then, Verres was becoming a bad *exemplum* of an urban praetor already during his time in office. His actions became blueprints for how not to behave, his edict a model on which not to draw. Unsurprisingly, Gnaeus Octavius, the originator of the *formula Octaviana*, fared very differently. More than twenty years after his praetorship, Cicero knew Octavius as a model urban praetor, combining strictness with popularity.[63] Crucially, this did not mean that all subsequent praetors took over the provisions in his edict. However, these provisions might have seemed a safe source on which to draw, as Metellus appears to have done.

The Verrines might provide another glimpse of such conscious selection from past edicts. Unlike his predecessor, Verres allowed children to claim a part of the estate of their parents' freedmen.[64] This difference provided the context for one of Verres's scandalous decisions: he applied this rule to a case, in which the freedman in question had died the year prior and the

[58] Cf. Bruce Frier, "Urban Praetors and Rural Violence: The Legal Background of Cicero's Pro Caecina," *Transactions of the American Philological Association* 113 (1983): 229.

[59] Otto Lenel, *Das Edictum Perpetuum* (Leipzig: Tauchnitz, 1927), 58–59 and 111–14 outlines various connections with provisions in the Hadrianic edict.

[60] *Verr.* 2.1.111, 117.

[61] *Verr.* 2.1.121.

[62] Schiavone, *The Invention of Law*, 146–53 discusses *aequitas* as an important category for assessing praetorian provisions in the legal culture of republican Rome.

[63] *Q fr.* 1.1.21.

[64] *Verr.* 2.1.125–26.

https://doi.org/10.1017/S0738248023000500 Published online by Cambridge University Press

testamentary heir had already accepted the inheritance. It seems significant that Cicero does not comment on this clear difference between Verres's edict and that of his predecessor. Might it be that such variations were so common and widespread that little could be gained from them for the purposes of tarnishing a man's character? At the very least, the fact that Cicero does not polemicize the provision itself, makes it possible that this provision was not new. Instead, Verres might have chosen to adopt it from a previous edict, possibly one with model status.

Beyond selectively adopting provisions from past edicts, judicial magistrates in Rome also composed new ones. My discussion so far has already featured several such innovations, including those of Verres. We know about the innovative parts of Verres's edict because they are at the center of Cicero's attack on him.[65] Crucially, though, Cicero did not attack Verres because he had introduced new clauses. That urban praetors would formulate such new clauses seems to have been nothing scandalous. Instead, Cicero focused on the nature of these provisions and just whom they benefited. Overall, his argumentative strategy reveals the same vulnerability inherent in newness that we have seen in the provinces. The details of his discussion also reveal that Verres might have sought to protect his provisions from attack in ways that resembled Cicero's strategy in *Cilicia*: by connecting them to causes that were difficult to politicize. Verres presented one of his innovations as an attempt to stall greed and its pernicious effects.[66] Greed was the metropolitan equivalent of provincial rebellion: no Roman citizen in his or her right mind would deny that it was to be avoided.

Defenses of new edictal provisions could also come in very different guises. In the *Pro Tullio* Cicero argued in favor of Marcus Tullius, who tried to gain damages from Publius Fabius for several slaves, who had died as part of a property dispute between the two neighbors. While the *lex Aquilia* provided the main framework for assessing damages in ancient Rome, a few years before the trial a certain Marcus Lucullus had developed a new way of approaching the problem. The *lex Aquilia* only awarded damages when the injury had resulted from an unlawful act; by contrast, Lucullus's provisions focused on how it had been inflicted: through violence and by men armed and banded together, who acted maliciously.[67] As Cicero explained, Lucullus's goal was to motivate slaveowners to better control the people they enslaved; he had devised this new way of assessing damages because the level of licentiousness and the size of armed slave gangs had reached new heights. When the *lex Aquilia* was introduced, the problems that the Lucullan provisions sought to address did not yet exist. As Cicero put it, the provision had originated in the unlawfulness of wicked men—just like so many other instances of legal severity.[68]

[65] Cic. *Verr.* 2.1.104–18.

[66] Cic. *Verr.* 2.1.106.

[67] Cic. *Tull.* 7–9. For the details of the *lex Aquilia* see Marianne Elster, *Die Gesetze der mittleren römischen Republik* (Darmstadt: Wissenschaftliche Buchgesellschaft, 2003), 127–32 (n. 57).

[68] *Tull.* 8–9.

https://doi.org/10.1017/S0738248023000500 Published online by Cambridge University Press

Why did Cicero go to such lengths to justify the Lucullan provision? The trial between Tullius and Fabius was conducted under it, and Fabius openly contested its fairness.[69] During the trial the latter's advocate suggested that the lawfulness of the actions causing the damage had to be considered, and Fabius himself had entreated the praetor before the trial to add considerations of (un)lawfulness (*iniuria*) to his *formula*.[70] The *Pro Tullio* thus not only provides a unique window onto how legal innovations could be argued about; it also shows litigants trying to shape the provisions under which their cases were being tried. Quite likely, such attempts at influencing the substance of praetorian jurisdiction in the city of Rome not only spilled over into the trials themselves, but already took place when magistrates were composing their edicts.

A passage from Cicero's Verrines would seem to support this idea. The *lex Voconia* limited the ways in which women could inherit from men in the first census class.[71] Verres extended the provisions of the law to cover men not registered in the census but wealthy enough to be in the first census class, most likely because since 86/85 BCE no census had been held.[72] According to Cicero Verres introduced this change to accommodate Lucius Annius. By making it impossible for the daughter of Publius Annius to inherit from her father, Verres helped the revisionary heir Lucius Annius lay hold of a substantial fortune. While many people might claim that the scheme originated with Annius, Cicero insisted that Verres had thought it up.[73] Cicero's arguments for Verres's initiative are circumstantial at best. Crucially, though, he does not claim that affected parties trying to influence the composition of judicial edicts in Rome was unheard of. In fact, the seeming credibility of accounts casting Annius as the culprit would suggest the opposite. Cicero and his audience seem to have been familiar with prospective litigants trying to influence how magistrates composed their edicts. In so doing, these litigants could have recourse to a range of different strategies.

Just like in the provinces, the ties of patronage and friendship could be invoked to influence how magistrates composed judicial edicts. When in *Cilicia*, Cicero wrote at least two letters of recommendation to introduce clients of his in Rome to judicial magistrates there. Both these letters pertained to ongoing trials, to the *formulae* under which they were to be conducted and to their potential outcomes.[74] It stands to reason that if Cicero had been present in Rome, he would have made these representations in person. Just as in the provinces, then, Roman magistrates in Rome were also embedded in the networks of friendship and patronage.[75] It thus seems at least possible that

[69] *Tull.* 38.

[70] *Tull.* 38–39, 46.

[71] Elster, *Die Gesetze*, 374–80 (n. 181).

[72] *Verr.* 2.1.104–14 with Frier, *The Rise*, 49.

[73] *Verr.* 2.1.105–6.

[74] *Fam.* 13.58, 59.

[75] Braund, "Function and Dysfunction," 138–40 and Andrew Wallace-Hadrill, "Patronage in Roman Society: From Republic to Empire," in *Patronage in Ancient Society*, ed. Andrew Wallace-Haddrill (London: Routledge, 1989), 63–88, 68–71. For attempts to normatively delimit the effects of these networks see Valentina Arena, "Fighting Corruption: Political Thought and

https://doi.org/10.1017/S0738248023000500 Published online by Cambridge University Press

potential litigants also used them to shape the provisions that magistrates included in their edicts. In the *Pro Tullio* Cicero we learn that in his quest to have his trial be conducted under a different *formula* Fabius also approached the ten tribunes, sitting on their bench in the forum.[76] Most likely, Fabius and other litigants asked the tribunes to grant them *auxilium*—meaning that they asked one of these ten magistrates to use his unique powers within the Roman political system to intervene against the decisions of other officeholders. Here, then, a crucial difference between the provinces and the city of Rome emerges: in Rome potentially affected parties could mobilize a wider range of institutions and competing authorities to shape the provisions that magistrates might include in their judicial edicts.

In a letter to his brother Quintus Cicero draws a rather stark contrast between Rome and the provinces: in a province everything depended on the decision of one man; in the city of Rome, by contrast, there were other magistrates, the senate, and the Roman people, as well as means of redress and complaint (*auxilium* and *conquestio*), senate meetings, and public political gatherings (*senatus* and *contio*).[77] This contrast was certainly overdrawn. The senate clearly had an eye on what magistrates in Rome's provinces did, and the actions of governors could also become the subject of formal public meetings and debates in Rome.[78] At the same time, the passage supportsthe idea that in the city of Rome members of the political elite in their capacity as office-holders and senators might have shaped the process of edictal composition—not least when prospective litigants entreated them to do so.[79] Regardless of the route that litigants adopted, they will have drawn on a circumscribed set of arguments. As we have seen in the *Pro Tullio*, they might make arguments about fairness. Given the selective conservatism that marked how magistrates in Rome composed their edicts, litigants quite likely also understood that pointing to the legal past might help their case. This last dynamic comes to the fore most pointedly in historiographical accounts of debt revolts in late Republican Rome.

In 89 BCE a group of debtors in Rome approached the urban praetor Aulus Sempronius Asellio, asking him to uphold a law against usury.[80] We do not know the name, date, or precise provisions of the law. Appian, who records this episode, only speaks of "some ancient law (*nomou tinos palaiou*) that forbade lending money at interest." By appealing to such a statute, the debtors were trying to mobilize the urban praetor to support their cause in the context

Practice in the Late Roman Republic," in *Anticorruption in History, from Antiquity to the Modern Era*, eds. Ronald Kroeze, André Vitória and Guy Geltners (Oxford: Oxford University Press, 2018), esp. 36–38 and 46–48.

[76] *Tull.* 38; for further examples of this behavior and its spatial dynamics on the forum see Eric Kondratieff, "Reading Rome's Evolving Civic Landscape: Tribunes of the Plebs and the Praetor's Tribunal," *Phoenix* 63, no. 3/4 (2009): 352.

[77] *Q fr.* 1.1.22.

[78] The machinations of Sthenius of Thermae are most illuminating in this regard: *Verr.* 2.2.95–97, 100.

[79] See Mantovani, "Praetoris partes," 77–87 for the role of these institutions in how praetors instituted individual proceedings.

[80] App. *B Civ.* 1.54.

https://doi.org/10.1017/S0738248023000500 Published online by Cambridge University Press

of a rapidly escalating debt crisis that haunted Rome in the wake of the Social War and in anticipation of the Mithridatic revolt in the Greek East. As Appian tells it, Asellio responded to their appeals by trying to pass on the burden of the decision: the judges, not the praetor, were to navigate this "impasse of law and custom (*ten ek tou nomou kai ethous aporian*)." Despite his efforts, the creditors did hold him responsible. Asellio was reviving the old law—so Appian wrote (*ton nomon … anekainize*), and so the debtors probably claimed; and they killed him for it.

To be sure, Appian makes no mention of Asellio's edict or how he was putting it together. Given the narrative logic of the passage it is likely that the debtor's appeals to Asellio were part of the process by which litigants negotiated with the praetor about the precise wording of the *formula* under which their case was to be tried—a process during which praetors also could and did choose to deviate from their own edict.[81] That being said, the episode reveals an analogous dynamic to the one for which I have tried to argue in relation to edictal composition. Discretion and authorship came with responsibility, and Asellio went to great lengths to deflect that responsibility: by trying to get both sides to agree to a settlement, by trying to shift the burden of the decision onto the judges, and of course, also by having recourse to the legal reservoir that Rome's past offered. Crucially, this legal reservoir included not only past (model) edicts but also statute law, which often pertained to issues such as inheritance, obligations, and property—areas of law that the judicial edicts of magistrates covered as well.[82] In fact, the debtors in Sallust's *Bellum Catilinae* employed an analogous rhetorical strategy to those in Appian: the moneylenders and the praetor were oppressing them—so Sallust had them claim—and the senate should restore for them the protection of a statute (*lex*) that the injustice of the praetor had brutally taken from them.[83] As with Appian, the precise nature of the statute remains unknown.[84] However, the recurrence of this strategy in Sallust makes it likely that appealing to old statutes was a well-established part in the rhetorical repertoire of debtors' strikes in late Republican Rome—before, during, and after the magistrate in charge that year composed his edict.

The historiographical record concerning debt crises in Republican Rome thus not only shows that statutes could number among the arguments with which prospective litigants approached judicial magistrates; it also reveals an instance in which the selective conservatism that animated so much of what Roman judicial magistrates did, could turn revolutionary. This was possible because Rome's legal landscape had a distinct cumulative aspect: statutes

[81] For a helpful overview see Filipp Gallo, *L'officium del pretore nella produzione e applicazione del diritto: corso di diritto romano* (Turin: Giappichelli, 1997), 70; for an extensive discussion Mantovani, "Praetoris partes."

[82] On legislation in relation to "private law" see Kelly, "The Growth Pattern," 346 and Mantovani, "Legum multitudo e diritto private," esp. 729–39.

[83] Sall. *Cat.* 32.3–33.1.

[84] For fourth- and second-century BCE contenders see Elster, *Die Gesetze*, 37–39 (n. 19) and 313–15 (n. 149).

https://doi.org/10.1017/S0738248023000500 Published online by Cambridge University Press

and *formulae* often were not abrogated but fell into disuse instead.[85] The legal past thus contained many untapped sources—plus, like the past more generally, it was open to rewriting and reinterpretation. As a result, we need to imagine a continual (re)negotiation over the boundaries of the parts of Rome's legal past on which Roman magistrates might safely draw. Our sources preserve a few glimpses of the agents and actions that could play a role in these processes of boundary making.

Consider, for instance, Mucius Scaevola, who governed *Asia* in the 90s BCE. Upon his return to Rome the senate declared him an *exemplum* and model of administration for other magistrates to follow.[86] Unsurprisingly, then, Scaevola's edict, and his behavior more generally, became a safe source on which magistrates in the provinces might draw.[87] Conversely, when the creditors killed Asellio in 89 BCE, they not only punished a magistrate but also tried to make sure that any statute making the lending of money at interest a criminal act remained one of the many untapped resources in Rome's legal history. For a less pointed example we might return once more to the jokes about Verres's urban praetorship that circulated even before his trial for corruption in the provinces. Turns of phrases like *ius verrinum*, hog's law and/or soup, quite likely contributed to the fact that Verres's edict and the new provisions contained therein found no imitators, at least in the years immediately following his praetorship. We do not know who launched this campaign against Verres and why it became so successful so quickly. In the arguments about the (un)fairness of the Lucullan provision in the *Pro Tullio* we can see that the contestation over the status of a particular provision/magistrate could also be a drawn-out process that came with a great deal of uncertainty for the participants involved. By the middle of the first-century BCE men claiming juristic expertise proactively participated in this boundary work. According to Pomponius, Servius Sulpicius Rufus and Aulus Ofilius, both writing in the second half of the first-century BCE, were the first men to compose juristic treatises on the edict.[88] Beyond inclusion and exclusion by decree and murder, we should thus imagine a complex set of social and political processes that continually (re)shaped the legal reservoir on which Roman judicial magistrates could expect to draw (more or less) safely. The Roman elite's interest in exemplarity meant that entire edicts and the magistrates that issued them were a key aspect of the grammar by which these boundaries were set. As a result, it should not come as a surprise that so few of the edictal provisions that we know are associated with individual magistrates.[89] The paucity of the evidence in this regard does not reflect Roman magistrates' lack of involvement in edictal composition but would appear to result from the patterns of memorialization in Roman political culture instead.

[85] For abrogation and the dangers of assuming it see John Richardson, "Old Statutes Never Die. A Brief History of Abrogation," in *Modus Operandi: Essays in Honour of Geoffrey Rickman*, eds. Michael Austin, Jill Harries and Christopher Smith (Oxford: Oxford University Press, 1998), 47–61.

[86] Val. Max. 8.15.6.

[87] For evidence beyond Cicero see Diod. Sic. 37.8.1–4.

[88] *Dig.* 1.2.2.44 (Pomponius). I discuss the nature of these works on p. 20.

[89] Watson, *Law Making*, 31–33 gathers the evidence.

https://doi.org/10.1017/S0738248023000500 Published online by Cambridge University Press

Based on my arguments so far, we may note that several factors circumscribed the choices that Roman magistrates could and did make in the composition of their edicts. For one, the parts of Rome's legal past on which magistrates drew were heavily circumscribed. Also, the number of completely new provisions each year seems to have been quite small, and there do appear to have been provisions that featured in virtually every edict for long stretches of time; Cicero's rhetoric in the Verrines about certain provisions having featured in edicts since time immemorial could hardly have been persuasive otherwise.[90] Magistrates also seem to have lived in a world where a judicial edict had to cover certain areas. When describing the structure of his edict for *Cilicia*, Cicero identified one part as covering all the matters that "cannot be transacted easily enough without an edict". These matters included questions of inheritance, property and possession, sale, and tutelage; in short, matters that "are usually demanded and carried out based on the edict."[91] Expectations such as these suggest that while many clauses of judicial edicts might not have been tralatician (in the conventional sense), the structure and general subject areas of judicial edicts quite likely were.[92]

What can we say about the historical dimensions of these dynamics? The history of edictal innovation in the realm of the edict is well studied, and there can be little doubt that during the second- and first-centuries BCE, and especially the latter's first half, the edicts of the praetors were the site of more legal innovation than during the century before the creation of the *edictum perpetuum* under Hadrian in the 130s CE.[93] However, this long-term trend in no way implies that by the middle of the first-century BCE praetors stopped being involved in the composition of their edicts, that the edict by that point was becoming somehow "fossilized."[94] According to Bruce Frier, who made the most pointed and forcefully argued case for such fossilization, the high degree of legal uncertainty that arose from annual edictal variation provided the foil against which jurists, jurisprudence, and the autonomy of law that they embodied could rise to prominence in ancient Rome.[95] While Frier does not mention the edict in his conclusions, he does appear to regard its fossilization as part of the same process by which he also explains the jurists' victory: the inexorable triumph of independent law over legal uncertainty fostered by increasing commercialization, heightened political instability, and the staggering numbers of new Roman citizens after the Social War. For reasons of space, I cannot provide here the kind of substantive engagement that Frier's thought-provoking arguments deserve. However, I do want to suggest that on a minor matter he might

[90] *Verr.* 2.1.114. For more such passages see Mantovani, "Gli esordi," 86–96; Gallo, *L'officium del pretore*, 94–99.

[91] *Att.* 6.1.15.

[92] I owe this observation to Caroline Humfress.

[93] Watson, *Law Making*, 40–41 and 56–58 remains foundational for this basic history of edictal law making. See also Max Kaser, "'Ius honorarium' and 'ius civile,'" *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte, Romanistische Abteilung* 101 (1984), 108; Schiavone, *The Invention of Law*, 197; Capogrossi-Colognesi, *Law and Power*, 375.

[94] Frier, *The Rise*, 76, 261–62, building on Guarino, "La formazione," 70–72.

[95] Frier, *The Rise*, 272–82, 286–87.

https://doi.org/10.1017/S0738248023000500 Published online by Cambridge University Press

have overstated his case: there are good reasons to think that praetors concerned themselves with the composition of their edicts well into the first-century CE, thus also producing annual edictal variation albeit under rather different circumstances.[96]

Frier's argument for the stabilization of the edictal text by the middle of the first-century BCE may be reconstructed as follows: the *lex Cornelia de iurisdictione* of 67 BCE, which most likely forced praetors to adhere to the edict that they published at the beginning of their term of office, can be taken as an expression of the desire for more legal certainty; the existence of juristic treatises on the edict in the middle of the first-century BCE suggests the stability of the edict's text; this stability, he suggests, came about "by a slow process of virtually unconscious change through recurrent social practice" à la Giddens.[97] Clear and illuminating though this account may be, it is not necessarily conclusive. For one, we may note that the existence of juristic commentaries on the edict does not necessarily presuppose a stable text. The works in question, by Servius and Ofilius, are badly preserved. Servius's work, at least, could have been structured around the (tralatician) subject areas that men like Cicero expected these edicts to cover, discussing provisions, phrases, and concepts that frequently recurred therein.[98] As Dario Mantovani has suggested, early juristic writings on the edict might well have had a "lemmatic character," explicating the meanings of key phrases in specific *formulae*.[99] In the *Pro Tullio* Cicero explicated the implications of a recent and seemingly controversial *formula*, without consulting any new juristic literature; the *formula* in question drew on and recombined phrases and concepts that were already in use in other provisions. In such a context a juristic treatise explicating these recurring terms and their relationships might well constitute a meaningful enterprise. Furthermore, these works, especially that of Ofilius, have also been interpreted as jurisprudential claims to expertise on just what the edict of an urban praetor should contain.[100] This interpretation would help make sense of Pomponius's odd phrasing: the idea that Ofilius was the first to "compose an edict" (*edictum composuit*). The remaining fragments of Ofilius suggest that he did indeed write something like a commentary on an edict; in his formulation Pomponius might simply have picked up on what struck him as the most original aspect of Ofilius's work: that he himself, as jurist, composed an edict, which could be taken to imply that there was no ready-made stable text on which Ofilius could comment.

In a second step it seems worth dwelling on the large amount of controversy that the *lex Cornelia* provoked among contemporaries. As Frier himself suggests, the law faced mainly senatorial opposition.[101] The arguments I have advanced

[96] For a recent contribution that swings completely the other way, suggesting that the praetorian edict was in fact never "codified" or certainly never treated as such, see Filippo Cancelli, *La codificazione dell' edictum perpetuum: dogma romanistico* (Milan: Giuffrè, 2010).

[97] Frier, *The Rise*, 76, 170–71n133, 262.

[98] For our only notice about these texts see *Dig.* 1.2.2.44 (Pomponius).

[99] Mantovani, "Gli esordi," 127–32.

[100] *Dig.* 1.2.2.44 (Pomponius) with Schiavone, *The Invention of Law*, 367.

[101] Frier, *The Rise*, 261. On this law and its effects more broadly see Gallo, *L'officium del pretore*, 68–102; Mantovani, "Praetoris partes," 87–111.

https://doi.org/10.1017/S0738248023000500 Published online by Cambridge University Press

in this article can help us understand why members of the Roman senate, which included all past and many prospective urban praetors, might have opposed the attempt to limit their discretion in composing and altering their edicts: this discretion provided the basis for praetors' ability to both mitigate the risks and reap the rewards of edictal composition. Taking seriously this opposition to the *lex Cornelia* and its sociopolitical underpinnings makes the existence of a slow process of "virtually unconscious change" difficult to maintain. After all, any such process would have had to unfold by the steady accumulation of decisions by the people that strongly opposed the *lex Cornelia*, which after all restricted their discretion in issuing edictal provisions in only a very limited fashion.

Crucially, there is also some direct evidence for praetorian involvement in edictal composition in the first-century CE. At some point during that century a Gaius Cassius was *praetor urbanus*, and we know something about the choices he made in composing his edict. Cassius seems to have deviated from past edicts by not including the *exceptio metus*, only the *exceptio doli*—something in which many later jurists and possibly also praetors do not seem to have followed him. He also introduced a new provision about *restitutio in integrum* that did not end up in the Hadrianic version of the edict. However, another one of his innovations pertaining to heirs seems to have done just that.[102] Deviation from past practice, innovation, and variegated successes of individual choices —these features would appear to be very much in line with patterns that marked the composition of urban praetors in the early first-century BCE. Most likely, though, Gaius Cassius was not just any urban praetor; he was Gaius Cassius Longinus, the famous jurist of the first century CE, which would place his praetorship somewhere between 25 and 27 CE.[103] His renown as jurist explains why we know anything about his actions as praetor: other jurists commented on them, and some of their writings ended up preserved in Justinian's *Digest*. But did his identity as jurist also shape his actions as *praetor urbanus*? Were his compositional practices not only exceptional as regards their preservation but also when compared with those of the praetors coming before and after him?

Our evidence does not seem to allow for definitive answers to these questions. Helvidius Priscus is the only other first-century CE praetor about whose choices in composing his edict I have been able to find any information: unlike many others, he failed to include a reference to the emperor in its heading.[104] However, we may note that in the late 20s CE Cassius was still a rather young man in the early stages of his political and legal career. It is thus unlikely that he made his choices in composing his edict based on an established reputation for legal expertise; if anything, we might read these changes as attempts to claim such expertise and bolster a reputation for legal learning. If that is so, Cassius was probably not the only first-century CE praetor to use

[102] *Dig.* 4.6.26.7 (Ulp. 12 *ad edictum*), 42.8.11 (Ven. Sat. 6 *interdictorum*), 44.4.4.33 (Ulp. 76 *ad edictum*) with Watson, *Law Making*, 56–57.

[103] Richard A. Bauman, *Lawyers and Politics in the Early Roman Empire* (Munich: Beck, 1989), 77–79.

[104] Suet. *Vesp.* 15.

https://doi.org/10.1017/S0738248023000500 Published online by Cambridge University Press

his edict in this way. Many famous first-century jurists had successful political careers, which included holding the urban praetorship.[105] It seems at least possible that there were also some praetors whose claims to legal learning and expertise were not accepted, meaning that they did not make it into the canon of Roman jurisprudence. This speculative reconstruction of a scenario in which urban praetors, also in the first-century CE, continued to involve themselves with the text of the judicial edict that they published would help us make sense of a comment by Seneca the Elder, who wrote in the middle of the first-century CE. Seneca suggested that if a father was running after a midwife for his daughter, he would not stop to read the *edictum* or the schedule of events at the games.[106] The singular *edictum* and its pairing with the schedule of games makes it at least possible that Seneca was indeed thinking of the judicial edict of the *praetor urbanus* in the city of Rome. As such, the passage would seem to suggest that under different circumstances—when no emergency bore down on them, that is—men might well read these annually recurring forms of temporary public writing, possibly because they anticipated that each year, they might indeed be ever so slightly different.

Even if these arguments for some form of continuity between the first-centuries BCE and CE are accepted, there can be little doubt that the rise of the Principate profoundly reshaped the dynamics that informed the compositional practices of judicial magistrates in ancient Rome—most likely restricting the freedom and discretion of individual magistrates. Emperors quickly became an important source of law, and like officeholders, they too instituted and judged trials. Emperors manipulated and reshaped the authority of jurists when they accorded the *ius respondendi* to some but not to others, and they also changed the dynamics of patronage, becoming the most valuable friend and patron to have, not least for senators, whom they increasingly appointed to their offices. Beyond such structural factors it is worth noting that different emperors at different points in their lives might also have taken rather different attitudes toward magistrates and their administration of justice. Suetonius's observation that Caligula allowed magistrates "unrestrained jurisdiction, without appeal to himself" (*liberam iurisdictionem et sine sui appellatione*) remains a tantalizing, if isolated glimpse of such variation.[107] Jurists, too, could imagine praetorian action and discretion in rather different ways. Labeo, the Augustan jurist, who wrote a famous commentary on the edict, conceived of the actions of a magistrate and those of a jurist as separate if related behaviors: as a jurist Labeo gave advice on how praetors should behave and suggested new formulations for provisions that they might include, all the while maintaining that it was up to the praetor to issue his edict; by the end of the first-century CE Sextus Pedius articulated a more integrated vision of the relationship between jurisprudential expertise and praetorian action.[108]

[105] cf. *Dig.* 1.2.2.44–53 (Pomponius, *Enchiridion*).

[106] Sen. *Ep.* 117.30.

[107] Suet. *Calig.* 16.2.

[108] Schiavone, *The Invention of Law*, 367 with *Dig.* 2.4.11 (Paul 4 *ad edictum*), 4.8.15 (Ulp. 15 *ad edictum*), 42.1.4.3 (Ulp. 42 *ad edictum*), 47.10.15.26 (Ulp. 77 *ad edictum*).

https://doi.org/10.1017/S0738248023000500 Published online by Cambridge University Press

The latest testimony for praetorian edicts brings us back to the beginning. In the middle of the second-century CE Aulus Gellius knew that the library on Trajan's Forum in Rome contained copies of *edicta veterum praetorum*, the edicts of praetors of old.[109] Did some early second-century CE praetors still consult the edicts of other, earlier praetors as they were composing their own? Or were these texts merely of antiquarian interest? I tend toward the latter without wanting to categorically exclude the former. But regardless of how this may have been, the expression *edicta veterum praetorum* and the archiving practice to which it testifies would seem to evidence a vision of the edictal past that is very much in line with the intimate connection between edicts and the magistrates that issued them for which I have sought to argue in this article. During the late republic—the period for which our evidence for edictal composition is best—magistrates were considered responsible for the content of their judicial edicts, both in the provinces and in Rome. This condition came with risks and rewards, and the magistrates in question dealt with them in largely two ways: by including new provisions, mostly rather few and often connected to specific policy goals, and by selectively drawing on the parts of Rome's legal past that was safe and uncontroversial, not least to accommodate the needs and demands of their friends and clients in their exercise of justice. Arguably, these dynamics have far-reaching implications—not just for how we think about the history of judicial edicts, but also for how we understand the temporalities of law in ancient Rome more generally.

Edicts, Time, and Politics in Ancient Rome

Legal scholars and historians have long relegated time to the background of their inquiries, treating it as a container, in which legal and historical processes and events could unfold. In recent years, however, time has become the focus of a steadily growing set of inquiries.[110] Today we understand that linear and historicist time—the kind of time that allows and encourages us to treat it as a container—turns out to be only one temporality among many, both historically speaking and within modern-day societies. It has also become clear that the multiple temporalities pervading the worlds that historians and legal scholars study need to be produced, and law can play a crucial role in this process. At the same time, each of these temporalities stands to have far-reaching effects for the people that live in their ambit, also when law operates through distinct forms of time to achieve its effects. As it turns out, law and time are inextricably intertwined, and their relationships deserve untangling, not least in the writing of legal history.

This article has sought to contest a particular aspect of the way in which Roman legal history is told. The traditional narrative about edicts and how they were composed has an important correlative in how their history is imagined. Schichten, layers, strati—these are the constitutive elements of a

[109] Gell. *NA* 11.17.

[110] Sian Beynon-Jones and Emily Grabham, "Introduction," in *Law and Time*, eds. Sian Beynon-Jones and Emily Grabham (London: Routledge, 2018), 1–28 discuss important examples.

https://doi.org/10.1017/S0738248023000500 Published online by Cambridge University Press

multilingual vocabulary that imagines edictal history as a layer cake susceptible to stratigraphic analysis. On one level, this perspective is not wrong, especially from the vantage point of the fixed text of the Hadrianic edict. Some of the provisions that ended up in this second-century CE, final version of the edict of the *praetor urbanus* were indeed older, others more recent. Arguably, though, the geological vision of the edict implies a more substantive account of edictal history than the different ages of individual provisions: it implies a cumulative history for the praetorian edict, in which a provision, once introduced, could be expected to stay in place, unless of course it would be replaced with a later, better version. On this stratigraphic account edictal history was a process of accrual, marked by continual addition and occasional replacement.

If the arguments that I have tried to advance in this paper are taken into consideration, this account would seem to be untenable. Once we zoom into any one of the myriad iterations of judicial edicts in Rome and in the provinces and look to their respective predecessors and successors, the patterns in annual variation that we need to imagine stretch far beyond the existing framework of accumulation and replacement. At the origin of this mismatch lies the fact that existing accounts of edictal history are premised on a linear and historicist notion of time in which legal norms can only exist for continual stretches of time. In so doing, this account fails to recognize the historically specific temporality of judicial edicts in ancient Rome.

A judicial edict, so Cicero famously claimed, was a *lex annua*—not just a law valid for one year, as is often stated, but also a legislative act recurring each year.[111] As a result, judicial edicts, not least in their material form as wooden boards painted white with red and black letter drawn onto them, emerge as crucial technologies in the production of time in ancient Rome.[112] The annual pronouncements of Roman magistrates and the temporary forms of public writing on which they appeared partook in the creation of a future that was certain—until it was not. They constituted a temporality, in which change, or the potential for it, was a regular feature. Every year any one of the words written in the black letters on whitened boards might be different; every year, the (legal) future might change. Variability was the one certain aspect of the futurity that judicial edicts and the political system in which they were embedded produced. Arguably, this temporality and the imbrication of judicial edicts in its production also entailed historically specific attitudes to law.

Law—or rather, the annually recurring materialization thereof in the edicts of the praetors—was up for grabs. It emerges as something that contemporaries might try to shape, each year, with potentially far-reaching consequences for future attempts to do so. Of course, this attitude to law had a distinct distribution in the social worlds of Rome and its empire. A range of factors,

[111] Cic. *Verr.* 2.1.109; for these two meanings of *annuus* see *Oxford Latin Dictionary (2nd Edn)*, s.v. "annuus."

[112] For other temporalities in ancient Rome see Brent Shaw, "Did the Romans Have a Future?" *Journal of Roman Studies* 109 (2019): 1–26 and Astrid van Oyen, "Rural Time," *World Archaeology* 5, no. 2 (2019): 191–207.

https://doi.org/10.1017/S0738248023000500 Published online by Cambridge University Press

including one's place in networks of patronage and one's rhetorical skills and education, will have influenced the degree to which any one person shared this attitude. At the same time, the patterns in legal reasoning in the context of debtors' revolts would suggest that sociopolitical circumstances could conspire to extend this attitude beyond the social elite. As a result, judicial edicts were imbricated in (Roman) politics in more than one sense.

Composing these texts provided members of Rome's political elite, who competed before the Roman people in annual election, with an avenue for gaining exemplary status, veneration among the Roman populace, and the gratitude of their friends and clients. The details of these same texts also provided fodder for those looking to damage their political careers, not least by ending their lives altogether. Arguably, the patterns in annual variation that we should imagine for these edicts were the direct result of this competition for office and glory among the political elite. At the same time, their temporality also made judicial edicts into arenas in which people, at times also beyond the political elite and its networks, could contest and shape socioeconomic dynamics. Overall, then, judicial edicts, as materialization of law, were not set up in opposition to politics. They constituted a legal practice that did not have to break in the face of economic, social, and political struggles, and not because it lay above or beyond them. Judicial edicts could encompass sociopolitical contestation because annually recurring change was their one defining feature. Theoretically, then, they could also encompass revolution, at least for a year.

Acknowledgments. I thank Emily Mackil, Carlos Noreña, and Nikolaos Papazarkadas, whose invitation to speak on "law and revolution" at UC Berkeley in 2018 gave me the first occasion to articulate some of the ideas presented here. The criticism and encouragement of audiences in Berkeley, in the online colloquium "New Work on the Roman Republic," at the Roman Law Group in Edinburgh/St. Andrews, and at the Institute for Ancient History in Freiburg have greatly contributed to their further development. Special thanks go to Caroline Humfress for support and insight along the way. Andrew Pettinger kindly shared and discussed with me some of his ongoing work on the praetorian edict. Kit Morell provided perceptive comments on an earlier version of the manuscript. The suggestions of the three anonymous reviewers helped me further clarify the argument. Leopold Luz and Tommy Benfey helped in the final stages of the editing. All remaining faults are my own.

Lisa Pilar Eberle is Assistant Professor in the Institute of Ancient History at the University of Tuebingen.

Cite this article: Lisa Pilar Eberle, "The Edicts of the Praetors: Law, Time, and Revolution in Ancient Rome," *Law and History Review* (2023): 1–25. https://doi.org/10.1017/S0738248023000500