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Law & Order

Thomas A. J. McGinn

For Luigi Capogrossi Colognesi

JILL HARRIES, *LAW AND CRIME IN THE ROMAN WORLD* (Key Themes in Ancient History; Cambridge University Press 2007). Pp. x + 148. ISBN 978-0-521-53532-8 (paperback). \$80 (cloth), \$29.99 (paperback).

Of late, Roman criminal law has witnessed an increase in popularity as an object of study, yet it remains a vast subject and, like other areas of Roman law, one that is relatively inaccessible to classicists and ancient historians. Perhaps not surprisingly, recent studies have tended to focus on aspects of the subject rather than attempting global coverage.¹ The book under discussion attempts what might be described as a selectively broad survey. Harries, deploying her considerable knowledge of late antiquity to particularly good effect, offers a useful survey of some of the more important aspects of the field. The book may thus be recommended to anyone looking for a point of entry into the subject, and it contains much of interest for the specialist too.

As the title obliquely suggests, Harries is interested in not just "criminal law", but in law, crime, and the society that shaped and was shaped by both. In the Preface she lays out three main themes. One concerns how the work of legal specialists affected ideas about crime and the solutions adopted to confront it. The second examines the rôles played by litigants and court decisions under the Empire as important sources of new law. Third, she pays extensive attention to the perspectives of non-jurists, in particular those expressed by Quintilian, Aulus Gellius, and Apuleius.

A rough summary of the book is as follows. After the Preface and an introductory chapter surveying rival discourses on law and crime and the challenge of measuring the impact of change over time, there come two chapters on procedure, chiefly devoted to the *quaestio* and *cognitio*. Before turning to criminal offenses *per se*, Harries provides a chapter on the private wrongs known as delicts, here almost exclusively focusing on the wrongful infliction of harm to another's property (*damnum iniuria datum*), theft (*furtum*), and affront (*iniuria*). Next come two chapters on "upper-class crime", namely, electoral corruption (*ambitus*), extortion (*res repetundae*), and treason (*maiestas*). After a chapter dealing with an assortment of offenses assumed to be sex crimes, there follow separate treatments of violence and murder. A bibliographic essay, bibliography, and general index round out the volume.

Chapter 1 ("Competing discourses") helps set the stage through a presentation of the author's 'take' on legal discourses, crime and society, jurists and the past, and "the counter-cultures". One concern is to provide a definition of "crime", which she succinctly characterizes as an offense against the community, while acknowledging the difficulties incumbent upon making any such definition. One obstacle is that conceptions changed with Rome's transformation from a city-state to a world empire and the attendant expansion of Roman citizenship. Another lies in the different sources of law. Statute remained of paramount importance for criminal law even as some of the private wrongs known as delicts (in particular, theft) eventually came to be regarded as crimes. Not least challenging are the questions of who controlled the discourse on such matters and who decided what a crime was.

Harries does well to emphasize the influence of moral concerns on crime and law: "moral discourse is inextricably linked with legal process" (1). One sign of this is the importance attached to questions of status, as well as of honor and shame. At the same time, she identifies the social and legal discourses as separate in nature. The disjuncture is perhaps at its widest in the presentation of alternative or "counter" cultures, such as bandits and Christians. Unfortunately, our understanding of these is hobbled by an asymmetry of information, possessing as we do much more information about Roman views of bandits than *vice versa*, and more about

1 I mention here only O. F. Robinson, *Penal practice and penal policy in ancient Rome* (London 2007), which is for the most part a series of case studies.

Christian views of Romans than the other way around. The relatively late appearance of substantial juristic commentary on criminal matters cries out for explanations, even if they must be speculative, especially as the jurists focused on a court system already largely obsolete.

The first of two chapters on procedural matters ("Public process and the legal tradition") examines the *iudicium populi*, the *quaestio*-statutes, process at Rome, the move from *quaestio* to *cognitio*, and the *quaestio*-statutes under the Empire. After a brief review of influences on judicial decisions, with particular emphasis laid on extra-legal factors, Harries proceeds to an examination of the early criminal-trial procedure known as the *iudicium populi*. As the name implies, the People themselves sat in judgment (14):

The key feature of the proceedings was that the debates on the facts were open to all, but the final judgement rested with a formally constituted assembly of the People.

The assembly had to be convened by a (duly elected) public official, and indeed, apart from special circumstances, only tribunes of the plebs, aediles, and quaestors are on record as prosecutors. Since this court was empowered not only to decide on the issue of guilt or innocence but to pronounce on the definition of criminality itself, no enabling statute was necessary.² Thus the scope of cases heard was very broad, in both theory and practice. The community, strictly unfettered by statute, precedent, or the opinions of legal experts, defined and continually redefined what was criminal and what was not.³

In 149 B.C., the *lex Calpurnia* established a court to deal with cases of extortion (*res repetundae*) by provincial governors (an offense initially cast as a delict rather than as a crime, in that the judicial mechanism established by the statute aimed solely at compensating victims). This set the stage for the introduction of a series of similar courts. One innovation here was the court's definition as a standing court (*quaestio perpetua*) — previously, *quaestiones* had been set up only from time to time to deal with specific issues. Another was that the enabling statute or *lex* defined the offense to be investigated and the procedure to be followed. The *quaestiones perpetuae* did not formally displace the *iudicia populi* but over time eclipsed them, as more and more standing courts came into being, notably with Sulla's criminal court reforms of 81 B.C.

The restrictions placed on these courts, also known as the *iudicia publica*, were significant, particularly as a departure from the *iudicia populi*, but they were hardly a straitjacket, at least from a modern point of view. The offenses addressed by the enabling statutes tended to be strictly political in nature such as treason (*maiestas*), identifiably upper-class in terms of milieu such as forgery (*falsum*), or rather obviously a response to a pressing contemporary problem such as violence (*vis*). The jury panels were chaired by public officials, often praetors (or their substitutes, typically ex-aediles), and composed of senators, equestrians or both (this was a notoriously contentious political issue in the Late Republic), apart from that category of 'shadow equestrians', the *tribuni aerarii*. Prosecution was generally left to any Roman citizen, although some statutes placed restrictions on who was eligible, or privileged some over others (the Augustan adultery law is a good example of the latter). Procedures structured not only the trials themselves but expectations about them, and so aided the cause of legal certainty.

Thus, even with the *quaestio perpetua* there was input from the community or, at any rate, from upper-class elements of it, at every stage. The entire community in theory voted the comitial law that established the court, defining (describing, at least naming) the offense, and setting forth the procedures to follow. The People's elected representatives (or their substitutes) oversaw these procedures, while a prosecutor might at any time step forward from the community (sometimes within predefined limits, always within practical ones) while other members sat on the juries (always within predefined limits). Despite the procedural safeguards, jurors enjoyed broad discretion in delivering their verdict, a matter discussed at greater length below.

2 Liv. 26.3.8 (*seu legibus seu moribus*) does not, to my mind, contradict this assumption. Cf. T. Mommsen, *Römisches Strafrecht* (Leipzig 1899) 151 n.1; A. H. M. Jones, *The criminal courts of the Roman Republic and Principate* (Totowa, NJ 1972) 18.

3 Cic., *Dom.* 45, briefly lays out the procedure, which he attributes to the *maiores*. For a fuller discussion, see Jones (*supra* n.2) 1-44.

Chapter 3 ("Cognitio") takes up the procedure known by this term, torture and social status, punishment in theory and practice, and judicial incompetence. Provincial governors held broad powers that were reflected in the exercise of their jurisdiction. They heard civil and criminal cases outside the procedural (and other) framework provided by the Edict and the *iudicia publica* at Rome, so beyond the *ordo* (i.e., *extra ordinem*). For the sake of convenience, many rules were imported from that *ordo*, in part through the agency of the jurists, but the *cognitio* procedure employed by the governors retained a great deal of flexibility all the same.⁴ This flexibility in turn encouraged innovation in the law. Over time, the *cognitio* grew in importance in Rome as well, under the jurisdiction of the Praetorian Prefects and other high officials, eventually supplanting the *iudicia publica*. Harries is ever sensitive to the fact that cases were decided on the basis of other factors besides law, such as "... the skills of advocates and legal advisers, the standing of litigants and their supporters, and the will of the crowd and the prejudices of the judges ..." (33). Governors, and the judges they appointed, might be incompetent (often through ignorance of the law) or even corrupt. When they erred, they tended in the direction of severity.

Chapter 4 turns to the subject of delicts, a series of offenses against private individuals that often straddled the boundary with crime itself and that, especially in the later period, were sometimes treated as such. "A thief in the night" addresses delict and obligation, delict as a civil offense, the *lex Aquilia* and 'unlawful damage', the delict of *iniuria* (often translated as "outrage" or "affront"), Gellius and Gaius on theft, and theft as 'crime'. It is a peculiar feature of Roman law to treat certain instances of what we would define as criminality, such as theft, as species of private wrongs, identified as delicts (in contrast to the modern law of torts), that were pursuable in a civil law forum, at least initially and for a long time afterwards. Like contracts, delicts were classed as obligations.⁵

Harries is concerned to show (44) how these civil wrongs (for which successful plaintiffs might "... expect not merely restitution but also a 'penal' award of a multiple of the damages incurred or the property lost") were transformed into criminal offenses over time or, in her words, "... that the perception of delict as obligation was undermined over time by social perceptions of criminality, which caused the idea of exacting a penalty through compensation to be replaced by that of revenge, which punished the wrongdoer but provided no material benefit for the victim" (45). It is clear from the context that Harries is generalizing from theft to the other delicts, not all of which traveled along the trajectory she describes. This is in part because they were not equally "penal" in nature. The most obvious example is the régime of *damnum iniuria datum* as established by the *lex Aquilia* and interpreted by the jurists. This provided relief for harm that was wrongfully inflicted, "wrongfully" here signifying loss given either intentionally or negligently. The latter meant that *damnum iniuria datum* was not easily translatable into a criminal law régime.⁶

Harries' discussion of theft, especially a comparison of the nearly contemporary discourses of Gaius and Gellius on the subject, contains much of interest. The treatment of the other two major delicts, *damnum iniuria datum* and *iniuria*, is less sure. For example, a rapid and abbreviated summary of developments in the former (45-46) appears to place the praetorian development of actions *in factum* before the passage of the *lex Aquilia*. In fact, the dates of that statute and of the introduction of liability for harm inflicted through negligence are uncertain, and highly controversial.⁷ The verbs in the third chapter of the *lex Aquilia* (*usserit*

4 Harries avoids, where possible, the expression *cognitio extra ordinem* not so much as dubious Latin, but because it can confuse the non-specialist: there was nothing "extraordinary" about this procedure (9 and 29-30).

5 See Gaius, *Inst.* 3.88, 182, who specifies that every obligation arises either from delict or from contract.

6 *Damnum iniuria datum* was not the only delict where liability might arise from wrongful conduct that was not intentional in nature. For example, the standard under *pauperies* (for damage caused by domestic animals) was one of strict liability. See T. A. J. McGinn, "A conference on Roman law: the future of obligations," in preparation.

7 On the controversy raging around these subjects, see M. F. Cursi, *Iniuria cum damno: antigiuridicità e colpevolezza nella storia del danno aquiliano* (Milan 2002) 147-219 and 271-84.

fregerit ruperit) are better translated as "burning", "breaking", and "rending" than "burning", "breaking", and "destroying", as Harries would (46);⁸ she then proceeds (47) to confuse the latter two in a discussion of an important text.⁹ The main difficulty of the chapter to my mind, however, is that it does not adequately map out the frontier between crime and delict.¹⁰

Chapter 5 ("Controlling elites I: *Ambitus* and *Repetundae*") is the first of two on the problem of managing the behavior of members of the upper classes. As the title indicates, it deals with the crimes of electoral corruption and extortion by provincial administrators, with an analysis of the latter extending in some detail over the Republic, Principate, and late antiquity. Regarding these crimes, Harries postulates: "Too much was left to the skills of advocates, the personal influence of the defendants and the prejudices of the judges" (59). One is tempted to ask: too much for the Romans, or too much for us? To be fair, such questions go beyond the scope of this book, but I would argue that they are central to our understanding of the peculiar nature of Roman criminal law, which was, as Harries repeatedly emphasizes, highly exposed to extra-legal factors. While we might tend to regard this as suspect, there are repeated suggestions in the ancient record that this was, more or less, what the Romans wanted.

Of course, this preference helped raise the specter of corruption, which the authors of laws enabling the prosecution of *repetundae*, for example, were at pains to confront, as Harries shows well. For me, however, this fact undercuts her assertions that the sustained Late Republican controversy over jury composition was a "sideshow" or "distraction" (64-65). Granted, jury composition was a supremely political issue, but it was one which also had crucial implications for perceptions (and more) of justice in the *iudicia publica*. As my description (above) of the community input into the operation of the criminal law should make clear, only a certain sector of that community routinely saw its interests served in the context of the *quaestiones perpetuae*. These were courts established to punish upper-class criminality, where members of those upper classes sat in judgment of their peers. Tensions among groups on the level of the élite might distort the outcome of a trial. Sympathy of some jurors for some defendants threatened the integrity of the system. This remained a problem under the Principate, when senators were tried for criminal offenses by other senators (68).¹¹

Chapter 6 ("Controlling elites II: *Maiestas*") follows a similar track, tracing developments in the Late Republic from Saturninus to Caesar, under the Principate, and on to late antiquity. First, Harries does an expert job situating, in a highly concise manner, the development of the law on treason in its political context. She identifies two strains of treason: an older one identified with threats to the physical security of the Roman community (*perduellio*), and a more recent type characterized in more openly political terms as damage to the greatness of the Roman people (*maiestas*). The latter famously took its beginning with the *lex Appuleia* of 100 B.C., which traces its roots to a series of tribune-prompted prosecutions of incompetent or corrupt optimate generals through the *iudicia populi* and the *quaestio Mamilia*. Harries rightly points out (73) the paradox of a reduced rôle for the people as a judge in its own case through the introduction of a standing court, though of course this was mitigated somewhat by the *populares'* strategy of assigning equestrians to the juries in place of senators.

Harries seems right to suppose that L. Appuleius Saturninus, the sponsor of the first enabling statute on *maiestas*, did not define the offense, making it a flexible legal and political instrument: *maiestas* was precisely what the courts said it was. The really interesting question is to what extent this rendered treason different from other crimes that the laws did trouble to define. Sulla attempted to restrict its application, evidently without much success. As Harries points out, with his law we have the further paradox of a partisan of the *optimates* legis-

8 Ulp., *D.* 9.2.27.5 has the statutory language. For the translation, see B. W. Frier, *A casebook on the Roman law of delict* (Atlanta, GA 1989) 6.

9 Mucius-Pomp., *D.* 9.2.39; see Frier *ibid.* 34 for an accurate translation.

10 This problem is tackled rather more effectively in a section in chapt. 8 (111-15), in the context of a broader discussion of civil remedies.

11 The section on *repetundae* in late antiquity contains very useful remarks (69-70) on fines as penalties for official misconduct.

lating on *maiestas* (75). Julius Caesar, perhaps paradoxically for a *populares* politician, made a great effort to define the crime in detail in his law, to judge from the account of it given by the Severan jurist Ulpian.¹² Despite its characterization as the *lex Iulia maiestatis*, the focus of the statute was evidently placed on *perduellio*.

Not even the vicissitudes of the Late Republic prepare us for what happens in the reign of Tiberius. He allowed or encouraged innovations in penalty, procedure (the Senate becomes the principal venue for prosecution, as with other offenses committed by members of the *ordo senatorius*), and the definition of the crime, which comes to be construed rather broadly. *Maiestas* was now what the emperor allowed the Senate to say it was. Tacitus shows how, once these brakes were relaxed, political competition manifested through treason trials savaged the *ordo*. The phenomenon is characteristic of the latter part of Tiberius' reign, which may be contrasted with that of Augustus continuing into the first years of his successor, when a greater concern can be traced to manage aristocratic competition, for example, through legislation.¹³ Harries makes a series of excellent observations here, particularly concerning imperial management of the upper classes as accomplished through an artful mix of law with terror, a policy that continued long after Tiberius. Regarding late antiquity, she shows how treason 'went viral' in the *Codex Theodosianus* and how the tension between the strains of *maiestas* and *perduellio* never quite played itself out.

In chapt. 7 ("Sex and the city"), amid reflections on law and morality, Harries treats abortion, rape, *incestum*, and adultery, devoting particular attention to the latter. She discusses in turn the Augustan adultery law, Quintilian and school exercises that deal with the statute, the penalties inflicted by the latter, and adultery in late antiquity. I am no less guilty with the title of this review (taken from that of a popular American television series), but let it be said that there is very little "city" in this chapter, and no indication that these offenses were somehow more urban than the ones discussed elsewhere. As for the "sex", the Romans themselves do not seem to have regarded abortion as a sex crime, but as an infringement of the rights of a *pater familias* and/or husband to produce offspring. Like modern feminists, they treated rape as a crime of violence, and it is clear from what she writes that Harries agrees.¹⁴ Why not discuss it in chapt. 8?¹⁵

The heart of the chapter concerns adultery. Harries places the criminalization of this behavior, in the context of "Augustus' broader interest in families in general" (95). She emphasizes how the creation of the standing court to deal with this offense made it necessary to provide for greater interaction between the legal order and the social institution of the family. She is equally interested in what might be termed the Severan reception of the statute, in a period when it received a great deal of particularized attention in the form of juristic commentaries (and renewed imperial repression). She detects here a "greater recognition of women's rights than Augustus would have accorded" (101). Just so, but it was precisely the *lex Iulia* itself that helped set the stage for an enhancement of women's status under the Principate. The holdings of the Severan jurists Harries cites are but the late fruits of that development.

The most important part of the chapter concerns Quintilian and school exercises regarding the adultery statute. In barely two pages Harries lays down an engaging (though not utterly new) thesis about the relationship between this literary genre and the law. She concedes that Quintilian's aim here was not to state in accurate fashion the legal particulars but to provide the minimum amount of information necessary for the rhetor's pupils to construct their arguments. Given that the law was, as any Realist will tell you, what the courts said it was, what mattered more than the details of black-letter law was the mastery of techniques that would influence the emotions of the judges. Harries views Quintilian's ultimate purpose as not

12 Ulp., *D.* 48.4.1.

13 See T. A. J. McGinn, "Something old, something new ... : Augustan legislation and the challenge of social control," *Ancient History Bulletin* 22.1-2 (2008) 1-32.

14 See Marcian, *D.* 48.6.3.4 (rape is *vis publica*), cited by Harries (88).

15 To the author's credit, it does come up for mention in this chapter (111).

to teach actual law but potential law.¹⁶ Rhetoric and the courts provided a kind of laboratory in which new legal solutions could be worked out. The idea has much to commend it, but one might wish all the same for some acknowledgment of the differences (which remain important) between rhetoric and law.¹⁷

Chapter 8 ("Remedies for violence") surveys violence and the crowd, the *lex Iulia de vi* and its commentators, and civil remedies. As in the chapter on treason, Harries does a good job of placing legal developments in the turbulent political context of the Late Republic. Violence was as Roman as *panis farreus*: "To legislate against violence was to seek to inhibit forms of behaviour endemic to Roman culture" (106). Complications (that were perhaps predictable) ensued in the framing and implementation of relevant legislation. The author is alert to the fact that Roman ideas on "legitimate violence" might be very different from our own.

Chapter 9 ("Representations of murder") deals with the *lex Cornelia* and the *SC Silanianum*, Apuleius (process and parody), the trial of Apuleius, and magic and deviance. Harries points out that killing was not always "wrong" or at least against the law" (118). She cites killing enemies in war, as well as outlaws, thieves and adulterers (the latter two in certain circumstances) and assailants in self-defense. Both are relevant examples (in the first case, she might have cited the consequences of declaring a fellow-citizen a *hostis*),¹⁸ but perhaps more interesting is the question of non-intentional killing. Intentional, unjustified "murder" was famously punished by the *lex Cornelia de sicariis et veneficis* in 81 B.C., which, if it did not function from the start as a generalized murder statute, did so before too long. Liability for non-intentional, unjustified killing was late in coming and restricted in scope, with a large measure of discretion left to public officials.¹⁹ One can draw an important distinction between the Sullan law and the *SC Silanianum* (A.D. 10), which punished household slaves for the killing of their masters under a standard of strict liability.²⁰

The heart of the chapter concerns the theme of deviance, as exemplified by Christianity and above all magic. Of particular interest is the author's reliance on modern theories of deviance, especially the process of "labelling". Harries is again able to suggest how easily "the will of the people could become the law" (131).

The useful Bibliographical Essay might have included, as others do in the *Key Themes* series, items published in languages other than English. The need for such citations is acute in any area of Roman law, a field for which English is far from being the most important language in the secondary literature. It is a general weakness of this book that it does not depend more on Continental scholarship than it does.²¹

16 Harries overplays her hand, however, with use of the word "subvert" (103).

17 The section on statutory penalties is a little disappointing. There is, for example, no real room for doubt about the death penalty, despite Harries' hesitations. The references to this in sources dating from before the death of Constantine (*Alex. Sev. C.* 9.9.9 [224]; *Diocl., Max. C.* 2.4.18 [293]; *Constantinus C.* 9.9.29[30].4 [326]; cf. *Inst.* 4.18.4) were convincingly (and long ago) shown to be interpolated: A. Esmein, "Le délit d'adultère à Rome et la loi Julia de adulteriis," in id., *Mélanges d'histoire du droit et de critique: droit romain* (Paris 1886) at 111-12; B. Biondi, "La poena adulterii da Augusto a Giustiniano," in id., *Scritti giuridici 2* (Milan 1965) 47-74 (= *Studi Sassaresi* 16 [1938] 63-96); J. Beaucamp, *Le statut de la femme à Byzance (4^e-7^e siècle)*, 1: *Le droit impérial* (Paris 1990) 166 with n.157, against the view of Mommsen, *Strafrecht* (supra n.2) 699, who argues for the introduction of this penalty in the 3rd c. Aside from a special case involving slaves convicted of adultery (I omit of course the *ius occidendi*), the death penalty makes its first legitimate appearance in *Constantius, Constans CTh.* 11.36.4 (339).

18 Cf. the discussion at Harries 129, which comes very close to making this point. On this subject, see now J. E. Gaughan, *Murder was not a crime: homicide and power in the Roman Republic* (Austin, TX 2010) 126-31.

19 The distinction is obscured by Harries. See A. Wacke, "Fahrlässige Vergehen im römischen Strafrecht," in id., *Unius poena – metus multorum: Abhandlungen zum römischen Strafrecht* (Naples 2008) 1-62 (= *Revue int. des droits de l'antiquité* 26 [1979] 505-66); E. Höbenreich, "Überlegungen zur Verfolgung unbeabsichtigter Tötungen von Sulla bis Hadrian," *ZSav* 107 (1990) 249-314; A. M. Riggsby, *Crime and community in Ciceronian Rome* (Austin, TX 1999) 55 and 78.

20 See McGinn (supra n.6).

21 The bibliography itself is not exclusively anglophone, but one misses, for example, any reference to the

Discussion

Given the compression of material and argument, some disagreement seems inevitable, and I think it important therefore to conclude by emphasizing one of the book's more significant contributions. It concerns the theme of outside influence on the Roman criminal law, which I believe can serve as the point of departure for fruitful investigation in the future, perhaps in part through the deployment of a comparative perspective.

Different legal systems manage in different ways the almost inevitable tension between a desire for legal certainty and a predictable outcome in similar cases, on the one hand, and the wish to evaluate each case on its own merits, without being obstructed by precedent or rules (procedural or otherwise), on the other. In the first instance, there is often a concern to guard against bias for or against the defendant, who might be thought vulnerable to such in the absence of a strict application of the rules. The second privileges a broad consideration of context through the application of flexible rules (sometimes flexible to the point of being "guidelines" rather than rules) in order to paint a "big picture" of the case in question. Both of these ideologies aim at justice, if by notably different means. In other words, the idea under both scenarios is to enable finders-of-fact, whether identified as judges or juries, to reach a "fair" verdict. Rarely, if ever, does one or the other stand forth in its pure form, so we are left to place manifestations in a given culture along a spectrum. Modern systems tend to fall fairly far along the first part of the spectrum as just described, though of course there will be disagreement on where precisely to locate the contemporary American system, for example.

The Roman criminal courts both in the form of *iudicia populi* and that of *quaestiones perpetuae* shared a few important characteristics. There was no independent judge or legal authority to give instruction on what substantive law to follow. There was no binding precedent, in the form of previously decided cases. A wide variety of evidence of a non-legal nature that we would consider irrelevant to the case in question came before the finders of fact. This meant contextual information, including that bearing on the background to a trial, the character and conduct of the parties beyond the commission of the offense itself, the anticipated impact of the sentence on the defendant(s) and/or society at large. Moral blame mattered, as did considerations of equity. The juries reached verdicts by majority vote without (as far as we can tell) deliberation or discussion. The composition of the juries, as with other aspects of the criminal courts, was closely linked to fundamental questions of political structure. The advent of the *cognitio* system changed surprisingly little in this picture.

There is in fact an important debate among experts on this subject which is impossible to ignore. Scholars disagree over the precise way in which the interface between law and society worked and its significance in particular for the Roman criminal courts: some argue that they were utterly politicized and that the juries had scant regard for the truth, while others hold for the primacy of the rule of law. The former view is more common, the latter more recent. E. S. Gruen, in a work on the pre-Sullan and Sullan criminal courts, sees politics at work:

The elaboration of legal techniques and the evolution of judicial machinery were wrapped up in politics almost from the beginning and continued to be subject to the vagaries of politics in the period of 149-78 ...

A political trial may be defined independently of the charge involved: a criminal prosecution motivated by political purposes... [the purpose of the system of criminal courts] ... was largely political, not legal or administrative.²²

Gruen views the significance of these courts to lie in functioning as a means to settle factional disputes, in allowing foreign crises to act as a pretext for seeking political vengeance in a judicial setting, and in offering a venue for the pursuit of personal or family feuds; "these various elements are by no means mutually exclusive".²³

numerous and important works of C. Venturini. Other examples (which are but the tip of the iceberg) are mentioned above in the notes.

22 E. S. Gruen, *Roman politics and the criminal courts, 149-78 B.C.* (Cambridge 1968) 6 and 286.

23 Gruen *ibid.* 285.

In a subsequent book devoted in part to the post-Sullan criminal courts, Gruen holds to a very similar line:

Where evidence is full, it is possible to discern a multiplicity of motives that induced men to engage in the *iudicia*: private quarrels, familial rivalries, ambition to put one's talents on display, personal obligations, political contests, and public issues. Results also varied. More prominent individuals generally secured acquittal ... The verdict in any individual case was not crucial. The trial itself was the important event: a forum for propaganda and a vehicle for political ambition and rivalry.²⁴

Over a decade later, H. C. Gotoff, in an analysis of Cicero's *Pro Caelio*, makes the following generalization:

In his judicial speeches the only thing Cicero needs to create in his listeners is a disposition to acquit. Whether they should so vote because the charges against his client are dismissed as irrelevant, disproved as false, or despised as a cover for the character assassination of his client is a secondary matter.²⁵

In a later essay he writes:

The implication ... that fact and law mean less in a judicial speech than imagination, psychology, and showmanship, would not have surprised Cicero's contemporaries or earlier generations of Roman orators.²⁶

That this view had become the dominant one by the early 1990s seems confirmed by two other contributions. The first, by P. R. Swarney, views Roman criminal trials in the Late Republic as fundamentally contests over honor and status, a conclusion reached on the basis of a survey of three Ciceronian speeches:

The thrust of the cases for and against will be seen as attempting to enhance the social stature of one side, and of all associated with it, and to diminish the other either brutally or gently as the circumstances required ...

What we witness in these events is less a judicial and more a social occasion.²⁷

Second is a review by J. E. G. Zetzel in which he declares:

Truth is not an issue in a Ciceronian forensic oration: winning is. Indeed it is arguable that no client defended by Cicero was "innocent" in strict law of the crime of which he was accused: it is perfectly clear that Cluentius, Archias and Sestius were guilty as charged, not to mention Murena, Flaccus and Milo...

... truth itself, the guilt or innocence of Cicero's client, was rarely very important.²⁸

It was not long afterwards that a reaction arose, as other scholars asserted the importance of a rule of law to the Roman criminal courts of this period. First, A. M. Riggsby argues that:

The problem has been a tendency to underestimate drastically the 'relevance to the case' of many of Cicero's arguments ...

... Roman courts were understood primarily to establish whether defendants had or had not committed certain reasonably well-defined crimes ...

The express purpose of the Roman *iudicia publica* (as defined by legal, rhetorical, and philosophical texts and even the name of the institution) was to determine whether or not defendants had violated the various 'criminal' statutes which established them.²⁹

M. C. Alexander declares himself to be in basic agreement, asserting that:

The legal question before Roman juries was whether the defendants did or did not seem to have violated the law.³⁰

24 E. S. Gruen, *The last generation of the Roman Republic* (1974; rev. edn. Berkeley 1995) 310; see also 356-57.

25 H. C. Gotoff, "Cicero's analysis of the prosecution speeches in the *Pro Caelio*: an exercise in practical criticism," *CPh* 81.2 (1986) at 123.

26 H. C. Gotoff, "Oratory: the art of illusion," *HSCPh* 95 (1993) at 293.

27 P. R. Swarney, "Social status and social behaviour as criteria in judicial proceedings in the Late Republic," in B. Halpern and D. W. Hobson (edd.), *Law, politics and society in the ancient Mediterranean world* (Sheffield 1993) at 139 and 155.

28 J. E. G. Zetzel, review of C. Craig, *Form as argument in Cicero's Speeches*, *BMCR* 94.01.05 (1994).

29 A. M. Riggsby, "Did the Romans believe in their own verdicts?" *Rhetorica* 15.3 (1997) at 237 and 248.

30 M. C. Alexander, *The case for the prosecution in the Ciceronian era* (Ann Arbor, MI 2002) at 36.

It is worth pointing out that none of the authors in either camp represent a "pure" form of their argument, in that any of them are, despite the contents of the selections of quotations offered above, utterly unwilling to admit the validity of the other point of view. For one thing, qualifiers ("primarily", "largely", "rarely") abound. Occasionally there is a frank admission to this end. For example, Gruen concedes:

Whatever the political machinations behind the scenes, Roman jurors might still render verdicts on the merits of the case.³¹

Alexander, in turn, admits

... factors other than fact and law played an important role in a Ciceronian speech ...

... Plausibility was, after all, the issue, for the prosecution as well as the defense.³²

Both sides tend to ignore or elide distinctions between law and rhetoric or, more narrowly, between what evidence the Romans deemed relevant or irrelevant as against what was legal or extra-legal in nature. The Romans evidently found it difficult to prove wrongdoers guilty of their wrongdoing and wanted to leave a very broad discretion to the finders of fact regarding this very issue. So they allowed, or even encouraged, private prosecutors with personal or political motives to step forward. Such persons could, we may presume, be counted on to assemble the necessary evidence and present it as effectively as possible. The defense could be counted on to point out such motives to the jury, if by chance the latter were unaware of them from the start. There was no effective rule excluding categories of evidence, as in modern courts, so that much that was extra-legal might count as relevant. The scope of evidence allowed was broadened by collapsing what we regard as two distinct phases of the trial, the finding of guilt and the passing of sentence. The burden of proof of guilt was low, corresponding more to our civil one of preponderance of the evidence, rather than to our criminal standard of proof beyond a reasonable doubt.³³

Despite some assertions to the contrary, the presentation or discussion of evidence bearing on a defendant's guilt is not far to seek in the context of the Roman criminal trial. Even a casual perusal of Cicero's *Verrines* is enough to prove this point, and this is far from being an isolated case. In the *Pro Caelio*, for example, Cicero at one point recites four separate charges leveled at his client, and goes on to spend a good portion of the remainder of his speech refuting a fifth.³⁴

This is hardly to deny the abundance of extra-legal material in the extant evidence (which for the most part consists of Cicero's speeches). To remain with the *Pro Caelio*, while we lack the texts of the relevant statute(s), it is scarcely credible that Roman laws on *vis* or any other criminal offense stipulated an affirmative defense exonerating otherwise guilty defendants who had appropriately sympathetic and/or sorrowful fathers. And yet Cicero does not hesitate to trot out poor old M. Caelius Rufus the Elder to score whatever points he might, in no small part because the man's lifestyle and his relationship to his son had evidently been part of the prosecution's case.³⁵ This material is indeed extra-legal, but not for that reason irrelevant. We may rely on the judgment of Cicero, a superb orator at the height of his rhetorical powers when he delivered this speech in 56 B.C., as a guarantee of this fact. How then to reconcile the apparent inconcinnity between legal and non-legal factors?

The most plausible solution lies between the two perspectives presented above. In fact, Roman criminal courts seem to have practiced (or, at minimum, were thought capable of practicing) a form of what we might term "jury nullification",³⁶ in which the jurors might ignore

31 Gruen (supra n.24) 265.

32 Alexander (supra n.30) 32 and 35.

33 See Alexander *ibid.* 35.

34 Cic., *Cael.* 23.

35 Cic., *Cael.* 3-4 and 79-80.

36 For a definition, see B. A. Garner (ed.), *Black's law dictionary* (8th edn., St. Paul, MN 2004) 875: "A jury's knowing and deliberate rejection of the evidence or refusal to apply the law either because the jury wants to send a message about some social issue that is larger than the case itself or because the result dictated by law is contrary to the jury's sense of justice, morality, or fairness". This does not address the question of exactly what type of jury nullification operated at Rome. For a sense of the

the evidence and either acquit an obviously guilty defendant or convict someone, not because they were convinced he committed the crime he was charged with, but because of his perceived bad character. In his defense speeches, Cicero is ever at pains to thwart this latter possibility, suggesting it was a very real one. I think it strictly impossible, given the state of our evidence, to prove that this is what happened in any given case, but the extant record in a number of Roman criminal cases would be rendered unintelligible by an assumption that it could not. More routinely, Roman criminal juries reached their verdicts on the basis of evidence that was both legal and non-legal in character, some of which we would not regard as relevant to the case in question. Thus we have the radically direct and fairly continuous importation of community norms into the law.³⁷

The most obvious point of comparison to this system are the Athenian civil and criminal courts of the late 5th and 4th c. B.C.³⁸ Here too there is significant disagreement among scholars about the nature of the system: some hold that it was fundamentally social rather than legal, thus affording a venue for the contestation of social rank and honor, while others assert the supremacy of the rule of law, though disagreeing about exactly how this worked. The most persuasive view is that the Athenian courts were a mixture of both, in that they provided an arena for struggles over status and adopted a broad (and complex) notion of what was relevant as evidence, but that they were primarily legal institutions assigned the task of delivering a just verdict, meaning one that was ideally consistent with both the laws and commonly-shared norms and values.³⁹

As will be clear, this is, broadly speaking, the view I take of the Roman system, without arguing that the two were identical. One important difference is that Rome's private law system was very different from the criminal, unlike what we find with Athens. In the Roman private law it is possible again and again to trace the importation of social values into the legal rules, but with the important distinction that the former were filtered through statute (occasionally) and (above all) juristic interpretation.⁴⁰ Given the original and striking contribution that the jurists made to the private law, the question arises as to why something similar did not occur in the criminal field. The obvious response (and one worth examining in greater detail than is possible here) is that the Romans preferred to maintain a criminal system that was highly permeable to community input, whether political, moral or even legal, without erecting a screen managed by a body of legal professionals responsible for developing an autonomous system of (private) law. Their choice was far from an inevitable one, as the Athenian

possibilities, see T. A. Green, *Verdict according to conscience: perspectives on the English criminal trial jury, 1200-1800* (Chicago 1985) xviii; D. K. Brown, "Jury nullification within the rule of law," *Minnesota Law Review* 81 (1997) at 1171-96. For a recent, partisan discussion of this subject, which is a highly controversial one in modern law, see A. J. Parmenter, "Nullifying the jury: 'the judicial oligarchy' declares war on jury nullification," *Washburn Law Journal* 46 (2007) 379-428. For relevant bibliography and cases in the U.S.A., see T. L. Conaway et al., "Jury nullification: a selective, annotated bibliography," *Valparaiso Univ. Law Review* 39 (2004) 393-443.

37 There are scattered acknowledgments of this fact throughout the book under review (e.g., pp. 102 and 127). But it is impossible to place Harries squarely within the terms of the debate over the nature of the Roman criminal courts, given that her observations on the subject are vague and a little inconsistent (cf. 59 and 103).

38 See, e.g., D. Cohen, "Crime, punishment, and the rule of law in Classical Athens," in M. Gagarin and D. Cohen (edd.), *The Cambridge companion to ancient Greek law* (Cambridge 2005) 211-35; S. C. Todd, "Law and oratory at Athens," *ibid.* 97-111; A. Lanni, *Law and justice in the courts of Classical Athens* (Cambridge 2006).

39 This is the view of Lanni (*ibid.*), who recognizes a distinction between the Athenian (civil and criminal) popular courts, on the one hand, which correspond to the description in the text, and the courts that dealt with homicide and maritime (contract) cases, on the other, which had tighter rules of evidence. For the scholarly controversy, see Lanni 1-2.

40 At Rome, the enabling statutes behind the system of *quaestiones perpetuae* provided a legal framework that functioned to an extent as a constraint on the operation of the criminal courts (though much less than we would expect to find in a modern context); see above. I would argue that the *iudicia populi* more closely corresponded to the Athenian model, but emphasize that this is merely a matter of degree.

example suggests. At stake were not only conceptions of justice that diverge from our own, but the safety of the community, its individual members, and even the continued existence of aristocratic government at Rome.⁴¹

We can see emerge some developments crucial for our understanding of the institutional framework the Romans developed over time for their criminal law. Some of these concern changes in the basic design of the courts, such as the transition from the *iudicium populi* to the *quaestio perpetua*. Such changes were anything but isolated and evolutionary; rather, they show every sign of being strongly linked to the pressing political issues of the time. So at least part of the explanation for the switch can be discovered in anxieties shared by members of the aristocracy over controlling the behavior of its members. The move from the latter to the *cognitio* and Senate as venues for criminal trials is highly determined by the transition from Republic to Principate. There is no consistent development we can trace in the direction of the rule of law, certainly for a very long period of time, although eventually the jurists began to play a greater rôle, both in administering justice and in composing commentaries on criminal law statutes.

The transition from the *iudicium populi* to the *quaestio perpetua* represents, then, a deliberate choice, but not necessarily a fully rational one. It may have been as much or more a perception of the former's failure than a reasonable expectation of checking criminality or asserting élite control over fellow aristocrats (and, beyond them, society as a whole) that motivated the change. An economic analysis is tempting, but challenging to make. One may wonder whether the system of standing criminal courts was cheaper and more cost-effective as a system than what preceded or, especially if measured on a per-trial basis, the reverse was true.⁴² This is a point to be debated elsewhere, but it is worth observing that the *cognitio* consistently offered these advantages over both preceding systems, advantages that perhaps came to be recognized in part thanks to the typical reliance on the single *iudex* as finder of fact in private law litigation.⁴³

While I have tried to offer a description (or at least the beginnings of one) for the nature of the Roman criminal court system, presenting in some measure what it set out to accomplish, any substantial evaluation of its actual achievements must be reserved for another place. Did it enjoy success either in making clear and precise statements of a moral character that spoke to broad community norms or in fostering the development of a rule of law in criminal matters even remotely comparable to what the jurists were able to accomplish in this period (and subsequently) for private law?⁴⁴ Did the Romans achieve justice, on their own terms, or did an emphasis on flexibility and equity devolve into sheer inconsistency, unpredictability, and the triumph of personal and partisan advantage over the public good? Such considerations take us far beyond the scope of this book, but it is a tribute to *Law and crime* that this rich and stimulating study encourages the reader to want more, rather than less.

tajmcginn@gmail.com

Vanderbilt University, Nashville

41 At Athens, it was customary in criminal law prosecutions to invoke the "conceptual nexus" of the rule of law, prosecutors, jurors, and the interests of all citizens in the security of the community defined precisely as a democratic polity, at times to the extent of collapsing the distinction between vengeance and punishment that the rule of law and procedures for public trial of (alleged) wrongdoers were designed to uphold: see Cohen (supra n.38) 218-25. For similar rhetoric from a Roman context, we find Cicero in his *Verrines* identifying the interest of the prosecution not only with that of the Roman people writ large, but very specifically with that of the senatorial jurors as exponents of aristocratic government, about to lose their monopoly of the juries for the *quaestiones perpetuae* in the teeth of the *lex Aurelia iudiciaria*, passed later that year (70 B.C.): Cic., *Verr.* 2.5.166-79.

42 Such questions seem rarely to be asked. See Jones (supra n.2) 25.

43 The Athenians do not seem to have been motivated by containing costs, at least as a primary consideration. Numbers of jurors ranged from 200 to 400 for private cases to 500 or multiples thereof for public ones: Todd (supra n.38) 100 n.13. Juries under the *quaestio* system reached a maximum of 75 under the just-mentioned *lex Aurelia iudiciaria*: O. F. Robinson, *The criminal law of ancient Rome* (London 1995) 4.

44 For the latter, see B. W. Frier, *The rise of the Roman jurists: studies in Cicero's Pro Caecina* (Princeton, NJ 1985).