Law and Crime in the Roman World

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What was crime in ancient Rome? Was it defined by law or social attitudes? How did damage to the individual differ from offences against the community as a whole? This book explores competing legal and extra-legal discourses in a number of areas, including theft, official malpractice, treason, sexual misconduct, crimes of violence, homicide, magic and perceptions of deviance. It argues that court practice was responsive to social change, despite the ingrained conservatism of the legal tradition, and that judges and litigants were in part responsible for the harsher operation of justice in Late Antiquity. Consideration is also given to how attitudes to crime were shaped not only by legal experts but also by the rhetorical education and practices of advocates, and by popular and even elite indifference to the finer points of law.

JILL HARRIES is Professor of Ancient History in the School of Classics at the University of St Andrews.

KEY THEMES IN ANCIENT HISTORY

EDITORS

P. A. Cartledge
Clare College, Cambridge

P. D. A. Garnsey
Jesus College, Cambridge

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Preface

Crime is a large topic. So too is law. The relationship of crime to law and of both to the society affected by harm done to it raises numerous issues for the lawyer, the historian and the sociologist. Crime is a moral and social, as well as a legal, problem. It therefore attracts the attention not only of legislators, the police, the courts and judges but also of modern film makers and novelists, drawn to an ever-present implied conflict between good and evil. The popularity of modern fiction on detectives in the ancient Roman world, Stephen Saylor's Gordianus the Finder and Lindsey Davis's M. Didius Falco to name but two, testifies to the abiding fascination of the figure of the detective, given extra appeal by his location in the exotic and safely distant antique world.

This book is about how the Romans thought about and discussed offences against the community, who formulated the rules and conventions about crime and how they worked. It is not therefore a manual of criminal law, and discussion is not confined to legal writers, although the ancient jurists, or legal interpreters, are extensively represented. Choice of themes has been, inevitably, selective. One is the impact of legal traditionalism on how crime was discussed and dealt with; a tension existed between legal convention and social values, which affected the ability of the discourse – though not of the judicial system – to adapt to changing perceptions of what crime was. A second is the role of litigants and court decisions under the Empire; this book suggests that sometimes they, rather than the emperors at the centre, were the motivators of changes, not always, from a modern perspective, for the better. And, thirdly, extra attention is given to perspectives on law and crime other than those of the legal specialists. Three writers are especially prominent: Quintilian, the former advocate and teacher of rhetoric under Domitian in the late first century AD; Aulus Gellius, the engaging antiquarian, from Antonine Rome; and Apuleius of Madauros in Africa, rhetor, novelist and alleged practitioner of the black arts.

Contents

Competing discourses

Defining crime is harder than might be expected. We all think we know what is bad or wicked or what might be termed in general usage 'criminal'. We may also have some ideas about the functions of the 'criminal justice system', and its purpose, to punish, deter and/or reform the 'criminal' and keep the law-abiding majority safe. Dissatisfaction may be expressed – to the alarm of politicians – if the system apparently fails in its purpose. Crime statistics will be offered to show progress (or not) in dealing with 'the problem of crime'; other indicators will be used to ascertain if the 'public' feel more or less safe in their homes or on the streets. 'Policing methods' may be debated and the sentences handed down by judges criticised. Moral discourse is inextricably linked with legal process: 'evil' people are expected to receive due punishment through the courts.

Crime is the concern of every citizen, and in the Roman world, as now, it may be defined, provisionally, as an offence against the community. In England the criminal is proceeded against by the state, as 'Regina (or, in Scotland, 'Her Majesty's Advocate') versus X'. At Rome, however, the role of policing was limited (Nippel 1984). Although there were 'public courts' of various kinds, there was no police authority to conduct investigations or construct 'public' prosecutions, which were largely left to the initiative of individuals. The Twelve Tables, dated to *c.* 450 BC, stated that the main responsibility for producing a defendant in court lay with the plaintiff in any action, and he was entitled to 'lay hands' on the defendant to ensure compliance (XII Tables 1.2; 3.2). This is an expression of self-help justice, which would prove remarkably durable throughout Roman history, although, as we shall see, legal procedures for the trial of 'public' offences varied considerably over time, involving People's courts, public courts, and judges sitting alone.

Variations in process evolved in parallel with the changing nature of the Roman 'community of citizens' or *civitas*. Rome grew from a small town on the Tiber, established in the eighth century BC, to a world empire, the

western part of which, including Italy, ceased to exist as a political unity in the fifth century AD. The *civitas* expanded both numerically and geographically and institutions and conventions appropriate for a small face-to-face society failed to meet the needs of populations with different languages, societies and cultures, scattered over the known world from Hadrian's Wall to the Euphrates. What 'crime' was and how it was dealt with was inevitably affected by the changing role of the community and the individual within it. The evolution of law and crime is therefore also part of the story of the social and legal changes resulting from the rise (and fall) of Empire.

The story is complicated by the many forms that Roman law could take. In 44 BC Cicero defined the *ius civile*, from an advocate's point of view, as consisting of statutes passed by the people, resolutions of the Senate, decided cases, interpretations of the jurists, the edicts of magistrates, custom and equity (*Top.* 28). To these should be added, under the Empire, the legal replies and official pronouncements of emperors, which took the form of edicts, letters, rescripts and subscripts (Millar 1977; Turpin 1991). Cicero's snapshot of the forms of law in the first century BC contains a tacit acknowledgement that not all law was written down, reflecting the fact that custom and legal convention as well as self-help by individuals and family courts were essential to the self-policing of the early Roman state. Before the late second and first centuries BC there were no standing courts to try homicide, violence, forgery or corruption, but it does not follow that these offences went unpunished. As Cicero says of the rape of Lucretia, it was obviously unlawful in terms of 'natural law', although there was no written law against it (*Leg.* 2.10; cf. *Rep.* 2.46). The resultant expulsion of the Tarquins in 510 BC was perhaps the most extreme case of the community's punishing offences against itself by direct action.

LEGAL DISCOURSES

To define 'crime' as an offence against the community is to beg many questions. Who decides what is damaging to the community, as opposed to what harms an individual? What is the difference between 'crime' and 'wrongdoing' and will the lawyer's answer be consistent with social perceptions? How could new 'crimes' be assimilated into the legal system? What was the relationship overall between legal discourse and morality? Who were in control of the discourse in the first place?

Crime can be studied as a purely legal construct; it was what the lawyers said it was. An essential point to understand about Roman law is that its

primary purpose was to provide remedies by defining the legal processes by which a legal remedy could be sought to compensate for some alleged wrong or injury, or achieve resolution of a dispute. Thus an offence defined by law as subject to 'public' legal process was a 'crime'. It follows, as a general point about legal discourse, that the existence of law is a precondition for the existence of crime. No 'law' means no 'crime', because crime could exist only in the context of the legal process set up to deal with it. It would also follow from this that discussion of law and crime would be confined to a group of texts, with their own assumptions and agenda. Change over time would be acknowledged, but only in the terms of discourse imposed by the texts themselves.

If, in line with a provisional definition of crime as an offence to be prosecuted in the public courts, we list Roman crimes in terms of public procedure, we emerge with a restricted and somewhat arbitrary list, consisting, for example, of treason, murder – specifically knifing and poisoning – forgery, adultery, peculation, kidnapping and electoral corruption. These acquired standing courts (*quaestiones*) from 149 BC onwards and the list became fixed, to apply even after the courts had ceased to function, at some point before the third century AD. The canon remained operational in Justinian's collection of extracts from juristic writings, assembled as the Digest (D.) in AD 533; 'public' offences were covered in Book 48 (out of fifty). This excludes many forms of wrongdoing which we might assume to be 'criminal', such as theft, fraud, injurious behaviour, robbery with violence and some kinds of murder (e.g. of a slave), as well as what we might term 'white-collar crime', such as embezzlement. But such assumptions are both anachronistic and based not on legal assumptions but social values.

Privileging purely 'legal' discourse raises other problems for the historian. Our subject would be redefined as 'the law of crime', and analysis would be confined to a select group of texts, created and subsequently excerpted and codified by specialists. Although the legal interpreters, or jurists, on whose writings so much of modern understanding of law is based, were not especially interested in public criminal law (because, in theory, the public owned it), they worked within a legal framework which could be self-referential to a fault. Law had its own traditions, not invariably shared by the movers of changes in criminal, especially penal, policy. The excerpted imperial juristic texts in the Digest of Justinian are fragmentary and arranged to create a single, coherent narrative of law. It is deceptively easy to view the interpretative tradition as continuous and uniform, because that was the impression Justinian sought to create. In fact, from the Late Republic to the Late Empire, the legal interpreters

responded (or failed to respond) to several changes in judicial practice, while also seeking to assert unbroken continuity with the past. The end result was a narrative, given final shape by Justinian, which is traditionalist, Rome-centred, despite the impact of Empire, and dependent on the structures of a political and judicial past which, by the second century AD, no longer existed.

There were also tensions between different types of law. Early imperial legal thought inherited a system of civil law, based on the Praetor's Edict and the *ius civile*, or law of citizens, which regulated Romans in their dealings with each other (and also, through various ingenious devices, with non-Romans). A conflict would come to exist within the legal establishment (which included the emperor) between the culture of civil procedures, which regulated recompense or compensation, including awards that were 'penal', and the 'revenge' culture of parts of the public 'criminal' law. One story to be told of the evolution of Roman law is the incorporation into public criminal procedures of unlawful acts largely dealt with under civil procedures while Rome was a Republic.

CRIME AND SOCIETY

Is crime purely a social construct? Killing, for example, may be acceptable if it is an enemy who is killed, or unlawful if it is a neighbour or fellow-citizen (although accident or provocation might still be taken into account). Adultery was (and is) punishable by death under some legal systems but is no longer so in modern Britain. Moreover, formal legal sanctions are not the only means by which society may punish offenders. Social pressure may isolate the offender against its values, making continued existence within the group impossible, but without resort to legal process.

In the case of the Romans, the social approach is attractive because it privileges the moral terminology which the Romans attached to actions they found socially unacceptable or threatening and therefore deserving of punishment in some sense, by public or private process, extra-legal jurisdiction (such as that of the *pater familias* over the family) or social ostracism. The moral discourse of the Romans had numerous words for bad behaviour and wrongdoing: *scelus* (villainy), *facinus* (bad action), *nefas* (evil action), *peccatum* (bad action, later the Christian word for sin), *maleficium* (something done badly) and *delictum* (moral failure), to name but a few (for more, see Riess 2001: 32–44). Some of these, notably *maleficium* and *delictum*, were imported into legal discourse as well and acquired technical meanings. Even used technically, loose vocabulary encouraged misunderstanding. Gaius, for

example, described as *maleficium* wrongful intent on the part of a substitute heir, in the relatively innocuous context of disputes arising if the original heir died in the lifetime of the testator (*Inst.* 2.81). But he also termed a criminal conviction under the Lex Cornelia as *maleficium*, observing that it was one of the grounds on which citizenship could become forfeit (*Inst.* 1.128). As Gaius' contemporaries also labelled magic as a *maleficium*, there was clearly scope for confusion between the 'criminal' and merely 'civil'.

The legal discourse on badness was primarily concerned not with moral castigation but with legal remedies. It therefore focused on the word from which the English 'crime' would be derived. This was *crimen*, which meant not 'crime' but 'reproach' and, in both legal and moral discourse, 'accusation'. The law on 'crime' was defined in terms not of a hierarchy of offences but of the nature of the accusations that could be brought and the procedural and penal consequences of so doing for both accuser and accused. The Romans therefore did have a vocabulary for what might be termed 'crime' in a moral sense but there was no one word for 'crime' in Roman law. Instead, the procedure, through public accusation, served as a form of signal as to the nature of the offence. The 'accuser' asked the public, through its courts, to hold the accused to account.

But events once a public case reached the courts were far from predictable. Under the public *quaestio* system operated in the Late Republic at Rome, the panels of judges (*iudices*), although drawn from the elite, were not necessarily experts in any aspect of public criminal law, nor could they expect to receive legal guidance from the presiding magistrate, whose job was to ensure that procedures were correctly observed. The rhetorical strategies of Cicero, and later Quintilian, who practised as an advocate before turning to education, allowed generous space for interpretation of statute as well as concentration on the characters of the accused and accusers. Cicero later acknowledged that his defence of Cluentius, charged in 66 BC by a group including his mother, Sassia, with various crimes, had fooled the jury (Quint. *Inst.* 2.17.21); his technique was to vilify the 'unnatural' Sassia and her now dead husband, Oppianicus, at considerable length, destroying the moral credibility of the prosecution as a whole. The *quaestio* process encouraged the development of forensic oratory. When the *quaestio* was superseded by hearings before a single judge (*cognitio*), advocates and speechmakers still had a role. However, under *cognitio* the tendency was for advocates and legal representatives to resort to techniques of cross-examination rather than emotive appeals.

Where Roman law showed the clearest traces of the social values of the elite law-givers was in its treatment of honour and shame. Several forms of

civil dispute hinged on trust or good faith (*bona fides*), and improper behaviour was castigated also in moral terms; investment of gains made dishonestly in a partnership, for example, were stigmatised as a 'shameful and disgusting co-operation in wrongdoing' (Ulpian, at D. 17.1.53, *delicto-rum turpis ac foeda communio*). Losing the legal argument even in civil disputes under the Republic could damage reputation (*existimatio*) but under the Empire *infamia* became a formal legal sanction, including not only disgrace but also the loss of civil rights (D. 3.22.1). It applied to the soldier dishonourably discharged; the man who failed to discharge his legal obligations; the thief and the robber by violence; even, in Late Antiquity, the bigamist (*Codex Justinianus* (*CJ*) 5.5.2.11; 9.9.18). And some actions were disgraceful, even if legal; Ulpian advised that a man who had hidden away a prostitute for lust was not liable for kidnapping or theft but none-theless acted more 'shamefully' than either kidnapper or thief and so would incur social 'ignominy', which more than made up for the lack of legal redress (D. 47.2.39).

It was not necessary to have done something wrong at all to incur *infamia*, because being 'infamous' was a state of being. It was a status attached, for example, to professions, the exercise of which would automatically entail 'shameful' behaviour. For example, owners of brothels, taverns and bath-houses, which openly or covertly engaged in the sex trade, were categorised as guilty of pimping (*lenocinium*) and were therefore *infames* (D. 3.2.4.2–3). The 'infamous' were not, therefore, the same as the lower of the two social classes, the *humiliores*, identified from the second century AD onwards as being less legally privileged than their superiors, the *honestiores*. However, the two 'less honourable' social and legal statuses could operate together to disadvantage the would-be litigant of lower status. The rule on the legal action for cheating (*dolus*) by 'devious and dishonest' types (Ulpian at D. 4.3.1), which entailed *infamia* for the guilty, was that it was to be used only where other actions for dishonesty were not available. An additional restriction was that an action could not be brought by a social inferior against a superior, nor could a 'dissolute, spendthrift or otherwise unworthy' char-acter prosecute someone of superior respectability (D. 4.3.11.1), although other, lesser actions not entailing *infamia* could be used. Thus the elite law-makers looked after their own, denying to lesser (and by association less virtuous) people choice of legal remedy.

The moral also impinged on the philosophical and other manifesta-tions of the elite culture from which all legislators and commentators were drawn. Jurists were, on the whole, practical people, concerned with solutions to specific problems arrived at by the manipulation of rules,

but philosophical discourse also had its place in the promotion of the discipline. When the Severan jurist Ulpian claimed that law was a true philosophy (D. 1.1.1.1), or his older contemporary Papinian translated Demosthenes on law as the expression of the public will (D. 1.3.1; cf. the original at 1.3.2) or jurists in general cited Homer or Xenophon or other classical writers (e.g. Gaius, *On the Twelve Tables*, at D. 50.16.233; Just. *Inst.* 4.18.5), they asserted their shared identity with their cultivated readership. And they shared a common enemy, the doer of bad actions, deserving of punishment or at least social censure.

JURISTS AND THE PAST

The existence of two separate discourses, the social and the legal, inevitably created tension between legal provision and social expectations of appropriate punishments for the 'wicked'. How was a 'public' offence to be defined? How could the law respond to changing social perceptions of (for example) religious or sexual 'deviance'? If the law failed to change in line with social values, or the agenda of those charged with administering the criminal law, a point could be reached at which legal procedures, established in a different geographical and temporal context, could fail to satisfy the requirements of rulers for order, and of citizens for protection against perceived threats.

The evolution of public justice under the Empire was shaped by a creative tension between observance of the legal tradition and innovations which were enabled through the flexibility of court practice and the power of emperors and (to a lesser extent) provincial governors to act as they wished. As radical reform was institutionally impossible and an unacceptable breach of continuity with the past, flexibility was in practice created through the *cognitio* procedure, which was conducted, not by a group of jurors representing the public, but by a single judge, who had wide discretion. The *cognitio* process was probably always the norm in the provinces, where the provincial governor or his deputy presided, along with his *consilium*, and quickly became so at Rome, as the *quaestiones* gradually closed down and their business was transferred to the Prefect of the City. Despite this, jurists in the second century embarked on the production of a series of treatises on the *publica iudicia*, the public courts, even though those courts, apart from perhaps the adultery court, were no longer in existence.

Jurists were prisoners of their past and the legal tradition in which they worked. The location at Rome of second-century AD jurists, such as Gaius (probably) and Pomponius, and a prevailing antiquarian culture affected