

GELLIANA

II

Aulo Gellio

tra diritto e antiquaria

a cura di

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Punishment in Aulus Gellius

Leofranc Holford-Strevens

1. Whether or not because Gellius, as a judge, could pronounce no sterner sentence than that Numerius Negidius must pay Aulus Agerius the full value of his claim, he shows a considerable interest in harsh punishments. Now punishment can be inflicted either by divine or by human agents, the latter either public or private. Divine punishment is marginal in Gellius: the sacrilegiously stolen *aurum Tolosanum* brought a miserable death upon who all who touched it¹; the gods cannot be expected to show greater patience with malefactors than parents do²; but the maleficent deities who need to be placated are not said to be punishing any specific offence³. It is human punishment that engages Gellius' serious interest.

2. Just as Gellius, without being a jurist, treats of legal matters, so, without being a philosopher, he treats of philosophy, including the

¹ Gell. 3.9.7 (after discussion of the *equus Seianus*): *Eadem sententia est illius quoque veteris proverbii quod ita dictum accepimus, «aurum Tolosanum». Nam cum oppidum Tolosanum in terra Gallia Quintus Caepio consul diripuisset multumque auri in eius oppidi templis fuisset, quisquis ex ea direptione aurum attigit misero cruciabilique exitu perit.* All quotations from Gellius are taken from my edition, *Auli Gelli Noctes Atticae*, Oxonii 2020.

² Gell. 1.6.8: *Di immortales plurimum possunt; sed non plus velle nobis debent quam parentes. At parentes, si pergunt liberi errare, bonis exheredant. Quid ergo nos a dis immortalibus dissimile diutius exspectemus, nisi malis rationibus finem facimus? Is demum deos propitios esse aecum est qui sibi adversarii non sunt. Dii immortales virtutem adprobare, non adhibere debent.*

³ Gell. 5.12.8: *nam deos quosdam ut prodesse celebrabant, quosdam ut ne obsessent placabant.*

philosophy of punishment. In 2.12 his admired philosopher Favorinus defends the Athenian law, reported in the Aristotelian Ἀθηναίων πολιτεία, that punished neutrality in time of stasis with loss of civil rights⁴. In 7.14.5-9 Gellius seeks the reason why of the three grounds for punishment that his other philosophical teacher had canvassed Plato had entertained only two⁵. In 14.4 he bestows emphatic approval on the Stoic Chrysippus' portrait of the implacable virgin Justice⁶, in which adherents of softer schools had seen rather an image of Cruelty⁷; his epithet for those schools, *deliciorum*, implies not so much squeamishness as unmanliness.

3. Such severity is championed in 20.1 by the jurist Sex. Caecilius, better known to Romanists as Africanus, who is made, in dialogue with Favorinus, on the one hand to explain certain enactments of the Twelve Tables that without historical and linguistic explication seemed too harsh or too soft, on the other to defend the death penalty for corrupt judges and night-time thieves (which as Favorinus observes the Roman people had allowed to lapse), the law of *talio*, and above all the long-obsolete provision that the judgment-debtor who owed money to more than one creditor should after sixty days in chains be cut in pieces and shared out amongst them⁸. Afri-

⁴ Ἀθ. πολ. 8.5: ὃς ἂν στασιαζούσης τῆς πόλεως μὴ θῇται τὰ ὄπλα μηδὲ μεθ' ἑτέρων, ἄτιμον εἶναι καὶ τῆς πόλεως μὴ μετέχειν. The law's authenticity is much disputed, and in my view rightly denied; for a new case against see D. A. Teegarden, *The Inauthenticity of Solon's Law against Neutrality*, in *Buffalo Law Review* 62, 2014, 157-175.

⁵ See O. Diliberto, *La pena tra filosofia e diritto nelle Noctes Atticae di Aulo Gellio*, in *Studi economico-giuridici* 54, 1991-2, 121-172.

⁶ Gell. 14.4.1: *Condigne mehercule et condecere Chrysippus, in librorum qui inscribuntur* Περί καλοῦ καὶ ἡδονῆς *primo, os et oculos Iustitiae vultumque eius severis atque venerandis verborum coloribus depinxit.*

⁷ Ibid. §5: ... *deliciorum quidam disciplinarum philosophi Saevitiae imaginem istam esse, non Iustitiae, dixerunt.*

⁸ See J. Zabłocki, *Los niewypłacalnego dłużnika*, in Id., *Rozważania o procesie rzymskim w «Noctes Atticae» Aulusa Gelliusa*, Warszawa 1999, 107-135.

canus, asserting that its deterrent effect had saved it from ever needing to be applied, regrets that it was no longer in force to protect the *fides* so highly valued by the ancients, regrets too that perjurers were no longer thrown off the Tarpeian rock, and quotes Vergil to justify the tearing apart of the perfidious Mettius Fufetius. All present, including Favorinus, applaud.

4. No ancient dialogue is to be supposed the record of a historical event; Cicero, as careful to set his dialogues at a time when and a place where the participants could have met as Plato had been to do the opposite, nevertheless confessed to Varro he had invented conversations that had never taken place⁹; to be sure he allowed Varro to express opinions he found congenial¹⁰, but not in every dialogue was he so scrupulous¹¹. Gellius too seems to have respected time and place (at least he has never yet been found at fault in that regard), but to have taken liberties with his characters' opinions; the literary and linguistic tastes ascribed to Fronto in the *Noctes Atticae* do not fully coincide with those revealed by Fronto's correspondence¹², nor is a consistent account of Favorinus' competence in Latin matters easily extracted from the chapters in which he appears, in some of which, but not all, this Hellenized Gaul shows a surprising degree of knowledge¹³.

5. The structure of 20.1 recalls 2.26, in which Favorinus is refuted by Fronto on the relative wealth of the two languages in terms for shades

⁹ Cic. *Ad fam.* 9.8.1 (of the *Academica Posteriora*): *puto fore ut, cum legeris, mirere nos id locutos esse inter nos quod numquam locuti sumus, sed nosti morem dialogorum.*

¹⁰ Ibid.: *tibi dedi partis Antiochias, quas a te probari intellexisse mihi videbar.*

¹¹ Cic. *Ad Att.* 13.19.5 (of the *Academica Priora*): *sane in personas non cadebant; erant enim λογικώτερα quam ut illi de iis somniasse umquam viderentur.* The ultra-optimate positions taken by the character 'Quintus' are surely not those of Q. Tullius Cicero, pr. 60 BC, but rather those that Marcus did not quite dare espouse in his own person.

¹² See L. Holford-Strevens, *Aulus Gellius: An Antonine Scholar and his Achievement*, Oxford 2003, 135-138.

¹³ An attempt is made by Holford-Strevens, *Aulus Gellius* cit. 118-129.

of red and green; that Favorinus is not such a master of Latin as of Greek is also the message of 8.2, in which, having informed Gellius that ten Greek words in common use are not Attic, he learns from him that ten Latin words in common use are not found in ancient authors, and of 18.7.1-2, in which he asks the bad-tempered grammarian Domitius 'Insanus' whether he had been right to use *contio* of a public speech¹⁴. Hence, in his debate with Africanus, as a Roman by citizenship only, he is allowed to recoil from early Roman practices and to misunderstand early Latin terms; that Africanus is made to hail him as an expert on the Twelve Tables, like Favorinus' claim to relish reading them no less than the twelve books of Plato's *Laws*¹⁵, is nothing more than the politeness that scholars, not always its most notable exponents, have commonly failed to recognize¹⁶.

6. No commentary on the Twelve Tables was known even to Tribonian, either by Africanus or by anybody else, Gaius apart, after Labeo, whom

¹⁴ Gell. 8.2.lemma: *Quae mihi decem verba ediderit Favorinus, quae usurpentur quidem a Graecis, sed sint adulterina et barbara; quae item a me totidem acceperit, quae ex medio communique usu Latine loquentium minime Latina sint neque in veterum libris reperiantur* (for βάρβαρον = non-Attic see Phrynichus *passim*); 18.7.1-2: *Domitio, homini docto celebrique in urbe Roma grammatico, cui cognomentum Insano factum est quoniam erat natura intractabilior et morosior, ei Domitio Favorinus noster cum forte apud fanum Carmentis obviam venisset atque ego cum Favorino essem, «quaeso» inquit «te, magister, dicas mihi: num erravi quod, cum vellem δημογορίας Latine dicere, contiones dixi? dubito quippe et requiro, an veterum eorum qui electius locuti sunt pro verbis et oratione dixerit quis contionem».*

¹⁵ Gell. 20.1.20: *Tum Sex. Caecilius amplexus utraque manu Favorinum «tu es» inquit «unus profecto in nostra memoria non Graiae modo, sed Romanae quoque rei peritissimus. Quis enim philosophorum disciplinae suae leges tam scite atque docte callet, quam leges tu nostras decemvires perculluisti?»;* §3: *non enim minus cupide tabulas istas duodecim legi quam illos duodecim libros Platonis de legibus.*

¹⁶ If Caesar had really thought Cicero *omnium triumphorum laurea maiorem* (Plin. *NH* 7.117), he was a sufficiently gifted orator to have sought eminence in the forum rather than the field.

Favorinus is made to quote on L. Veratius' abuse of the *ius civile*¹⁷; that the quotation is in Gellian language hard to believe of any Augustan author conforms to Gellius' habit of imposing his own idiolect on Imperial authors quoted for content not for style or vocabulary¹⁸. Labeo, that venerator of the old ways with his well-known grammatical interests¹⁹, is also a likely source for the interpretations of *morbus*, *arcera*, and *iumentum*²⁰, even as the invocation of *fides* suits the man who denied the title of purchaser to one who purported to buy a *res Mancipi* off a woman without her tutor's authority and hence *non bona fide*, a position disowned by later writers²¹.

¹⁷ On which see V. Scarano Ussani, *Gli 'scherzi' di Lucio Verazio*, in *ZPE*. 90, 1992, 127-135.

¹⁸ Gell. 20.1.13: *Itaque {cum} eam legem cum Labeo quoque vester in libris quos ad duodecim tabulas conscripsit non probaret, «<***>» inquit «L. Veratius fuit egregie homo inprobus atque inmani vecordia. Is pro delectamento habebat os hominis liberi manus suae palma verberare. Eum servus sequebatur ferens crumenam plenam assium; ut quemque depalmaverat, numerari statim secundum duodecim tabulas quinque et viginti asses iubebat. Propterea» inquit «praetores postea hanc abolescere et relinqui censuerunt iniuriisque aestumandis recuperatores se daturos edixerunt»*. It is easier to credit Gellius than Labeo with the syntagm *egregie homo inprobus*, the Sallustianism *uecordia*, the Terentian echo *pro delectamento habebat* (cfr. *HT* 952), the hapax *depalmaverat*, and the synonym-pair *abolescere et relinqui*; on his freedom with Imperial authors see Holford-Strevens, *Aulus Gellius* cit. 78-79.

¹⁹ Suffice it here to quote Capito fr. 9 Strzelecki (Gell. 13.12.1-4) and Gell. 13.10.1-3.

²⁰ Gell. 20.1.26-29: *Nam morbus in lege ista non febriculosus neque nimium gravis, sed vitium aliquod inbecillitatis atque invalentiae demonstratur; non periculum vitae ostenditur. Ceteroqui morbum vehementiorem vim graviter nocendi habentem legum istarum scriptores alio in loco non per se morbum, sed morbum sonticum appellant. Iumentum quoque non id solum significat quod nunc dicitur; sed vectabulum etiam quod a iunctis pecoribus trahebatur veteres nostri iumentum a iungendo dixerunt. Arcera autem vocabatur plaustrum tectum undique et munitum quasi arca quaedam magna vestimentis instrata, qua nimis aegri aut senes portari cubantes solebant*.

²¹ Gell. 20.1.39-40: *Omnibus quidem virtutum generibus exercendis colendisque populus Romanus e parva origine ad tantae amplitudinis instar emicuit, sed omnium maxime atque praecipue fidem coluit sanctamque habuit tam privatim quam publice. Sic consules, clarissimos viros, hostibus confirmandae fidei publicae causa dedit, sic clientem in fidem acceptum cariorem haberi quam propinquos tuendumque esse contra*

I am on record as arguing that Gellius' facts are Labeo's but his value-judgements are his own²²; the task of expounding and defending old Roman law and old Roman ways is assigned to Africanus, I suggest, also because he was an acquaintance of Favorinus²³. That he might clinch an argument by quoting Vergil is not in itself incredible, since Ulpian finds him adducing a proof-text from Homer²⁴, but in this context it is rather a characterization than a fact²⁵.

cognatos censuit, neque peius ullum facinus existimatum est quam siqui probaretur clientem divisui habuisse; Vat. 1: Qui a muliere sine tutoris auctoritate sciens rem Mancipi emit vel falso tutore auctore quem scit non esse, non videtur bona fide emissee, itaque et veteres putant et Sabinus et Cassius scribunt. Labeo quidem putabat nec pro emptore eum possidere, sed pro possessore, Proculus et Celsus pro emptore, quod est verius...

²² Holford-Strevens, *Aulus Gellius* cit. 128; cfr. L. Ruske, *De A. Gellii Noctium Atticarum fontium quaestiones selectae*, Glaciae 1883, 66. This is no more an aspersion on Gellius' probity as supposed by F. Casavola, *Giuristi adrianei*, Napoli 1980, 94 than Plato's adoption of Callicles' persona in *Gorgias* impairs his status as a truth-lover: Gell. 10.22.1: *Plato, veritatis homo amicissimus eiusque omnibus exhibendae promptissimus, quae omnino dici possint in desides istos ignavosque qui obtentu philosophiae nominis inutile otium et linguae vitaeque tenebras secuntur; ex persona quidem non gravi neque idonea, vere tamen ingenueque dixit*; cfr. §24: *Haec Plato sub persona quidem, sicuti dixi, non proba, set cum sensus tamen intellegentiaeque communis fide et cum quadam indissimulabili veritate disseruit*.

²³ But not well enough known to Gellius as to make good the *vivae vicis paenuria* encountered in 14.2.1.

²⁴ Gell. 20.1.54: *Historia de Metto Fufetio Albano nobis quoque non admodum numero<os> istiusmodi libros lectitantibus ignota non est, qui, quoniam pactum atque conditum cum rege populi Romani perfide ruperat, binis quadrigis evinctus in diversa nitentibus lacreratus est. Novum atque asperum supplicium quis negat? sed quid elegantissimus poeta dicat vide: «at tu dictis, Albane, maneres» (= Verg. *Aen.* 8.643); D. 48.5.14.1 (Ulp. 2 de adult.): *Plane sive iusta uxor fuit sive iniusta, accusationem instituere vir poterit: nam et <l. ut> Sextus Caecilius ait, haec lex ad omnia matrimonia pertinet, et illud Homericum adfert: nec enim soli, inquit, Atridae uxores suas amant, οὐ μόνον φιλέουσ' ὀλόχους μερόπων ἀνθρώπων Ἀτρεΐδαι* (cfr. *Il.* 9.340-343; Achilles declares that he loved Briseis from his heart, spear-won as she was).*

²⁵ So rightly M. Talamanca, *Per la storia della giurisprudenza romana*, in *BIDR.* 80, 1977, 193-344 at 283 nt. 185.

7. Favorinus, be it noted, does not argue on philosophical grounds either here or in 14.2, when consulted on a suit brought by a man of proven uprightness who has no evidence against a notorious scoundrel for whom Gellius cannot bring himself to find; instead, despite being said to reply *ut virum philosophum decuit* and airing some questions about judicial conduct, he first refers to a treatise by Tubero (whether the elder or the younger is unclear) that Gellius must in real life have read for himself, and then quotes Old Cato to justify believing the better man, advice Gellius does not dare to follow. Nor in 2.2 does the Platonist philosopher L. Calvenus Taurus argue philosophically to determine the question whether, if there is only one chair available, it should be occupied by a Roman magistrate or his father, but uses the language of law, giving an interim ruling *absque praeiudicio* and describing a domestic visit as *privata actio*. In Roman matters peregrine speculations have no place; to be sure Gellius, as we have seen, approves of Chrysippean severity, and his preparatory reading had included Greek as well as Latin texts²⁶, but we hear no more of what those Greek texts were or what they said²⁷, and even though the chapter-summary of 1.13 states that *quaesitum est in philosophia* whether it is legitimate to disobey orders for the benefit of the superior who gave them, it is not philosophy but Roman history that informs the discussion, which culminates in the brutal treatment of an allied magistrate who had used his brains instead of obeying an order²⁸.

8. In 11.18 Gellius discusses the treatment by various societies of theft, starting with Athens, where he asserts that Draco's punishment of

²⁶ Gell. 14.2.1: *Quo primum tempore a praetoribus lectus in iudices sum, ut iudicia quae appellantur privata susciperem, libros utriusque linguae de officio iudicis scriptos conquisivi...*

²⁷ Were they rather among the many discourses Περὶ δικαιοσύνης recorded by Diogenes Laertius?

²⁸ See L. Pelloso in this volume.

all thefts by death was set aside not by explicit repeal but by tacit consent of the people, a phenomenon that interests him elsewhere²⁹; Plutarch in his life of Solon says the opposite³⁰, but there is no proof that Gellius knew the *Parallel Lives*³¹. He then turns, citing Masurius Sabinus (second only to Capito in frequency of quotation), to the Decemviral law that imposed a range of physical penalties but had likewise been superseded by four-, three-, or twofold restitution; he digresses by way of Aristo's assertion, which he seems, rightly, not quite to believe, that theft was not a crime in ancient Egypt to the better-supported fact that in the Spartan *agoge* boys were encouraged to steal as part of their military training³² (without adding that they were punished for being caught³³) and to Old Cato's complaint that private thieves are punished while public thieves flourish³⁴, which he quotes with such relish as to suggest its application

²⁹ Gell. 11.18.4: *Eius* [sc. Draconis] *igitur leges, quoniam videbantur impendio acerbiores, non decreto iussoque, set tacito inlitteratoque Atheniensium consensu obliteratae sunt*; for repeal by tacit consent in Roman context see *NA* 12.13.5, 20.10.9; *D.* 1.3.31.1 (*Julian 84 digest.*); *I.1.2.11.*

³⁰ *Plu. Sol.* 17.1: *Πρῶτον μὲν οὖν τοὺς Δράκοντος νόμους ἀνέϊλε πλὴν τῶν φονικῶν ἅπαντας διὰ τὴν χαλεπότητα καὶ τὸ μέγεθος τῶν ἐπιτιμίων.*

³¹ Holford-Strevens, *Aulus Gellius* cit. 295 nt. 117.

³² Gell. 11.18.16-17: *Id etiam memini legere me in libro Aristonis iureconsulti... aput veteres Aegyptios... furta omnia fuisse licita et inpoenita. Aput Lacedaemonios quoque... cuius rei non adeo ut Aegyptiis fides longinqua est, non pauci neque ignobiles scriptores... ius atque usum fuisse furandi dicunt, idque a iuventute eorum non ad turpia lucra neque ad sumptum libidini praebendum comparandamve opulentiam, sed pro exercitio disciplinae rei bellicae factitatum, quod ea furandi sollertia et adsuetudo acueret firmaretque animos adulescentium et ad insidiarum astus et ad vigilandi tolerantiam et ad obrependi celeritatem.*

³³ *Heraclid.Lemb. Excerpta politiarum* 13 Dilts: ἐθίζουσι δὲ αὐτοὺς καὶ κλέπτειν, καὶ τὸν ἄλόντα κολάζουσι πληγαῖς, ἵν' ἐκ τούτου πονεῖν καὶ ἀγρυπνεῖν δύνωνται ἐν τοῖς πολέμοις.

³⁴ Gell. 11.18.18: *Ea verba quoniam nobis impense placuerant adscripsimus: «Fures» inquit «privatorum furtorum in nervo atque in compedibus aetatem agunt, fures publici in auro atque in purpura»* (*Cato fr. 224 Malcovati = 172 Sblendorio Cugusi*).

was not purely historical. He returns to Sabinus for more details on the law of *furtum*, though these do not include punishment. One such detail is that there could be *furtum* of land³⁵, which by Gellius' day had been discredited³⁶; but not only is he more interested in past than in present law, not only as a judge was he bound by the praetor's *formula*, but his language earlier in the chapter (§10), *si qui super manifesto furto iure et ordine experiri velit*, suggests that already as in Ulpian's day the preferred procedure was the criminal³⁷, which as Julian tells us excluded the civil³⁸, so that theft cases seldom came before him.

9. Other death sentences are mentioned summarily. In the chronological survey of 17.21 the condemnations of Miltiades and Socrates by the Athenian people pass with neither reference to the charges nor comment on their justice; at least Miltiades is acknowledged to have been a victorious commander. So is M. Manlius Capitolinus, condemned for plotting a *coup d'État*; a later Manlius, at 9.13.20, executed his son for attacking the enemy against orders (as did Olus Postumius Tubertus at 17.21.17), but such *imperia* are *aspera et inimitia*, even in Gellius' eyes. In 3.9.4 Cn. Seius, owner of the fatal horse³⁹, is condemned to death by Mark Antony. In 4.5 the criminals are the Etruscan haruspices who deliberately gave false advice.

³⁵ Gell. 11.18.13: *In quo (Sabinus' book de furtis) id quoque scriptum est, quod vulgo inopinatum est, non hominum tantum neque rerum moventium, quae auferri occulte et subripi possunt, sed fundi quoque et aedium fieri furtum...*

³⁶ Gai 2.51: *... cum improbata sit eorum sententia qui putaverint furtivum fundum fieri posse.*

³⁷ D. 47.2.93 (Ulp. 38 *ad edictum*): *Meminisse oportebit nunc furti plerumque criminaliter agi... non ideo tamen minus, si qui velit, poterit civiliter agere.*

³⁸ D. 47.2.57.1 (Jul. 22 *dig.*): *Qui furem deducit ad praefectum vigilibus vel ad praesidem, existimandus est elegisse viam qua rem persequeretur: et si negotium ibi terminatum et damnato fure recepta est pecunia sublata in simplum, videtur furti quaestio sublata...*

³⁹ On which see G. Traina in the present volume.

10. The death penalty is also at issue in the problem on which the inept declaimer of 9.15 holds forth concerns it: if out of the seven judges who are to decide by majority two vote for exile, two for a fine, and three for death, the defendant is to show cause why he should not die⁴⁰. The problem is said to be insoluble, which would have surprised professional rhetoricians⁴¹; it is so only if *plures* means an absolute not a relative majority, though if it does a bold defendant might argue that since there was a majority against each punishment, he ought to escape scot-free. However, Gellius' focus is not on the legal question, but on the declaimer's shapeless jabber and the jest that it provokes⁴².

11. Exile does not play a large part in the *Noctes Atticae*: Metellus Numidicus' letter to the Domitii is quoted twice in passing (15.13.6 for *consolor* passive, 17.2.7 for *fruniscor*), Solon's voluntary departure from Athens is noted at 17.21.5, Domitian's banishment of philosophers at 15.11.4-5, and at 2.12.1 ἄτιμον εἶναι καὶ πόλεως μὴ μετέχειν in the reported Athenian prohibition of neutrality is interpreted as *is domo patria fortunisque omnibus careto, exul extorrisque esto*⁴³.

12. Fines are considered in 11.1, where Gellius the antiquarian rehearses the ancient penalties in livestock, and Gellius the grammarian the etymology of *multa* and the verb used for its imposition. In 10.6, citing Capito's *commentarius de iudiciis publicis*, Gellius records the

⁴⁰ Gell. 9.15.7-8: *De reo septem iudices cognoscant, eaque sententia sit rata quam plures ex eo numero dixerint. Cum septem iudices cognovissent, duo censuerunt reum exilio multandum, duo alii pecunia, tres reliqui capite puniendum. Petitur ad supplicium ex sententia trium iudicum et contradicit.*

⁴¹ See D.A. Russell, *Greek Declamation*, Cambridge 1983, 23; Holford-Strevens, *Aulus Gellius* cit. 292.

⁴² Gell. 9.15.11: *Atque ibi Iulianus festivissime «nolite quaerere» inquit «quid sentiam; adolescens hic sine controversia disertus est.»*

⁴³ At 16.8.7 *Milo caedis damnatus est* is offered as an example of a proposition; there was no need to add that Milo escaped into exile.

fine of 25,000 asses in *aes graue* imposed by the plebeian aediles in 246 BC on the arrogant Claudia, who, jostled in a crowd of common folk, expressed the wish that her brother Publius, responsible for the naval disaster off Trapani, would return to life and lose another fleet⁴⁴; the amount, a thousand times that for *iniuria*, must reflect the outrage felt at these *verba incivilia* by all those in the crowd who had lost fathers, brothers, husbands, or sons in the disaster⁴⁵.

⁴⁴ Gell. 10.6: *Non in facta modo, sed in voces etiam petulantiores publice vindicatum est; ita enim debere esse visa est Romanae disciplinae dignitas inviolabilis. Appi namque illius Caeci filia a ludis quos spectaverat exiens turba undique confluentis fluctuantisque populi iactata est. Atque inde egressa, cum se male habitam diceret, «quid me nunc factum esset» inquit «quantoque artius pressiusque conflictata essem, si P. Claudius, frater meus, navali proelio classem navium cum ingenti civium numero non perdidisset? certe quidem maiore nunc copia populi oppressa intercidissem. Sed utinam» inquit «reviviscat frater aliamque classem in Siciliam ducat atque istam multitudinem perditum eat, quae me nunc male miseram convexavit!» Ob haec mulieris verba tam inproba ac tam incivilia C. Fundanius et Tiberius Sempronius aediles plebei multam dixerunt ei aeris gravis viginti quinque milia. Id factum esse dicit Capito Ateius in commentario de iudiciis publicis bello Poenico primo Fabio Licino {et} Otacilio Crasso consulibus.*

⁴⁵ The details are rather obscured than clarified by the other sources. The *periocha* of Livy book 19, though chronologically compatible, merely states that she was fined for her words: *Claudia, soror P. Claudii, qui contemptis auspiciis male pugnauerat, a ludis revertens cum turba premeretur, dixit: utinam frater meus viveret; iterum classem duceret. ob eam causam multa ei dicta est.* Valerius Maximus (8.1.damn.4) claims that she was undone by her wicked wish even though innocent of the crime alleged against her: *Adiciatur his Claudia, quam insontem crimine quo accusabatur votum impium subvertit, quia, cum a ludis domum rediens turba elideretur, optaverat ut frater suus, maritimarum virum nostrarum praecipua iactura, revivisceret saepiusque consul factus infelici ductu nimis magnam urbis frequentiam minueret, what this crime was, and even whether it was related to her outburst or to a case already pending, he does not say. Suetonius (Tib. 2.3), who alone seats her in a carriage, speaks of *maiestas*, an offence not yet recognized at law: *et quae novo more iudicium maiestatis apud populum mulier subiit, quod in conferta multitudine aegre procedente carpento palam optaverat, ut frater suus Pulcher revivisceret atque iterum classem amitteret, quo minor turba Romae foret.* Neither was the crime recognized that the French Revolution called *incivisme*, but Gellius' description of her words as *incivilia* foreshadows it. On this case see B. Santalucia in the present volume.*

13. Offences against good order and discipline not explicitly covered by statute particularly concerned the censors, of whose sternness he tells several stories. It was only in words that Q. Metellus had in 1.6 rebuked the Roman people for misdeeds including refusal to contract lawful matrimony; but other censors had degraded people for neglecting their farms and horses⁴⁶, or for giving frivolous answers, in particular, the man who, according to the younger Scipio, when required to declare honestly, *ex animi sententia*, whether he had a wife, he punningly replied, using the same phrase, that she was not to his liking⁴⁷. The same story was told by Cicero, who tells us that the censor was Old Cato and the jester one L. Nasica⁴⁸, presumably a relation of Scipio's whose name he suppressed. Censors had expelled P. Cornelius Rufinus, twice consul and ex-dictator, from the senate for owning ten pounds' weight of silverware⁴⁹. The prisoners of war who had found a loophole in their

⁴⁶ Gell. 4.12: *Siquis agrum suum passus fuerat sordescere eumque indiligenter curabat ac neque araverat neque purgaverat, sive quis arborem suam vineamque habuerat derelictui, non id sine poena fuit, sed erat opus censorium, censoresque aerarium faciebant. Item quis eques Romanus equum habere gracilentum aut parum nitidum visus erat inpolitiae notabatur; id verbum significat quasi tu dicas incuriae. Cuius rei utriusque auctoritates sunt, et M. Cato (ex incertis fr. 92 Cugusi and Sblendorio Cugusi) id saepenumero adtestatus est.*

⁴⁷ Gell. 4.20.2-6: *Censor agebat de uxoribus sollemne ius iurandum; verba erant ita concepta: «Ut tu ex animi tui sententia uxorem habes?» Qui iurabat cavillator quidam et canicula et nimis ridicularius fuit. Is locum esse sibi ioci dicundi ratus, cum ita uti mos erat censor dixisset «ut tu ex animi tui sententia uxorem habes?», «habeo equidem» inquit «uxorem, sed non hercle ex animi mei sententia.» Tum censor eum, quod intempestive lascivisset, in aerarios rettulit causamque hanc ioci scurrilis apud se dicti subscripsit. The younger Scipio (fr. 13 Malcovati) is named as the source in §10.*

⁴⁸ Cic. *De or.* 2.260: *Ridicule etiam illud L. {Porcius} Nasica censori Catoni; cum ille «ex tui animi sententia tu uxorem habes?» «Non hercule» inquit «ex mei animi sententia».* Since Porcii Nasicae are unknown to history, it should seem that an interpolator has bestowed M. Porcius Cato's *nomen* on L. Cornelius Scipio.

⁴⁹ Gell. 17.21.39: *eodemque tempore C. Fabricius Luscinus et Q. Aemilius Papus censores Romae fuerunt et P. Cornelium Rufinum, qui bis consul et dictator fuerat,*

oaths to Hannibal were disgraced⁵⁰; it was an *opus censorium* to bring about the passage of a *senatus consultum* before dawn or after sunset⁵¹. Teachers of Latin rhetoric had met with censorial displeasure, albeit in uncultured times⁵². Excessively fat persons were deprived of the public horse, though whether that counted as an ignominy was disputed⁵³. It is also Gellius who records that those to whose names the censors had affixed a *nota* were registered in the *tabulae Caerites*⁵⁴, which, though

senatu moverunt, causamque isti notae subscripserunt, quod cum comperissent argenti facti cenae gratia decem pondo libras habere; cfr. 4.8.7: Hunc Rufinum postea bis consulatu et dictatura functum censor Fabricius senatu movit ob luxuriae notam, quod decem pondo libras argenti facti haberet (ten Roman pounds were some three and a quarter kilogrammes). This was over a century before the first of the sumptuary laws listed in 2.24 or Macr. Sat. 3.17.

⁵⁰ Gell. 8.18.10: *Haec eorum fraudulenta calliditas tam esse turpis existimata est, ut contempti vulgo dispretique sint, censoresque eos postea omnium notarum et damnis et ignominiis adfecerint, quoniam quod facturos deieraverant non fecissent.*

⁵¹ Gell. 3.2.8: *Post haec deinceps dicit (sc. Varro) senatusconsultum ante exortum aut post occasum solem factum ratum non fuisse; opus etiam censorium fecisse existimatos per quos eo tempore senatusconsultum factum esset.*

⁵² Gell. 15.12.2-3: *... Cn. Domitius Ahenobarbus et L. Licinius Crassus censores de coercendis rhetoribus Latinis ita censuerunt... Illis solum temporibus nimis rudibus necdum Graeca discipline expolit...*

⁵³ Gell. 6.22: *Nimis pingui homini et corpulento censores <constat> equum adimere solitos, scilicet minus idoneum ratos esse cum tanti corporis pondere ad faciendum equitis munus. Non enim poena id fuit, ut quidam existimant, sed munus sine ignominia remittebatur. <M.> tamen Cato (fr. 78 Malcovati = 85 Sblendorio Cugusi) in oratione quam de sacrificio commisso scripsit obicit hanc rem criminosius, uti magis videri possit cum ignominia fuisse. Quod si ita accipias, id profecto existimandum est, non omnino inculpatum neque indesidem visum esse cuius corpus in tam inmodicum modum luxuriasset exuberassetque.*

⁵⁴ Gell. 16.13.7: *Primos autem municipes sine suffragii iure Caerites esse factos accepimus, concessumque illis ut civitatis Romanae honorem quidem caperent, sed negotiis tamen atque oneribus vacarent pro sacris bello Gallico receptis custoditisque. Hinc tabulae Caerites appellatae versa vice, in quas censores referri iuebant quos notae causa suffragiis privabant.*

he does not say so, succinctly explains Horace's *Caerite cera digni*, and better than Porphyrio or some scholia do⁵⁵. Gellius' interest in this office and especially in its disciplinary function is clear, but from the safe distance of an age in which no Cato watched over your conduct and no Fabricius monitored your wealth.

14. Military discipline is of less concern: apart from the commanders who executed their sons, noted in §9 above, we hear only of bloodletting, which Gellius takes to have been originally a medical intervention, and the oath imposed on soldiers in 190 BC to limit looting⁵⁶.

15. Private actors also imposed punishments. From 10.23 we learn that husbands in Cato's day could kill wives caught with a lover or

⁵⁵ Hor. *Epist.* 1.6.62-3: *quid deceat, quid non, obliti, Caerite cera | digni...*; Porphyrio ad loc.: *Hoc ideo, quia victis Caeritibus Romani in percutiendo foedere non dederunt suffragii ferendi ius, quod ignominiosum fuit.* Of the Pseudacron scholia (ed. Keller, II 235) only one accords with Gellius (*Aliter: Cere oppidum in Italia, quo capta a Gallis urbe sacra translata sunt, pro quo beneficio postea civitatem Romanam meruit, ita tamen, ne suffragium ferrent*); the others treat it as an ignominy, or even as punishment for rebellion.

⁵⁶ Gell. 10.8: *Fuit haec quoque antiquitus militaris animadversio, iubere ignominiae causa militi venam solui et sanguinem demitti. Cuius rei ratio in litteris veteribus quas equidem invenire potui non exstat; sed opinor factum hoc primitus in militibus stupentis animi et a naturali habitu declinatis, ut non tam poena quam medicina videretur. Postea tamen ob pleraque alia delicta idem facitatum esse credo per consuetudinem, quasi minus sani viderentur omnes qui delinquerent;* 16.4.2: *C. Laelii C. filii consulis L. Cornelii P. filii consulis in exercitu decemque milia passuum prope furtum non facies dolo malo solus neque cum pluribus pluris nummi argentei in dies singulos; extraque hastam, hastile, ligna, poma, pabulum, utrem, follem, faculam si quid ibi inveneris sustulerisve quod tuum non erit, quod pluris nummi argentei erit, aut tu ad C. Laelium C. filium consulem Luciumve Cornelium P. filium consulem sive quem ad uter eorum iusserit proferes aut profitebere in triduo proximo quidquid inveneris sustulerisve dolo malo, aut domino suo cuium id censebis esse reddes, uti quod recte factum esse voles.* In §5 we read that the soldier absent without leave was recorded as *infrequens*, but the consequences are not stated.

(though the passage is poorly worded) drinking wine⁵⁷. Milo, finding Sallust in bed with his wife, sent him away not only poorer but soundly thrashed, *loris bene caesum*⁵⁸; the colloquialism *bene* signifies amusement at the contrast with the great moralizer's *notiones censorias* against others' misdeeds⁵⁹.

16. Occasionally punishment is thwarted by tribunes. The prosecution of the courtesan Manilia by the curule aedile A. Hostilius Mancinus, injured by a stone hurled from her establishment after arriving in after-dinner revelry, no doubt roaring drunk, and when refused entry trying to force his way in, was blocked by the tribunes on the ground that it had been improper for him to come *cum corollario*, in other

⁵⁷ Gell. 10.23: *Qui de victu atque cultu populi Romani scripserunt, mulieres Romae atque in Latio aetatem abstemias egisse, hoc est vino semper, quod temetum prisca lingua appellabatur, abstinuisse dicunt, institutumque ut cognatis osculum ferrent deprehendendi causa, ut odor indicium faceret si bibissent. Bibere autem solitas ferunt loream passum murrinam et quae id genus sapiant potu dulcia. Atque haec quidem in his quibus dixi libris pervulgata sunt; sed Marcus Cato non solum ~~existimatas~~, set et multatas quoque a iudice mulieres refert non minus si vinum in se quam si probrum et adulterium admisissent* (fr. 221 Malcovati = 200 Sblendorio Cugusi). *Verba Marci Catonis adscripsi ex oratione quae inscribitur De dote, in qua id quoque scriptum est, in adulterio uxores deprehensas ius fuisse maritis necare: Vir (inquit) cum divortium fecit, mulieri iudex pro censore est, imperium quod videtur habet, si quid perverse taetrefque factum est a muliere; multatur, si vinum bibit; si cum alieno viro probri quid fecit, condemnatur. De iure autem occidendi ita scriptum: «In adulterio uxorem tuam si prehensisses, sine iudicio impune necares; illa te, si adulterares sive tu adulterarere, digito non auderet contingere, neque ius est* (fr. 222 = 201)». On the textual perplexities see L. Holford-Strevens, *Gelliana: A Textual Companion to the Noctes Atticae of Aulus Gellius*, Oxford 2020, 108-109; on the substance see F. Botta in the present volume.

⁵⁸ Gell. 17.18: *M. Varro, in litteris atque vita fide homo multa et gravis, in libro quem <in>scripsit Pius aut de pace C. Sallustium, scriptorem seriae illius et severae orationis, in cuius historia notiones censorias fieri atque exerceri videmus, in adulterio deprehensum ab Annio Milone loris bene caesum dicit, et cum dedisset pecuniam dimissum.*

⁵⁹ *Notio censoria* appears four times in Cicero; see too Liv. 27.25.5.

words not in the course of his duty inspecting her business but as a would-be customer in no fit state to be admitted⁶⁰. In 6.19 Gellius tells two versions of the intervention by the tribune Ti. Sempronius Gracchus, father of the famous Gracchi, against his colleagues to save L. Scipio Asiaticus (*recte* Asiagenus) from imprisonment.

17. Unnamed censors were on the point of punishing a man who, supporting a friend in their court, emitted a very loud yawn, until he swore that he could not help himself, being afflicted with *oscedo*⁶¹, a word attested nowhere else in this sense. Since compulsive yawning is not a disorder, but a symptom of several disorders⁶², and the patient is not available for professional examination, we can do no more than contrast that other yawner, the high-class youth bored by the preaching of Peregrinus in 8.3⁶³, and the association in both places of yawning with the wandering mind⁶⁴.

18. The widow of Smyrna who in 12.7 killed her husband and son because they had killed her son by a previous marriage was referred by the proconsul of Asia for trial before the dedicated murder-court of the

⁶⁰ See P. Buongiorno in the present volume.

⁶¹ Gell. 4.20.8: *Deliberatum est de nota eius qui ad censores ab amico advocatus est et in iure stans clare nimis et sonore oscitavit, atque inibi ut plecteretur fuit, tamquam illud indicium esset vagi animi et alucinantis et fluxae atque apertae securitatis. Sed cum ille deiurasset invittissimum sese ac repugnantem oscitatione victum, tenerique eo vitio quod oscedo appellatur, tum notae iam destinatae exemptus est*. The source is the same speech of Scipio's as in nt. 46.

⁶² See O. Walusinski (ed.), *The Mystery of Yawning in Physiology and Disease*, Basel 2010.

⁶³ Gell. 8.3, lemma: *Quem in modum et quam severe increpuerit audientibus nobis Peregrinus philosophus adulescentem Romanum ex equestri familia, stantem segnem apud se et assidue oscitantem*. The one preserved fragment reads *Et adsiduo oscitantem vidit, atque illius quidem delicatissimas mentis et corporis halucinationes*.

⁶⁴ Cfr. Gell. 6.17.11: *oscitans et alucinanti similis*; Cic. ND 1.72: *quae Epicurus oscitans halucinatus est*; Dositheus GLK VII 431.8: *halucinor* χασμῶμαι.

Areopagus, which, unwilling either to convict or acquit, set the case down for a hundred years thence⁶⁵; neither in Gellius nor in his source Valerius Maximus is there any suggestion either as in John of Salisbury that two wrongs do not make a right⁶⁶, or as in Rabelais that the widow should have sought justice in the courts⁶⁷.

19. In 6.3 Gellius quotes extensively from Cato's speech in defence of the Rhodians, who had failed to assist their Roman allies against Perseus of Macedon, in order to rebut the captious criticisms of Cicero's freedman Tiro. However, it is the speech itself that interests Gellius, not its effect, which was to moderate Roman hostility, not to dispel it⁶⁸.

⁶⁵ On this chapter see, from various points of view, A. Atorino, G. Balestra, and R. D'Alessio (eds.), *Dolabella, gli Areopagiti e l'irragionevole durata del processo. Gellio, Notti Attiche 12.7*, Lecce 2021; also L. Holford-Strevens, *Getting Away with Murder: The Literary and Forensic Fortune of Two Roman Exempla*, in *International Journal of the Classical Tradition*, 7/4, Spring 2001 [2002], 489-514. For a Roman citizen, which of course the murderess was not, we learn from D. 48.5.39.8 (Papin. 36 *quaest.*) that by Gellius' day *iustus dolor* did no more than rule out the death penalty.

⁶⁶ *Policraticus* 4.11, ed. K.S.B. Keats-Rohan, Turnhout 1993, 269: *Ceterum et Brutum* (sc. L. Brutus, who killed his traitorous sons) *et mulierem deliquisse consentiam facile, eo quod excessit medicina modum nimiumque secuta est qua morbi duxere manum* (Luc. 2.142-3), *et licet magna fuerint crimina, praestantius fuerat eadem sine punientis crimine vindicari*; how that might have been done he does not say.

⁶⁷ *Le Tiers Livre*, ed. M.A. Screech, Genève 1964, 298: «veu qu'elle avoit fait la vengeance de soy, laquelle apartenoit à Justice». Cfr. Antonius Thysius in his and his fellow lawyer Jacobus Oiselius' edition, *Auli Gellii Noctes Atticae*, Lugduni Batavorum 1666, 635 nt. 4 on Gellius' words *quae digna venia fuit*: «Nequaquam. Potuit enim ad magistratum deferre crimen mariti & filii, ut juste à magistratu punirentur. Neque enim mulieris erat privatam vindictam sumere», to which Jacobus Gronovius, *Auli Gellii Noctium Atticarum libri XX*, Lugduni Batavorum 1706, 562 nt. 8 replied: «Alia igitur Dolabellæ, & Areopagitarum mens atque etiam Valerii Maximi justo dolore impulsam dicentis; alia nostri temporis». What hope of justice she might have had in Smyrna neither Rabelais nor Thysius knew.

⁶⁸ Liv. 45.25.4: *Rhodiis responsum ita redditum est ut nec hostes fierent nec socii permanerent*.

20. Gellius is firmly fixated on the past: one does not learn from him that a two-tier justice in which *humiliores* were already being subjected to rigours from which *honestiores* like himself were exempt was already acknowledged by jurists. He views that past in the traditional Roman manner as a better time⁶⁹, but without any serious commitment to its revival other than in the use of early words and the reading of early literature. Despite Favorinus' injunction to the injudicious archaist who praised ancient morality, *Vive ergo moribus praeteritis, loquere verbis praesentibus*⁷⁰, Ovid's Janus is nearer the mark: *laudamus veteres, sed nostris utimur annis*⁷¹.

⁶⁹ Contrast the Africans Fronto and Apuleius, who venerate ancient words but not ancient ways.

⁷⁰ Gell. 1.10.4.

⁷¹ *Fasti* 1.225.