CHAPTER 1

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

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western part of which, including Italy, ceased to exist as a political unity
in the fifth century AD. The *civitas* expanded both numerically and geo-
graphically 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 acknow-
ledgement 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 per-
ceptions? 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 establish-
ment (which included the emperor) between the culture of civil proce-
dures, 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 incorpo-
ration 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 pun-
ishment 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), *pecca-
tum* (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, *delictorum 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 nonetheless 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' character 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 manifestations 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 appro-
priate 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, estab-
lished 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 unaccept-
able 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 discre-
tion. The *cognitio* process was probably always the norm in the provinces,
where the provincial governor or his deputy presided, along with his *con-
silium*, 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

perspectives; Gaius composed a commentary on the Twelve Tables and
Pomponius a treatise on the *De iure civili* of Q. Mucius Scaevola, written in
the 80s BC. Treatises on the *publica iudicia* (Bauman 1996: 115–23) do not
appear to have been composed before the reign of Antoninus Pius, apart
from one book in a work with significant antiquarian content by Ateius
Capito in the reign of Augustus (Gell. *NA* 4.14; 10.6). Under Pius there
appeared two juristic studies of the 'public judgements', one by L. Volusius
Maecianus, later Prefect of Egypt, in fourteen books, and a shorter effort by
Venuleius Saturninus in three, which discussed among other things judicial
discretion in the punishment of slaves (D. 48.2.12). According to Ulpian
(D. 48.9.6), Maecianus, of whom only three fragments survive in direct
quotation, recorded that the punishment for parricide under the Lex
Pompeia should be inflicted on the accomplices of the murderer. He also
quoted with approval the judgement of the legate Trebius Germanus that
an under-age slave, who had failed to raise the alarm when his master was
attacked even though he slept at the foot of his bed, should be executed,
even though he was under age, as he could have saved his master (D.
29.5.14) – an example of a non-imperial court decision affecting legal
practice. For Maecianus, Rome was still the focus of judicial discourse,
despite its diminishing relevance to judicial practice in the provinces: the
Lex Julia on public violence, he wrote (D. 48.6.8), protected defendants
from being forcibly prohibited from reporting for trial at a stated time
at Rome.

The choice to write a book about a set of courts now probably obsolete,
especially when taken by a prominent imperial careerist such as Maecianus,
is significant. Both he and Venuleius Saturninus would have hoped to
shape a new discourse on public offences as a distinct category in the judicial
system. In so doing, they imposed a spurious uniformity on the offences
covered by the Republican *quaestiones*, which did not match the facts.
As we shall see (chapters 4 and 5), features of the original People's courts,
such as that anyone could accuse, were not invariably adopted, and the
penalties were not all the same either. But by creating a literature on
the *publica iudicia*, Maecianus, Saturninus and their successors under the
Severans set up a sort of canon of offences, which were categorised as
'public' and treated as such in legal hearings. The *publica iudicia* continued
to require the presence of an accuser, whom the defendant had a right to
confront, and the lodging of a formal document of 'inscription', written in
due form and signed by the accuser or another, if he was illiterate (D.
48.2.3.2); by Late Antiquity the accuser 'bound himself' by inscription also
to suffer the same penalty as the accused if his charge failed.

In a procedural sense, therefore, the separation of the *publica iudicia* from the rest had real practical significance. However, because the criteria were based on the distant past, the separation also risked alienating the legal process from changes in social perceptions of what damaged the community and therefore deserved public punishment. Moreover, Maecianus and Saturninus wrote within a few years of Salvius Julianus' revision and codification of the Praetor's Edict, as instructed by Hadrian, perhaps in 130 AD. They may well have been influenced by his project, as his codification was followed up with an extensive work of interpretation, consisting of a Digest of ninety books. Two kinds of *ordo* were thus created, the *ordo* of matters covered by the Edict, and the *ordo* of the *publica iudicia* and their statutes.

The idea of an *ordo*, therefore, is, in this context, a product of juristic discourse. The purpose of the concept was to provide a sense of system and order. While Maecianus and his colleagues at the time and later were not writing as official codifiers of public law, the effect was to create a fixed body of knowledge. But as any codifier or systematiser of law would find, the next thing to happen would be attempts to modify existing contents of the 'code' or add new ones. It was these new problems requiring remedies which required jurisdiction 'outside the order', *extra ordinem*. The conservatism of legal discourse was thus accommodated, but at a price, and that price has been paid also by modern scholarship, which uses as a collective term for this process of adaptation, the *cognitio extra ordinem*. This term will be avoided as far as possible in what follows (but see below, chapter 3, pp. 29–33), not because of its dubious Latinity – Latin does not like to attach prepositional phrases to nouns – but because the term is itself a product of a specialised discourse and its meaning is thus open to misinterpretation.

THE COUNTER-CULTURES

One further disjunction between legal discourse and social attitudes must also be acknowledged. Although the elite law-makers at Rome and administrators of public criminal justice dominate the record, they were open to challenge. Crowds did not always react as expected (see Foucault 1977: 59–69 on executions). Legal commentators acknowledged that certain types of hooligan could even be popular; if the 'Boys', wrote the Severan Callistratus, have done nothing worse than stir things a little, 'pandering to the applause of the mob', they should simply be given a mild beating and/ or banned from attending public entertainments in future (D. 48.19.28.3).

The nocturnal activities of less appealing hoodlums were recorded by
Suetonius, with reference to Nero (Suet. *Nero* 26), and Apuleius (*Met.* 2.18).

Champions of counter-cultures asserted an alternative world-view in
other ways: the literature which promoted illicit love as a form of celebra-
tion of adultery, made a public offence by Augustus in 18 BC, the cheeky
exploits of the bandit Bulla Felix in Italy in the early 200s AD, as recorded
by Dio (*Epitome*, 77.10), and the Christian denials of the powers of the
pagan gods, maintained through public martyrdom down to 313 AD, were
all challenges to the official consensus as expressed by the elite exponents of
Roman law. Nor did they exist in isolation. Ovid's 'didactic' work on
adultery, the *Ars Amatoria*, intended as a joke but interpreted as a challenge
to Augustus, mattered because it had readers; Bulla Felix struck a chord
because he satirised the Roman judicial system, impersonating Roman
officials and asserting that the prefect was no more than a bandit himself;
Christian martyr-acts asserted, to the bemusement of those who heard
them, that people executed as criminals in the arena had a privileged
passage to the afterlife.

The figure of the bandit (Shaw 1984) represented what organised society
was not and as such was fascinating to writers on exotic subjects remote
from real life. It was argued by Hobsbawn (1969) that the 'social bandit'
flourished with the support of his community (or part of it), preying on the
rich to redistribute wealth to the poor, as Bulla Felix allegedly did.
Certainly some bandits were an integral part of how their neighbourhood
functioned: in Late Antiquity Isaurian mafias ran effective protection
rackets for the mutual benefit of themselves and the local landowners
(Hopwood 1989), and in fifth-century Gaul the citizens of Auxerre pre-
ferred coexistence with their local Bacaudae to assistance from an imperi-
ally sponsored Alan warlord (Constantius, *Life of Germanus* 6.28). But in
much literary discourse the figure of the bandit is subsumed by other
agendas. For the novelist (Hopwood 1998), the bandit inhabited inacces-
sible places, such as the marshes of the Nile Delta or remote mountain
caves. In Apuleius a band of robbers establish an alternative state, with a
treasury (*fiscus*, *Met.* 7.10.1) and decrees (*Met.* 6.26.5).

For those public figures who claimed to speak for the virtuous majority,
the otherness of the bandit could be ascribed to such individuals as
Catiline, Clodius and Antonius, the political rivals of Cicero from the
60s to the 40s BC, or the opponents in Galilee of the controversial Josephus
in the 60s AD (Isaac 1984; Shaw 1993). So pervasive is the 'establishment'
representation of all social and political movements to which the writer or
speaker is opposed that it is often not possible to establish the motives or