

The Narrative of the Law and Philosophy in the *Noctes Atticae* of Gellius

1. Usi autem sumus ordine rerum fortuito, quem antea in excerpendo feceramus. Nam proinde ut librum quemque in manus ceperam seu Graecum seu Latinum vel quid memoratu dignum audieram, ita quae libitum erat, cuius generis cumque erant, indistincte atque promisce annotabam eaque mihi ad subsidium memoriae quasi quoddam litterarum penus recondebam (Gell. *NA pr.1.2*)

But in the arrangement of my material I have adopted the same haphazard order that I had previously followed in collecting it. For whenever I had taken in hand any Greek or Latin book, or had heard anything worth remembering, I used to jot down whatever took my fancy, of any and every kind, without any definite plan or order; and such notes I would lay away as an aid to my memory, like a kind of literary storehouse.¹

2. These passages reveal several functions at play in the text...crafting a form of memory exercise through which Gellius instructs his reader and ensures that they correctly understand the content before moving on. Frequently his discussion draws on the previous chapters, and later chapters challenge readers to recognize and apply the numerous facts and techniques that Gellius has introduced previously. (DiGiulio, 108-109)
3. Eas leges cum Sex. Caecilius, inquisitis exploratisque multarum urbium legibus, eleganti atque absoluta brevitate verborum scriptas diceret, "Sit," inquit, "hoc" Favorinus, "in pleraque earum legum parte ita uti dicis; non enim minus cupide tabulas istas duodecim legi quam illos duodecim libros Platonis De Legibus. Sed quaedam istic esse animadvertuntur aut obscurissima aut durissima aut lenia contra nimis et remissa aut nequaquam ita, ut scriptum est, consistentia" (Gell. *NA 20.1.4*)

When Sextus Caecilius, who had examined and studied the laws of many cities, said that they were drawn up in the most choice and concise terms, Favorinus rejoined: "It may be as you say in the greater part of those laws; for I read your twelve tables with as eager interest as I did the twelve books of Plato On the Laws. But some of them seem to me to be either very obscure or very cruel, or on the other hand too mild and lenient, or by no means to be taken exactly as they are written.

4. Cum hanc legem Solonis...tenuit nos gravis quaedam in principio admiratio, requirens quam ob causam dignos esse poena existimaverit, qui se procul a seditione et civili pugna removissent. Tum, qui penitus atque alte usum ac sententiam legis introspererant, non ad augendam, sed ad desinendam seditionem legem hanc esse dicebant...Nam si boni omnes, qui in principio coercendae seditioni impares fuerint, populum percitum et amentem non deseruerint, ad alterutram partem dividi sese adiunxerint, tum eveniet, ut cum socii partis seorsum utriusque fuerint eaeque partes ab his...temperari ac regi coeperint, concordia per eos potissimum restitui conciliarique possit, dum et suos, apud quos sunt, regunt atque mitificant et aduersarios sanatos magis cupiunt quam perditos. (Gell. *NA 2.12.2-4*)

When I read this law of Solon... I was at first filled with something like great amazement, and I asked myself why it was that those who had held themselves aloof from dissension and civil strife were thought to be deserving of punishment. Then those who had profoundly and thoroughly studied the purpose and meaning of the law declared that it was designed, not to increase, but to terminate, dissension...For if all good men, who have been unequal to checking the dissension at the outset, do not abandon the aroused and frenzied people, but divide and ally themselves with one or the other faction, then the result will be, that when they have become members of the two opposing parties, and... have begun to guide and direct those parties, harmony can best be restored and established through the efforts of such men, controlling and soothing as they will the members of their respective factions, and desiring to reconcile rather than destroy their opponents.

5. Poeniendis peccatis tres esse rationes a philosophis attributas...Poeniendis peccatis tres esse debere causas existimatum est. Una est causa, quae Graece vel κόλασις vel νοουθεσία dicitur, cum poena adhibetur casti gandi atque emendandi gratia, ut is qui fortuito delinquit attentior fiat correctiorque. Altera est, quam hi qui vocabula ista curiosius diviserunt τιμωρίαν appellant. Ea causa animadvertendi est, cum dignitas auctoritasque

¹ Translations are from J.C. Rolfe, 1927, available through the Loeb Classical Library

eius in quem est peccatum tuenda est, ne praetermissa animadversio contemptum eius pariat et honorem leve; idcircoque id ei vocabulum a conservatione honoris factum putant. Tertia ratio vindicandi est quae παράδειγμα a Graecis nominatur cum poenitio propter exemplum necessaria est, ut ceteri a similibus peccatis ...metu cognitae poenae deterreantur. (Gell. NA 7.14.cap, 1-4)

The three reasons given by the philosophers for punishing crimes... It has been thought that there should be three reasons for punishing crimes. One of these, which the Greeks call either κόλασις or νοθεσία, is the infliction of punishment for the purpose of correction and reformation, in order that one who has done wrong thoughtlessly may become more careful and scrupulous. The second is called τιμωρία by those who have made a more exact differentiation between terms of this kind. That reason for punishment exists when the dignity and the prestige of the one who is sinned against must be maintained, lest the omission of punishment bring him into contempt and diminish the esteem in which he is held; and therefore they think that it was given a name derived from the preservation of honour (τιμή). A third reason for punishment is that which is called by the Greeks παράδειγμα, when punishment is necessary for the sake of example, in order that others through fear of a recognized penalty may be kept from similar sins.

6. Quod M. Varro...L. Aelium magistrum suum in ἔτυμολογία falsa reprehendit; quoque idem Varro in eodem libro falsum furis ἔτυμον dicit...Sed in posteriore eiusdem libri parte 'furem' dicit ex eo dictum, quod veteres Romani 'furuum' atrum appellaverint et fures per noctem, quae atra sit, facilius furentur. Nonne sic videtur Varro de fure, 3 tamquam Aelius de lepore? Nam quod a Graecis nunc κλέπτης dicitur, antiquiore Graeca lingua φῶρ dictum est. Hinc per adfinitatem litterarum, qui φῶρ Graece, est Latine "fur." (Gell. NA 1.18.cap, 4-5)

That Marcus Varro...criticizes his teacher Lucius Aelium for false etymologies; and likewise, that Varro, in the same book, says a false origin of *fur*... But in the latter part of the same book he says that *fur* is so called because the early Romans used *furvus* for *ater* ("black"), and thieves steal most easily in the night, which is black. Is it not clear that Varro made the same mistake about *fur* that Aelius did about *lepus*. For what the Greeks now call κλέπτης, or "thief," in the earlier Greek language was called φῶρ.

7. Quam severe moribus maiorum in fures vindicatum sit; et quid scripserit Mucius Scaevola super eo, quod servandum datum commodatumve esset. Labeo in libro de duodecim tabulis secundo acria et severa iudicia de furtis habita esse apud veteres scripsit idque Brutum solitum dicere et furti damnatum esse, qui iumentum aliorum duxerat, quam quo utendum acceperat, item qui longius produxerat, quam in quem locum petierat. Itaque Q. Scaevola...verba haec posuit: "Quod cui servandum datum est, si id usus est, sive, quod utendum accepit, ad aliam rem, atque accepit, usus est, furti se obligavit. (Gell. NA 6.15)

How severely thieves were punished by the laws of our forefathers; and what Mucius Scaevola wrote about that which is given or entrusted to anyone's care. Labeo, in his second book On the Twelve Tables, wrote that cruel and severe judgments were passed upon theft in early times, and that Brutus used to say that a man was pronounced guilty of theft who had merely led an animal to another place than the one where he had been given the privilege of using it, as well as one who had driven it farther than he had bargained to do. Accordingly, Quintus Scaevola...wrote these words: "If anyone has used something that was entrusted to his care, or having borrowed anything to use, has applied it to another purpose than that for which he borrowed it, he is liable for theft."

8. Decemviri autem nostri, qui post reges exactos leges, quibus populus Romanus uteretur, in XII tabulis scripserunt, neque pari severitate in poeniendis omnium generum furibus neque remissa nimis lenitate usi sunt. Nam furem, qui manifesto furto pressus esset, tum demum occidi permiserunt, si aut, cum faceret furtum, nox esset, aut interdiu telo se, cum prenderetur, defenderet. Ex ceteris autem manifestis furibus liberos verberari addicique iusserunt ei, cui furtum factum esset, si modo id luci fecissent neque se telo defendissent; servos item furti manifesti pressos verberibus adfici et e saxo praecipitari, sed pueros inpuberes praetoris arbitrato verberari voluerunt noxiamque ab his factam sarciri. Ea quoque furta, quae per lancem liciumque concepta essent, proinde ac si manifesta forent, vindicaverunt. (Gell. NA 11.18.6-9)

But our decemvirs, who after the expulsion of the kings compiled laws on Twelve Tables for the use of the Romans, did not show equal severity in punishing thieves of every kind, nor yet too lax leniency. For they permitted a thief who was caught in the act to be put to death, only if it was night when he committed the theft, or if in the daytime he defended himself with a weapon when taken. But other thieves taken in the act, if they were freemen, the decemvirs ordered to be scourged and handed over to the one from whom the theft had been made, provided they had committed the theft in daylight and had not defended themselves with a weapon. Slaves taken in the act were to be scourged and hurled from the rock, but they decided that boys under age should be flogged at the discretion of the praetor and the damage which they had done made good. Those thefts also which were detected by the girdle and mask, they punished as if the culprit had been caught in the act.

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10. Sed quaedam istic esse animadvertuntur aut obscurissima aut durissima aut lenia contra nimis et remissa aut nequaquam ita, ut scriptum est, consistentia. (Gell. NA 20.1.4)

But some of them seem to me to be either very obscure or very cruel, or on the other hand too mild and lenient, or by no means to be taken exactly as they are written.

11. "Obscuritates" inquit Sex. Caecilius, "non adsignemus culpae scribentium, sed inscitiae non adsequentium, quamquam hi quoque ipsi, qui quae scripta sunt minus percipiunt culpa vacant. Nam longa aetas verba atque mores veteres obliteravit, quibus verbis moribusque sententia legum comprehensa est" (Gell. NA 20.1.5-6)

"As for the obscurities," said Sextus Caecilius, "let us not charge those to the fault of the makers of the laws, but to the ignorance of those who cannot follow their meaning, although they also who do not fully understand what is written may be excused. For long lapse of time has rendered old words and customs obsolete, and it is in the light of those words and customs that the sense of the laws is to be understood.

12. Non enim profecto ignoras legum oportunitates et medellas pro temporum moribus et pro rerum publicarum generibus ac pro utilitatum praesentium rationibus proque vitiorum quibus medendum est fervoribus mutari atque flecti neque uno statu consistere, quin, ut facies caeli et maris, ita rerum atque fortunae tempestatibus varientur.

For you surely are not unaware that according to the manners of the times, the conditions of governments, considerations of immediate utility, and the vehemence of the vices which are to be remedied, the advantages and remedies offered by the laws are often changed and modified, and do not remain in the same condition; on the contrary, like the face of heaven and the sea, they vary according to the seasons of circumstances and of fortune. (Gell. NA 20.1.22)

13. Dure autem scriptum esse in istis legibus quid existimari potest? nisi duram esse legem putas, quae iudicem arbitrumve iure datum, qui ob rem iudicandam pecuniam accepisse convictus est, capite poenitur aut quae furem manifestum ei cui furtum factum est in servitute tradit, nocturnum autem furem ius occidendi tribuit. Dic enim, quaeso, die, vir sapientiae studiosissime, an aut iudicis illius perfidiam contra omnia divina atque humana iusiurandum suum pecunia vendentis aut furis manifesti intolerandam audaciam aut nocturni grassatoris insidiosam violentiam non dignam esse capitibus poena existumes?"

But what can be looked upon as cruel in those laws? Unless you think a law is cruel which punishes with death a judge or arbiter appointed by law, who has been convicted of taking a bribe for rendering his decision, or which hands over a thief caught in the act to be the slave of the man from whom he stole, and makes it lawful to kill a robber who comes by night. Tell me, I pray, tell me, you deep student of philosophy, whether you think that the perfidy of a juror who sells his oath contrary to all laws, human and divine, or the intolerable audacity of an open theft, or the treacherous violence of a nocturnal footpad, does not deserve the penalty of death?"

14. Ex ceteris autem manifestis furibus liberos verberari **addicique** iusserunt ei, cui furtum factum esset, si modo id luci fecissent neque se telo defendissent (Gell. NA. 11.18.8)

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15. Nihil profecto inimitius, nihil inmanius, nisi, ut re ipsa apparet, eo consilio tanta inmanitas poenae denuntiatast, ne ad eam umquam perveniretur. Addici namque nunc et vinciri multos videmus, quia vinculorum poenam deterrimi homines contemnunt, dissectum esse antiquitus neminem equidem legi neque audivi, quoniam saevitia ista poenae contemni non quitast...**Acerbitas plerumque ulciscendi maleficii bene atque caute vivendi disciplinast.**

Nothing surely is more merciless, nothing less humane, unless, as is evident on the face of it, such a cruel punishment was threatened in order that they might never have to resort to it. For nowadays we see many condemned and bound, because worthless men despise the punishment of bondage; but I have never read or heard of anyone having been cut up in ancient days, since the severity of that law could not be scorned. **Severity in punishing crime often serves as the teaching of upright and careful living.**

