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3

Magic in Roman Law

*The Reconstruction of a Crime*¹

J. B. Rives

As Book Four of *The Aeneid* draws to its climax, Dido begins to make plans for her self-immolation and enlists her sister's help with the preparations. In order to hide from Anna the true significance of her requests, she explains that she has found a way either to get Aeneas back or to loosen the hold of love: a priestess (*sacerdos*) of the Massylii can by means of chants (*carmina*) free her mind from cares. But before giving Anna her instructions, Dido makes a short but emotional apology: 'Dear sister, I call the gods to witness, and you and your sweet life, that unwillingly do I resort to magical arts' (*Aeneid* 4. 492–3). An innocent reader might wonder why she feels the need to apologize in this way. The ancient commentator Servius, writing probably in the early fifth century CE, provides a plausible answer: 'because, although the Romans adopted many rites (*sacra*), they always condemned those of magic (*semper magica damnarunt*); for that reason she excuses herself' (Servius on *Aeneid* 4. 493). Since

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Servius was writing as an ancient *grammaticus*, concerned above all with the linguistic exposition of his text for young students, it is not surprising that his comment is somewhat lacking in nuance. It is not, however, inapposite: if we understand that both the author and his readers condemned magical rites, a character who was meant to appear sympathetic would naturally express shame at recourse to them.

Nor did Servius' observation lack historical basis. By using the verb *damnare*, with its strong legal connotations, Servius almost certainly meant to suggest that *sacra magica* were not merely improper but actually illegal. At the time that he was writing, this was indeed the case.² Moreover, Servius had good reason to believe that it had in fact 'always' been the case, for he knew of a law from the Twelve Tables, the ancient compilation of Roman laws written some eight and a half centuries before, that concerned a specific magical rite. Commenting on the second half of Vergil's eighth *Eclogue*, a poem in which a young girl attempts by ritual means to bring her lover back from town, he elucidates her claim that certain herbs, *herbae*, and potent substances, *venena*, can be used to transfer crops from one field to another (*Eclogue* 8. 99) by remarking that 'this came about by means of certain magical arts; hence in the Twelve Tables there is the clause "nor entice the crop of others"'.³ It was therefore with some justification that he could assert that the Romans had 'always' condemned magical rites.

Although most scholars since Servius would agree with his assessment that magic was always illegal in the Roman world, there have been relatively few detailed discussions of the extent to which and, more importantly, the senses in which this was true. Until the latter part of the twentieth century, most classical scholars interested in the legal status of magic tended to accept 'magic' as an unproblematic, objective category that required little examination or definition. Many seem to have operated with an implicit version of the triangulated definition expressed most succinctly by Frazer, who characterized

² See especially *The Opinions of Paulus* 5. 23. 17–18, discussed below, and *Codex Theodosianus* 9. 16. 3–7 (translated in Beard, North, and Price 1998: ii. 263).

³ Since Augustine made the same connection between this passage of the *Eclogues* and the Twelve Tables (*City of God* 8. 19), it may have been a piece of stock knowledge in the repertoire of a *grammaticus*. For a discussion of this law, see Rives 2002: 273–9.

magic by contrasting it with religion and science.⁴ The lack of any need to worry over what was magic and what was not greatly simplified the task of these scholars, since they could proceed merely by collecting references to the legal status of anything that was 'obviously' magic. This approach, which I will refer to as the 'realist' school, resulted in some studies that still provide the most comprehensive collections of material.⁵ Yet they are generally quite weak in analysis, because the failure to consider the nature of magic tended to obviate the need for careful interpretation. It was not necessary to consider the specific issues at stake in any given case, since the fact that it concerned 'magic' was considered explanation enough. Hence these older studies often leave an aftertaste of tautology: 'these various magical practices were illegal, and they were illegal because they were cases of magic'.

Over the last twenty-five years or so, however, the revival of scholarly interest in ancient magic has led to a sea change in methodology. The category 'magic' has become a highly charged one, and even scholars disinclined to engage with theoretical issues now feel compelled to address questions about its meaning and applicability.⁶ A dominant approach in current scholarship, although by no means the only one, is to treat 'magic' as an evaluative term used to mark off activities or beliefs that the speaker regards with disapproval. Moreover, the cultural sphere to which this evaluative term referred is generally, although not universally, understood to be what we would call religion, i.e., interactions with the divine. In short, there exists today a widespread tendency to regard 'magic' simply as a label that people gave to religious practices they considered immoral,

⁴ For Frazer 1922: 56–60, magic, like science, assumes 'the order and uniformity of nature', so that the same causes always produce the same effects; the difference is that magic postulates causal connections where none in fact exist, so that magic is 'the bastard sister of science'. Religion, in contrast to both, assumes that the world is governed by conscious and personal powers, whose favour people must win by propitiation or conciliation; hence where the magician attempts to manipulate and control, the worshipper humbly supplicates.

⁵ In particular, Pharr 1932 and Massonneau 1934: 136–241; Mommsen 1899: 639–43 remains valuable for its sensitivity to the evidence.

⁶ For example, Dickie (2001: 18) asserts that 'my own reaction on coming across yet another attempt at defining the notion of magic is dismay combined with a sense of foreboding'; nevertheless he spends two chapters discussing the emergence of a concept of magic in the Greek and the Roman worlds.

fraudulent, or otherwise unacceptable.⁷ This is what I will call the 'nominalist' approach.

For the purposes of analysing the legal situation, the nominalist approach constitutes a tremendous advance over the realist approach, in that it calls explicit attention to an underlying issue rather than simply relying on the term 'magic' as a self-evident explanatory term. Yet it is not without limitations of its own: if realist assumptions obviated the need for analysis, nominalist assumptions tend to restrict analysis to one set of issues. Indeed, if we pursue the nominalist insight to its logical conclusion, we should dispense with 'magic' altogether, and focus instead on issues of religious deviance.⁸ The problem with this, I would argue, is that the issues behind the criminalization of certain activities shifted over time, as those activities came to be perceived in new ways. In an earlier paper I examined the laws in the Twelve Tables that dealt with 'wicked chants', *mala carmina*, and with the enchantment of crops (i.e., the law cited by Servius in the passage quoted above). I argued that the notion of 'magic' hinders rather than aids our efforts to understand these laws in their original historical context, although I also pointed out that Servius and other later Roman writers understood them precisely as laws against magic. I thus concluded that these laws both did and did not constitute laws against magic, insofar as they criminalized certain actions that were later reconceptualized as instances of magic (Rives 2002). It is this sort of reconceptualization, the possibility that the same set of actions might be treated as crimes over a long period but for reasons that gradually shifted, that the nominalist focus on religious deviance renders very difficult to analyse.

It thus seems important to retain 'magic' as a heuristic category if we wish to achieve a broader and richer analysis of Roman legal developments. This does not mean that we should return to the old

⁷ For important expositions of this approach, see M. Smith 1978: 68–93; Phillips 1986: 2711–32, 1991, and 1994; cf. J. Z. Smith 1975: 22–5; Gager 1992: 24–5; Beard, North, and Price 1998: i. 154–6; Janowitz 2001: 9–26; Dickie 2001: 20–2, 39–40, and 461; it is anticipated by Nock 1933: 169–75 (= 1972: 313–18). For a critique, see Versnel 1991 and J. Z. Smith 1995: 16–20; for general reflections, see Remus 1999.

⁸ As argued most cogently by Phillips: 'instead of looking for legal repression of ancient magic, we could more accurately—and hence more profitably—look for legal repression of unsanctioned religious activity' (1991: 269).

realist approach, but rather that we should extend the nominalist approach in order to take into account issues other than religious deviance; 'magic', it seems to me, provides the most convenient overarching category to encompass these various issues. It will be useful at this point to invoke the distinction between emic and etic levels of analysis, that is, between 'magic' as a Roman conceptual category and 'magic' as a modern heuristic category.⁹ If we hope to understand the issues at stake in the criminalization of any particular action, we must do our best to reconstruct emic categories. It is for this reason that in my earlier article I resisted describing the laws of the Twelve Tables as laws against magic, since that term does not seem to correspond to any contemporary conceptual category and consequently implies issues and concerns that have little relevance to archaic Rome. As several scholars have argued, however, a conceptual category of magic, what Richard Gordon has called a 'strong view' of magic, did eventually develop in the Roman world, probably sometime during the first centuries BCE and CE.¹⁰ This development in turn had an impact on Roman law, so that at some point people became liable to general charges of engaging in the magical arts, *artes magicae*, as I shall argue below, in this sort of charge issues of religious deviance could indeed play a central part. If we restrict ourselves to an emic level of analysis, therefore, if we are talking only about what Romans themselves described as the *artes magicae*, then the nominalist approach is an effective one.

Yet to restrict ourselves to an emic level of analysis is to make it virtually impossible to trace lines of continuity between shifting emic categories. Roman authorities criminalized the enchantment of crops long before a strong view of magic gained currency in the Roman world and for reasons that apparently had nothing to do with religious deviance, yet later Romans like Servius could associate that law with the later legal treatment of magicians, *magi*, and evil-doers, *malefici*. From Servius' perspective the archaic law on the

⁹ For a brief and convenient discussion of these terms, see Harris 1979: 32–41; on their role in the study of ancient magic, see Versnel 1991.

¹⁰ Gordon 1999: 164–5, 207, and 229–31; see also Garosi 1976: 33–73; Beard, North, and Price 1998: i. 154–6; Dickie 2001: 124–41.

enchantment of crops had 'always' been about magic, even though from our own perspective we can see how the underlying issues shifted as emic categories changed. But we can see these changes only because our perspective is precisely not that of contemporary actors, because we employ an overarching etic category that can encompass the shifting emic categories. For better or worse, 'magic' is the most suitable and convenient label for that category. It is useful not only because it is familiar and commonly accepted, but also because it is such a fluid term, able to function as an inclusive but not rigid rubric for a shifting cluster of concerns.¹¹ Thus the adoption of 'magic' as an explicitly etic, heuristic category allows us to analyse much more effectively the sorts of reconceptualization that I have traced in connection with the Twelve Tables.

In this paper I examine another more complex case of continuity and change in the Roman legal treatment of magic, the development of the *Lex Cornelia de sicariis et veneficiis*, 'the Cornelian law concerning assassins and poisoners'. Since it is not possible in a single paper to scrutinize all the pertinent material, I have chosen to focus on three key 'moments': the original *Lex Cornelia*, insofar as we can reconstruct it; the legal context of the *Apology* of Apuleius; and the situation represented by a passage from *The Opinions of Paulus*. I will argue that the concern of the original *Lex Cornelia* was with harmful and uncanny actions, and that this broadened out over time into a wider concern with religious deviance, even though the latter never entirely displaced the former. My purpose is two-fold. On the one hand, I hope my analysis will serve as a specific exploration of the general methodological issues that I have outlined above. On the other hand, I hope to demonstrate that these issues are not merely abstract, but significantly affect our understanding of historical developments in the Roman world. I thus conclude by discussing some

¹¹ In other words, the term 'magic' is well suited to a polythetic definition, in which the category is defined not by the invariable presence of a single feature or group of features, but instead by the variable presence of one or more features from a general pool; see Versnel 1991: 185–7, who stresses the advantages of such a definition for the study of magic in the ancient world. For a convenient overview of polythetic classification in the biological and social sciences, see Needham 1975; for an influential application to the study of ancient religion, see J. Z. Smith 1980.

of the connections between these changes in the Roman legal treatment of magic and other large-scale developments within the Roman world.

THE *LEX CORNELIA DE SICARIIS ET VENEFICIIS*

The original *Lex Cornelia de sicariis et veneficiis* was one of the laws passed in 81 BCE under L. Cornelius Sulla, by which he reorganized and augmented the system of standing courts that had been developing since the middle of the second century BCE (e.g. Brunt 1988: 216–22). None of these laws is extant in its original form, and we depend for our knowledge of them on later references and quotations. This evidence indicates that the original *Lex Cornelia de sicariis et veneficiis* had at least six sections, and provides a good idea of the contents of three. The first section (dealing with *sicarii*) concerned those 'armed with a weapon for the purpose of killing a person or perpetrating a theft' as well as those who killed someone or arranged for someone to be killed; its purview was restricted to cases in Rome itself or within one mile. The fifth section, (dealing with *venefici*), the one that most concerns us here, dealt with a person 'who for the purpose of killing a person' prepared, sold, bought, possessed, or administered a dangerous drug (*venenum malum*). The sixth section concerned people who caused someone to be wrongfully condemned on a capital charge. There is no evidence regarding the contents of sections two through four, although it is very likely that one of them concerned cases like those in section one that took place more than a mile outside Rome.¹²

At least for those sections whose contents are known, it is clear that this law was not a new creation of Sulla, but instead a reworking of pre-existing laws; Sulla's contribution may have been simply to combine previously separate laws.¹³ What were the common elements in these

¹² I follow the reconstruction of Ferrary 1996 and his more detailed discussion in Ferrary 1991; for the title *de veneficiis*, instead of *de veneficis*, see Cloud 1968: 140–1.

¹³ There was a specific court, the *quaestio inter sicarios*, already in 142 BCE (Cicero, *de Finibus* 2. 54), and section six of the Sullan law incorporated a law of C. Gracchus 'that no one should be convicted unjustly in trial' (Cicero, *For Cluentius* 151). An inscription (*ILS* 45 = *Inscriptiones Italiae* xiii. 3. 70b) records that C. Claudius

laws that caused him to group them together? The most obvious connection is the idea of murder: the first section was clearly directed against violent forms of murder, and the sixth against the manipulation of the courts to condemn an innocent person on a capital charge. Yet there may have been further considerations. We should note that the clause concerning *sicarii* dealt not only with actual killing but also with the possession of arms 'for the purpose of killing a person or committing theft'; a person who in a fit of rage bludgeoned someone to death would presumably not be tried as a *sicarius*. The term *sicarius* implied planning and concealment, and so meant something more like 'assassin' than simply 'murderer'.¹⁴ We can thus see a more precise connection between these two laws: not murder in general, but wrongful death brought about through stealth and malice aforethought.

It is easy to see why Sulla also included the law against *veneficium* in this grouping. *Veneficium* was in general the use of *venena*, substances that had the power to affect something else. The law on *veneficium*, however, did not concern all types of *venena*, but only those that were dangerous, *venena mala*.¹⁵ Secondly, it did not concern even all *venena mala*, but only those possessed 'for the purpose of killing a person'.¹⁶ In these respects, *veneficium*, as defined by the *Lex Cornelia*, was something very close to the modern idea of

poisoning.¹⁷ If anything, then, the clause concerning *veneficium* implied even more strongly than the other two the notion of wrongful death brought about through stealth. The limited physiological and pharmacological knowledge of the day meant that the presence of *venena* was difficult to detect and their effectiveness even more difficult to explain; consequently, their use was in many cases simply inferred from the effects. In such circumstances it was relatively easy to suspect *veneficium*, and allegations of *veneficium* were liable to follow on any death regarded as unusual or suspicious. Moreover, the difficulty in assigning responsibility meant that these allegations often allowed free rein to suspicions of conspiracy and the venting of personal hostilities. Consequently, charges of *veneficium* tended both to feed on and to reinforce fears about the hidden enemy, the seemingly innocuous who wielded deadly power.¹⁸

Was the law on *veneficium* a law against magic? Yes and no. A number of scholars have stressed the ambiguity of the word *venenum*, which they rightly point out can be translated as either 'poison' or 'magic potion', and have accordingly argued that the *Lex Cornelia* embraced both magic and poisoning.¹⁹ This distinction, however, depends on the conceptual categories of modern western science rather than on those of contemporary Romans. When we distinguish 'poison' from 'magic potion', we mean in general that the effects of the former can be explained and to some extent predicted within a scientific understanding of nature, while the effects of the latter

Pulcher was *iudex quaestionis veneficiis* probably in 98 BCE, and Cicero (*de Inventione* 2. 58) implies the existence of such a court c.84 BCE; see further Brunt 1988: 220–1. We know from Livy that earlier *quaestiones*, presumably ad hoc, were established to deal with cases of *veneficium* in 331 BCE (8. 18), 184 BCE (39. 38. 3; 41. 5); 180 BCE (40. 37. 4; 43. 2–3); 179 BCE (40. 44. 6); and 152 BCE (Livy, *Periochae* 48; cf. Valerius Maximus 6. 3. 8); note also Polybius (6. 13. 4), who says that cases of poisoning and murder come under the jurisdiction of the senate.

¹⁴ This clause is attested by Ulpian (*Coll.* 1. 3. 1) and Marcian (*Digest* 48. 8. 1. pr.); cf. Cicero, *For Rabirius, Charged with Treason* 19; *For Milo* 11; *Paradoxes of the Stoics* 31. Cloud 1969 interprets *sicarius* as 'gangster'.

¹⁵ Cf. Gaius in *Digest* 50. 16. 236. pr.: 'Whoever says *venenum* ought to add whether bad or good; for *medicamenta* are also *venena*, since under that word is contained everything that, when administered to something, changes the nature of that to which it was administered'; see also Marcian in *Digest* 48. 8. 3. 2; Servius on *Georgics* 1. 129, and on *Aeneid* 11. 458.

¹⁶ Marcian (in *Digest* 48. 8. 3. 2): 'only this [kind of *venenum*] is specified in the law, that which is possessed for the purpose of killing a person'; cf. *Digest* 48. 8. 1. 1 and 3. pr. 1; *The Opinions of Paulus* 5. 23. 1; Cicero, *For Caelius* 51.

¹⁷ This is apparent in the only trials in the republican period known to have taken place under the Sullan law, those connected with A. Cluentius Habitus: Cicero, *For Cluentius* esp. 55; 147–8. We may also note that both Cicero and the author of the *Rhetorica ad Herennium*, when using the terms *venenum*, *veneficium*, or *veneficus/a* in a legal context, always do so in reference to substances intended to cause death, i.e., poisons: *Rhetorica ad Herennium* 2. 8 and 44; 3. 33; 4. 23; Cicero, *de Inventione* 2. 58; *For Roscius of Ameria* 90; *For Cluentius* 1–2 and 166; *On the Orator* 2. 105.

¹⁸ Women were especially associated with *veneficium*; for the most spectacular example, see Livy's account of the matronly poisoners of 331 BCE (8. 18).

¹⁹ e. g., Pharr 1932: 272–4; M. Smith 1978: 75; Beard, North, and Price 1998: i. 233; Ogden 1999: 83; Dickie 2001: 15; it is misleading to infer the scope of the original *Lex Cornelia* from much later texts, such as *The Opinions of Paulus* (as Castello 1990: 673) or the *Institutes of Justinian* (as Hunink 1997: i. 13). Pace Phillips 1991: 264, Kippenberg 1997: 148, and Graf 1997: 46–7, it is unlikely that the original *Lex Cornelia*, by specifying *venena*, also covered maleficent rituals, although as I argue below they were eventually assimilated.

cannot: hence poisons are natural and magical potions are supernatural. The Romans, however, would not have made the same distinction. They may well have regarded the operation of *venena* as occult and uncanny, in the literal sense of 'concealed' and 'unknown', insofar as they could not observe or explain how certain substances produced certain effects. In our own culture, we tend to equate the occult and uncanny with the supernatural: something is uncanny only if it has no obvious explanation within the scientific framework of 'nature', and so is necessarily 'supernatural' as well. In the Roman world, by contrast, it would have been perfectly possible for people to regard something as occult or uncanny and yet not supernatural.²⁰ Within this conceptual framework, the word *venenum*, far from being ambiguous, denoted a consistent and fairly simple concept, namely, any natural substance that had an occult or uncanny power to affect something else. On an emic level, therefore, i.e., in Roman terms, it would be better to describe the law on *veneficium* as dealing not with both magic and poisoning, but rather with wrongful death effected through occult and uncanny means.

On an etic level, however, we might reasonably regard it as a law concerning magic, provided that by 'magic' we do not mean religious deviance. As I suggested above, it was the occult and uncanny aspect that endowed the concept of *veneficium* with its distinctive social implications, since any unexpected death could be attributed to the malice of some unknown agent who had used *venena* to bring it about. This pattern of attributing misfortune to the occult powers of a malicious agent is something that occurs cross-culturally: E. E. Evans-Pritchard's study of the Azande and Clyde Kluckhohn's study of the Navaho provide classic anthropological analyses (Evans-Pritchard 1937: 63–106; Kluckhohn 1944/1967; cf. Graf 1997: 47). Most scholars tend to describe this combination of occult powers and malicious intent as 'witchcraft' or 'sorcery' or 'black magic'. It is easy enough to understand the *Lex Cornelia* as a law dealing with 'magic' in this sense of the word. Moreover, it is useful

for analysis, since it allows us to label the common element that bound together the original law with its later extensions.

For it is important to keep in mind that Roman law was not a static system. Statutes were subject to a process of ongoing alteration and expansion in which three different activities could play a part: the application of the law in actual trials, the passage of new laws that modified earlier statutes, and the work of jurists in interpreting and codifying earlier laws. As a result, the scope of the original *Lex Cornelia* was gradually extended. On the one hand, there were tendencies to apply it to malicious actions effected by occult means other than *venena*. For example, a senatorial decree of unknown date, but probably prior to the mid-second century CE, decreed that anyone responsible for 'wicked sacrifices', *mala sacrificia*, should be condemned and punished under the *Lex Cornelia*.²¹ The text as we have it does not specify the nature of these *mala sacrificia*, but comparison with other evidence suggests that they were primarily cursing rituals, *devotiones*.²² Certainly Tacitus, in reporting some of the political trials in the reigns of Tiberius and Claudius, suggests that *devotiones* were easily assimilated to *venena* (e.g., *Annals* 4. 52. 1, 12. 65. 1), and Quintilian similarly implies that in his day it was an open question whether 'the chants of *magi*', *carmina magorum*, might be considered a type of *veneficium* (*Institutes* 7. 3. 7). On the other hand, the *Lex Cornelia* was also gradually extended to malicious actions other than murder. Quintilian suggests that there were debates whether love potions could be regarded as *venena* under

²¹ Modestinus (*Digest* 48. 8. 13): 'In accordance with a senatorial decree, whoever conducts or organizes *mala sacrificia* is ordered to be condemned to the punishment of that law.' Modestinus' *floruit* in the second quarter of the third century CE provides a *terminus ante quem* for the senatorial decree, and the fact that jurists were much more likely to refer to the initial motions of emperors than to the subsequent senatorial decrees for laws passed after the reign of Hadrian (Talbert 1984: 438–50) suggests an earlier date.

²² Cf. *The Opinions of Paulus* 5. 23. 15, quoted in section three below. Attempts to bring the use of *devotiones* under the law against *veneficium* may go back to the reign of Tiberius, if Tacitus is correct in saying that Germanicus' friends accused Piso of killing him by means of *devotiones et venenum* (*Annals* 3. 13. 2; cf. 2. 79. 1 and Pliny, *Natural History* 11. 187; see further Eck et al. 1996: 154–5); by the start of the third century CE, Tertullian can regard it as obvious that *homicidium* can be accomplished equally by sword, *venenum*, or magical binding spells (*de Spectaculis* 2).

²⁰ For example, Cicero, *On Divination* 1. 13 and 16. See especially Phillips 1991: 263–4 and 267–8 on the lack of a generally accepted theory of naturalistic causation in the Roman world.

the *Lex Cornelia*, and other evidence suggests that *venena* meant to cause madness might also come under this law. Although at least some jurists continued to insist on its limitation to *venena* that cause death, there was clearly a tendency to apply it to other types as well.²³ In both respects, then, the purview of the *Lex Cornelia* was gradually extended.

At the same time as the scope of the *Lex Cornelia* was being extended to include actions other than those defined in the original law, some Romans were also starting to change the way that they thought about them, by associating them with a range of other practices and ideas in a new conceptual category. Evidence for this change lies in lexical developments: alongside *veneficium* and its cognates, two new word groups appeared, those of *magus* and *maleficium*. *Magus* was a loan word from Persian by way of Greek, and originally denoted a Persian wise man or religious specialist. In our extant sources it does not appear in Latin before the 50s BCE; the first authors who use it do so in its original sense, as do prose writers down to the late first century CE.²⁴ Vergil is the earliest extant author to use the adjective *magicus*, and he does so in reference to what we would call magical rites; the word is thereafter very common in poetry with this meaning.²⁵ *Maleficium* was a native Latin term, originally with the generic meaning of 'wicked deed, crime'. By the

²³ Love potions: Quintilian, *Institutes* 7. 3. 10; 7. 3. 30; 7. 8. 2; 8. 5. 31; Pseudo-Quintilian, *Declamationes Minores* 385; *Declamationes Maiores* 14 (a 'hate potion'); Julius Victor, *Ars Rhetorica* 3. 3; Marcian (*Digest* 48. 8. 3. 2) notes that the term *venenum* can apply to a love potion, *amatorium*, but then says expressly that the *Lex Cornelia* applies only to *venena* intended to cause death; see further Gordon 1999: 256–8. Madness: Quintilian, *Institutes* 9. 2. 105; cf. Philo, *On Specific Laws* 3. 98–9; Numantina, accused in 24 CE of driving her husband mad 'by means of *carmina* and *veneficia*' (Tacitus, *Annals* 4. 22. 3), may have been tried under the *Lex Cornelia* (Dickie 2001: 146–7).

²⁴ Earliest examples: Cicero, *On Laws* 2. 26; *On the Nature of the Gods* 1. 43; *On Divination* 1. 46 and 90–1; *Tusculan Disputations* 1. 108; *de Finibus* 5. 87; Catullus 90. 1 and 3; Nigidius Figulus fgt. 67 (Swoboda 1889). Later examples in prose: Vitruvius 8. pr. 1; Valerius Maximus 8. 7. ext. 2, 1. 6. ext. 1b; Velleius Paterculus 2. 24. 31; Curtius 3. 3. 10; 5. 1. 22; Seneca, *Letters* 58. 31; *Dialogues* 5. 16. 3; the elder Pliny is the first prose author to use the term *magus* in a looser sense, e.g., *Natural History* 16. 249; 22. 20; 24. 156 and 160–7. See in general Nock 1933; Graf 1997: 20–61; Bremmer 1999: 1–9; Gordon 1999: 163–5.

²⁵ Vergil, *Eclogue* 8. 66; *Aeneid* 4. 493; Tibullus 1. 2. 41–63; 1. 5. 11–12; Propertius 1. 1. 19–24; 2. 28. 35–6; 4. 1. 103–6; Ovid, *Amores* 1. 8. 5–6 (*magus*); *The Art of Love* 2.

time of Apuleius, however, it and its cognates had apparently become closely identified with *magus* and its cognates, and by the fourth century CE had even started to displace them.²⁶ Although it is fairly easy to trace these semantic developments, it is more difficult to chart the conceptual shift that presumably lay behind them. Many scholars would agree, however, that an idea of 'magic' was fairly well established in Roman culture by the time of the elder Pliny, who gives a rambling and somewhat chaotic account of the magical art, *magica ars*.²⁷ The importance of these developments for us lies in the fact that the concept of magic provided a new umbrella category under which the various actions now associated with the *Lex Cornelia* could be classed. We can see its effects in the trial of Apuleius.

THE APOLOGY OF APULEIUS

Our information about the trial of Apuleius comes entirely from his *Apology*, which represents the speech that he delivered in his own defence before the proconsul of Africa around 158/9 CE.²⁸ Briefly, the

99–106, etc.; *magicus* does not appear in prose before the elder Pliny (*Natural History* 8. 106; 11. 203, etc.).

²⁶ Despite some hints in earlier writers (Festus. 414. 23–27 L; Tacitus, *Annals* 2. 69. 3), Apuleius is the first in whom this usage is clearly discernible: see *Golden Ass* 3. 16; 6. 16; 9. 29; 9. 31, and note especially the phrase *magica maleficia* that he commonly uses in the *Apology* (1. 5; 9. 2; 42. 2; 61. 2 and 69. 4; cf. 51. 10 and 96. 2). It may have begun as a popular usage, as later writers suggest (Lactantius, *Divine Institutes* 2. 16. 4; Constantius in *Codex Theodosianus* 9. 16. 4 and 6; Augustine, *City of God* 10. 9), but eventually assumed virtually 'official' status: see further below, n. 57.

²⁷ See above, n. 10. Gordon (1999: 260–1) likewise insists on the legal implications of these conceptual shifts, although his analysis differs somewhat from my own. For Pliny see *Natural History* 30. 1–15; partly translated in Beard, North, and Price 1998: ii. 263–4.

²⁸ The trial is dated by the proconsulship of Claudius Maximus, on which see Thomasson 1996: 62–3, nos. 76–7. I cite the text by the numbering of Paul Vallette's Budé edition (1924); Hunink (1997) and Harrison (2000: 39–88) provide valuable recent guides. Although there have been varying opinions about its historical value, with some scholars regarding it essentially as a literary exercise (e.g. Gaide 1993), I follow the majority opinion in seeing it as a version of the actual courtroom speech, probably with some revision for publication; Hunink (1997: i. 25–7) conveniently summarizes the debate, although I cannot agree with his conclusion that by approaching the text as 'a literary work of art' one 'rises above the level of historical, biographical, and legal records'.

background is as follows. Apuleius, a stranger to Oea, the modern Tripoli, had married a wealthy widow named Aemilia Pudentilla. She had two sons from her first marriage: Sicinius Pontianus, a friend of Apuleius' from Athens who at first encouraged the union, and Sicinius Pudens, who reached adulthood not long before the trial. Some connections of the family, however, strongly disapproved of the marriage: Sicinius Aemilianus, the brother of Pudentilla's first husband, and Herennius Rufinus, Pontianus' father-in-law. They spread the story that Apuleius was a *magus* and had used love charms to win Pudentilla, who they alleged had previously vowed never to remarry. They even managed for a while to turn Pontianus against his friend, although the two were reconciled shortly before Pontianus' unexpected death. This they also attributed to Apuleius, and even taxed him with it in the course of another legal case conducted before the governor of Africa, Claudius Maximus. At this point Apuleius challenged Aemilianus to bring a formal charge against him, which he did.

It is the nature of this charge that concerns us here. Unfortunately, to determine it is no simple matter, since our only evidence is Apuleius' speech itself. The scholarly consensus has been that Apuleius was tried under the *Lex Cornelia de sicariis et veneficiis*.²⁹ Although this may be true, it does not really help to illuminate the underlying issues at stake. As I noted above, the *Lex Cornelia* was no longer restricted to cases of *veneficium* as defined in the original law, that is, wrongful death effected through uncanny and occult means. So far as we can determine, Aemilianus' indictment reflected this development. It is clear that the issue of wrongful death was only peripheral to the case. Since Aemilianus had dropped the murder of Pontianus, the only remaining point relevant to such a charge was Apuleius' alleged attempt to buy a *lepus marinus*, a type of poisonous mollusc (Pliny, *Natural History* 9. 155 and 32. 8–9). More importantly, Apuleius several times implicitly denies that he was accused of

veneficium. For example, he argues that even if fish were used in magic, the mere purchasing of fish would not make someone a *magus* (*Apology* 30–2); similarly, 'if I had bought hellebore or hemlock or poppy-juice... who would endure it with equanimity, if on these grounds you were to indict me for poisoning (*veneficium*), because a man can be killed by them?'³⁰ But if wrongful death was not the issue, in what sense was the charge brought under the *Lex Cornelia*?

At the very end of the speech, Apuleius quotes from the actual indictment that Sicinius Aemilianus brought against him: 'This is the man, my lord Maximus, whom I have decided to indict before you... for numerous wicked deeds (*maleficia*), openly committed.'³¹ Thanks to Apuleius' rebuttal, we know what Aemilianus cited as specific instances of *maleficia*: Apuleius had sought to purchase certain kinds of fish, presumably for use as *venena*; he had used chants to send a slave boy into a trance; he kept a secret object wrapped up among the household gods of Pontianus; he had performed a nocturnal sacrifice; he had commissioned the carving of a ghoulish wooden statuette to which he paid cult; and last but not least, he had used *carmina et venena* (*Apology* 69. 4) to seduce Pudentilla. Some of these activities clearly came under the *Lex Cornelia*, especially with its extended purview: the nocturnal sacrifice recalls the senatorial decree on *mala sacrificia*, and the secret object and ghoulish statuette may also have been meant to suggest *devotiones*. Whether or not the use of love potions came under the *Lex Cornelia* was, as we have seen, a matter of debate, but Aemilianus could well have hoped that in this case the debate would be settled in his favour. Although the alleged enchantment of the slave boy seems rather remote from the concerns of the *Lex Cornelia*, we have little idea what the prosecution made of it: Apuleius focuses on the issue of

³⁰ *Apology* 32. 8; cf. 41. 6: 'Indeed, I am glad that my opponents are unaware that I have also read Theophrastus' *On Animals that Bite and Sting* and Nicander's *Antidotes for Poisonous Bites*; otherwise they would be indicting me for poisoning (*veneficium*) as well'; see also *Apology* 26. 8–9, where he contrasts people who accuse *magi* with those who accuse *sicarii*, *venenarii*, or thieves.

³¹ *Apology* 102. 9–103. 1; I owe thanks to an anonymous referee for calling my attention to the importance of this passage. See also *Apology* 90. 1 and especially 28. 4, where Apuleius suggests that he would even concede being a *magus* so long as it was understood that he had not been involved in any *maleficia*.

²⁹ Massonneau 1934: 168 and 190; Graf 1997: 66; Hunink 1997: i. 13 (with further references); Beard, North, and Price 1998: i. 235; Gordon 1999: 263; Dickie 2001: 147. This view, however, downplays both the loose structure of criminal trials, especially in the provinces, and the judges' often haphazard knowledge of law: see Peachin 1996: 7–9 and 25–53.

divination, but Aemilianus may have intended it as an example of harmful *carmina*. In general, however, the concern with harmful actions that informed the original *Lex Cornelia* seems fairly attenuated here; after all, the only people said to have been affected were Pudentilla and the slave boy. The focus seems thus to have been not so much on the harm caused by these actions as on the actions themselves. As I shall argue below, this shift in focus is significant.

Apuleius himself, although he also employs the term *maleficium*, insists that the charge was in essence one of *magia* or being a *magus*, two phrases that he uses interchangeably. He does this from the very start of his speech. Only a few days before the trial, he claims, Aemilianus 'began to accuse me of magical misdeeds (*magica maleficia*) and even of the murder of my stepson Pontianus' (*Apology* 1. 5). But when Apuleius challenged him to bring a formal charge, he changed his tune: he conveniently forgot about the murder of his nephew and instead 'based his indictment solely on the slanderous charge of magic (*calumnia magiae*), which brings disgrace more readily than conviction' (2. 2). This is how Apuleius presents the charge throughout the speech. For example, after he has dealt in the first part of the speech with general attacks on his character, he introduces its main section by saying 'I come now... to the actual charge of magic (*ad ipsum crimen magiae*)' (25. 5); indeed, all the allegations that Aemilianus has made are aimed at one idea, 'that I am a *magus*' (25. 8). Therefore, his primary task in the main section will be to demonstrate that 'their evidence has nothing at all to do with magic' (*Apology* 28. 4; cf. 29. 1, 47. 1, 66. 3, 67. 1, 79. 2, and 83. 5). According to Apuleius himself, then, the charge against which he was defending himself was that he was a *magus* or practiced *magia*.

This representation of the charge was well suited to the rhetorical strategy around which Apuleius shaped his defence. According to ancient rhetorical handbooks, speakers for the defence had three basic choices: they could deny the actions in question, they could dispute their characterization as crimes, or they could plead extenuating circumstances (e.g., *Rhetorica ad Herennium* 1. 18–25). Apuleius certainly avails himself of the first option, especially but not exclusively in connection with the charges concerning Pudentilla. But for his overall strategy he relied on the second option. Instead of denying the points alleged against him, he simply provided an

alternative explanation of them: they were the actions, not of a *magus*, but of a philosopher, and it was only his accuser's ignorance that led him to think otherwise.³² Apuleius proclaims this strategy in his address to the governor at the very start of his speech: 'I congratulate myself, by God, that with you as judge I have the opportunity and occasion to exonerate philosophy among the ignorant and to clear my own name' (*Apology* 1. 3). In the course of the speech, he reinterprets virtually every allegation brought by Aemilianus. He claims that his interest in fish is not that of a *magus* seeking out *venena*, but that of a philosopher exploring the mysteries of nature, as Aristotle and Theophrastus had done before him (36–8). Similarly, the slave boy whom he allegedly entranced is in fact an epileptic who happened to have a seizure; Apuleius treats his audience to a long philosophical discussion of this condition (49–51). The secret object that he kept wrapped up among the household gods of Pontianus was the token of an initiation into a mystery cult: his zeal for truth and piety towards the gods have led him to undergo countless such initiations (53–6). And the skeletal figure that he had carved is in reality an image of Mercury to whom he piously makes offerings on holidays (61–5).

Apuleius thus makes the case hinge on the distinction between a philosopher and a *magus*. As this very strategy shows, the distinction was by no means cut and dried: one person's philosopher might be another's *magus*.³³ The key issue therefore became one of perceived deviance. A wide range of acts that from one point of view might mark the actor as a *magus* could from another point of view appear

³² *Apology* 28. 2: 'And none of those charges, whether true or false, will I deny, but will confess them just as if they were facts, so that this whole crowd... may clearly understand that not only can no true objections be brought against philosophers, but not even false ones be devised'; see the useful discussions of Graf 1997: 69–88; Bradley 1997: 212–19; Harrison 2000: 45–7.

³³ Philostratus' defense of Apollonius of Tyana provides a useful parallel: without denying any of the feats attributed to Apollonius, Philostratus, like Apuleius, argues that he should not be regarded as a *magus* but as a philosopher (*Life of Apollonius* 1. 2). Again, Philostratus can provide no clear-cut criteria for distinguishing the philosopher from the *magus*; the best he can do is to insist that Apollonius performed his feats of prognostication by means of wisdom rather than magical art. See the stimulating discussion of Francis 1995: 108–29.

entirely innocuous.³⁴ The matter was thus essentially one of accepted norms and their limits: someone whose behaviour was judged to lie beyond the accepted limits could by that very fact be regarded as a *magus*. It became the task of the judge to decide whether Apuleius' activities were acceptable, and thus those of a philosopher, or were instead deviant, and thus those of a *magus*. Furthermore, although Apuleius treats philosophy as the non-deviant term against which the deviant term magic is defined, a modern observer might classify much of what he discusses as religion: the secret object hidden among the household gods, the performance of a nocturnal sacrifice, the allegedly demonic object of cult, perhaps even the enchantment of a boy, all relate in some way to interactions with the divine. We should also note what Apuleius presents as the popular definition of a *magus*: one 'who by an exchange of speech with the immortal gods exerts power in any matter he chooses through some amazing force of chants' (*Apology* 26. 6). On this definition it is his distinctive ability to communicate with the gods that gives the *magus* his unusual powers. But that Apuleius, in discussing all this, should have used the language of philosophy rather than that of religion is not surprising: in neither Latin nor Greek did there exist a word entirely equivalent to the modern term 'religion'.³⁵ In short, we may reasonably regard religious deviance, as we would describe it, as one of the key issues in the trial of Apuleius.

Whether or not the introduction of this issue was due solely to Apuleius' choice of rhetorical strategy is a more difficult question to answer, since his version of the case is the only one to which we have direct access. Two observations, however, suggest that it was not. First, the issue of philosophy versus magic was probably not entirely of Apuleius' making. His public persona as a philosopher must already have been well established, and his opponents had apparently made explicit attempts to undermine it in their prosecution; in other words, they understood that proving their charge of *maleficia*

³⁴ A point Apuleius makes much of: note especially *Apology* 54. 6–7.

³⁵ See M. Smith 1956: 79 (= 1996. i. 113). Note also the Greek and Roman tendency to identify as philosophers the religious specialists of other cultures, such as Egyptian priests, Persian *magi*, Indian Brahmins, and Celtic Druids: see, e.g., Dio Chrysostom 49. 7–8; Numenius Fgt.1a (des Places 1973); Clement of Alexandria, *Stromateis* 1. 15; Diogenes Laertius 1. 1–11.

depended to some extent on denying Apuleius' claims to be a philosopher.³⁶ Second, there is the issue that I sketched above, that Aemilianus' charge of *maleficia* seems to assume something more than actual or even potential harm to specific individuals. The allegations were undoubtedly meant to give the impression that Apuleius could indeed harm someone, if he chose, and had already harmed Pudentilla (although in her case the harm was presumably to her pocketbook and reputation rather than her body). Nevertheless, it is difficult to avoid the sense that the charge of *maleficia* also involved the assumption that these actions were simply wrong in and of themselves; as I noted in the previous section, the term *maleficium* was in this very period acquiring the specific connotations of 'magic' that came to dominate in late antiquity. In short, it seems that Apuleius' characterization of the charge as one of *magia*, with all the implications of deviance that it involved, may not have significantly misrepresented Aemilianus' intentions.

But although we can deduce a great deal about Apuleius' thinking and make some reasonable guesses about Aemilianus', we know virtually nothing about that of Claudius Maximus, the representative of Roman authority and law. It is impossible to say whether his decision to accept Aemilianus' indictment was motivated solely by a concern for the sorts of harmful actions that traditionally came under the *Lex Cornelia*, or by a more general concern with *magia* and issues of deviance, or by some of both. We do not even know what verdict he reached, although the probability is strong that he decided to acquit Apuleius.³⁷ If so, we might reasonably suppose that Apuleius' rhetorical strategy paid off. Certainly he had assessed the situation shrewdly: it is likely that Maximus was himself a philosopher, and Apuleius may therefore have counted on his sympathy for a

³⁶ e. g., *Apology* 4. 1: 'So you heard a little earlier the following statement made at the beginning of the indictment: "We accuse before you a philosopher who is handsome and most eloquent"—for shame!—"in Greek as well as Latin"; cf. 13. 5: 'Pudens almost split his sides shouting, "A philosopher has a mirror, a philosopher owns a mirror!"'.

³⁷ This is suggested not only by the very survival of his defence speech, but also by the fact that a few years later he was alive and well in Carthage, and indeed a local celebrity: he delivered speeches before Severianus, governor in 162/3 CE (*Florida* 9. 39), and Scipio Orfitus, governor in 163/4 CE (*Florida* 17. 1 and 21).

man of similar culture, with a cosmopolitan background and connections to the highest society, assailed by locals whom he could depict as vicious and ignorant bumpkins.³⁸ What we do know, however, is that Apuleius' decision to highlight the definitional issue of philosophy versus magic meant that Maximus was in effect required to make a decision about a general charge of magic, regardless of whether or not this was his initial concern.

Although the trial of Apuleius is the only trial of this kind for which we have any substantial evidence, it is unlikely to have been the only one that took place. I would suggest that we may regard it as representative of a gradual shift in the interpretation of the *Lex Cornelia*, away from an exclusive focus on harmful actions accomplished through occult and uncanny means, towards a more general concern with issues of religious deviance. The lexical shift, from *veneficus* and *veneficium* to *magus* and *maleficium*, is clear enough, and the evidence also strongly suggests an associated shift in the conceptualization of the legal issues involved. As more and more actions involving *venena* and *mala sacrificia* and the like were brought into association with the *Lex Cornelia*, and as a 'strong view' of magic that encompassed all these things became more and more widely spread in society, the *Lex Cornelia* came to serve as a precedent for what was in effect a general charge of being a *magus* or practicing *magia*, a charge in which issues of religious deviance tended to play an important part.³⁹ Once this became established in practice, it was only a matter of time before the charge of magic *tout*

³⁸ The proconsul's identity with the Stoic Claudius Maximus who taught Marcus Aurelius (*Historia Augusta, Life of Marcus Aurelius* 3. 2; Marcus Aurelius, *Meditations* 1. 15. 1 and 1. 17. 4) seems to be widely accepted: e.g., Champlin 1980: 32–3; Birley 1987: 96–7; and Bradley 1997: 216.

³⁹ In my general views about the emergence of an actionable charge of magic in Roman law I follow the observation of Mommsen (1899: 639–40) that the term *magus* 'appeared from the Trajanic period as a delictual category for the wicked magician'. For his Trajanic date, Mommsen cites Tacitus (*Annals* 2. 27. 3 and 32. 3; 6. 29. 3–4; 12. 22. 1 and 59. 11; 16. 30. 2 and 31. 1); I would argue that in all these cases the word has particular reference to divination, so that the trial of Apuleius is the earliest evidence for the usage that Mommsen had in mind, and that even in this case it is not certain that actual charge brought by Aemilianus was one of being a *magus*. For other accounts of the development of the *Lex Cornelia* with respect to magic, see MacMullen 1966: 124–5; Gordon 1999: 255–60; Dickie 2001: 145–8.

court, with its implications of religious deviance, entered into the formal discourse of Roman law. As I argue in the next section, it is this stage of development that is discernible in *The Opinions of Paulus*.

THE OPINIONS OF PAULUS

The first significant appearance of the term *magus* and its cognates in an extant legal text is a passage from a work entitled *The Opinions of Paulus* (*Pauli Sententiae*), one of the most frequently cited texts pertaining to the Roman legal treatment of magic.⁴⁰ The Paulus of the title is Julius Paulus, one of the great jurists of the early third century CE whose work summed up the legal developments of the classical period and became canonical in the post-classical period. The popularity of this passage is due to a number of perceived advantages: it provides the text of an actual law rather than an account of a trial; it is guaranteed by the authority of a famous jurist; it is a complete text and not a reconstruction from later citations and allusions. Unfortunately, almost all these advantages are illusory. First, as the work of a jurist, it was not in fact an actual law, in the same way that the *Lex Cornelia de sicariis et veneficiis* was a law; I shall deal with this issue at greater length below. Second, virtually all legal historians now agree that it is not the work of Paulus himself, but an epitome compiled at the end of the third century CE; it is not even possible to know what sort of documents lay behind it.⁴¹ Lastly, the passage is probably not even complete, since what is normally cited as *The Opinions of Paulus* is in fact a reconstruction compiled by Paul

⁴⁰ The very first appearance is in a passage of Ulpian (*Digest* 10. 2. 4) that equates magical books, *libri magici*, with *mala medicamenta* and *venena*.

⁴¹ This has been overlooked by a number of scholars who discuss the Roman law on magic, e.g., MacMullen 1966: 125; Garosi: 1976: 80; Francis 1995: 91; Graf 1997: 55; and Ogden 1999: 83; although Kippenberg 1997: 148–50 describes the text as a later compilation, he nevertheless consistently cites it as Paulus' own opinions. Pharr 1932: 288–9 and Massonneau 1934: 192 also attribute the text to Paulus, but were simply following the scholarship of their day.

Krüger in 1878 from a number of late antique sources.⁴² Yet despite all these considerable problems, this text nevertheless provides extremely valuable evidence for the further development of the *Lex Cornelia*.

It is best to begin with the passage itself. Because a sense of its context is necessary for an understanding of its significance, I will quote from the relevant section at some length.⁴³

The Opinions of Paulus 5. 23: On the *Lex Cornelia de sicariis et veneficiis*.

14. Those who give abortifacients or love potions (*abortionis aut amatorium poculum*), even if they do not act with malicious intent (*dolo*), nevertheless, because it sets a bad example (*mali exempli res est*): persons of low status (*humiliores*) are relegated to the mines, persons of high status (*honestiores*) to an island, with partial forfeiture of their property; but if as a result a woman or a man has died, they suffer the supreme punishment. 15. Those who perform, or arrange for the performance of, impious or nocturnal rites (*sacra impia nocturnave*), in order to enchant (*obcantarent*), transfix (*defigerent*), or bind (*obligarent*) someone, shall either be crucified or thrown to the beasts. 16. Those who sacrifice a man or obtain omens from his blood (*hominem immolaverint exve eius sanguine litaverint*), or pollute a shrine or a temple, shall be thrown to the beasts or, if persons of high status, be punished capitally. 17. It is agreed that those guilty of the magic art (*magicae artis conscios*) be inflicted with the supreme punishment, i.e., be thrown to the beasts or crucified. Actual magicians (*magi*), however, shall be burned alive. 18. No one is permitted to have in their possession books of the magic art (*libri artis magicae*); anyone in whose possession they are found shall have their property confiscated and the books publicly burnt, and they themselves shall be deported to an island; persons of low status shall be punished capitally. Not only is the profession of this art but also the

⁴² The fullest extant version of the text is an epitome made for the *Lex Romana Visigothorum* in 506 CE; other compilations such as the *Digest* quote individual sentences: Levy 1943: 17; Liebs 1993: 28–9; Robinson 1997: 63–4. Krüger's edition (Krüger et al. 1878–1927, vol. ii) is essentially followed by other standard editions, e.g., Riccobono et al. 1940–3. Liebs 1993: 121–210 offers an alternative reconstruction.

⁴³ It is worth noting that sentences 15–19 are preserved only in the *Lex Romana Visigothorum* (sentence 14 is also found as *Digest* 48. 19. 38. 5); apparently none of the other compilers who drew on this text were interested in the material on magic. On the legal differentiation of *humiliores* and *honestiores*, see Garnsey 1970 and cf. below, p. 96.

knowledge (*scientia*) prohibited.⁴⁴ 19. If a person has died from a medicine (*medicamen*) given for human health or recovery, the one who gave it, if a person of high status, is relegated to an island; a person of low status, however, is punished capitally.

The great interest of this text is immediately apparent. But to understand its exact significance, we must consider more generally what it is that Roman jurists did. In the imperial period, the main sources of law were senatorial decrees, which steadily declined in importance, and imperial pronouncements or 'constitutions'; as I discussed earlier, such decrees could extend the purview of previous laws as well as define entirely new areas. But these decrees were almost entirely ad hoc, concerned with specific problems arising out of specific circumstances. They were not, with very few exceptions, concerned with defining or redefining the general scope of a law or elaborating its underlying legal principle. Nor were they automatically incorporated into some comprehensive code, since no such code existed: it was only in the 290s CE that lawyers, apparently at imperial instigation, produced the first authoritative collections of imperial constitutions, the *Codex Gregorianus* and the *Codex Hermogenianus*.⁴⁵

These two deficiencies were in part made good by the jurists. In their expository works they would cite a range of material concerning a particular issue and discuss the general legal principles involved. With few exceptions, these works are now represented only as excerpts in later compilations, such as the *Digest* of Justinian; nevertheless, enough survives to indicate their original nature. As a relevant example we may consider the exposition of the *Lex Cornelia de sicariis et veneficiis* in the elementary textbook, the *Institutiones*, of

⁴⁴ This sentence was rejected as an interpolation by Krüger, on the assumption that Paulus was the author. If we accept that the author was a later compiler, I see no objections to its authenticity. It bears some resemblance to Ulpian's discussion of astrology, in which he asks whether the *scientia* or the 'exercise and profession', *exercitio et professio*, is punishable (*Coll.* 15. 2. 2); similarly, *The Opinions of Paulus* itself notes à propos of astrologers that it is better to stay away not only from divination, but also from 'the science itself and the books that deal with it' (*The Opinions of Paulus* 5. 21. 4).

⁴⁵ On the sources of law in the imperial period, see Peachin 1996: 14–25; on the Diocletianic codes, Corcoran 1996: 25–42.

the early third century CE jurist Marcian (*Digest* 48. 8. 1). Marcian apparently begins by quoting the chief provisions of the original law. He then proceeds to cite a rescript of Hadrian that those who committed murder without intending to kill could be acquitted, while those who wounded a person they had intended to kill should be found guilty of murder. At this point he pauses to consider the various implications of this ruling, before going on to cite two further rescripts, another of Hadrian and one of Antoninus Pius. What Marcian in effect does here is to gather later laws that modified or supplemented the original *Lex Cornelia* and to discuss some of the associated principles and problems. Such works as these did not themselves constitute law, although the senatorial decrees and imperial constitutions that they cited did. Yet because they provided the only coherent and systematic treatments of the law, they were by far the most convenient sources of information. Moreover, the knowledge and expertise of the jurists meant that their opinions were highly influential and in some cases even authoritative.⁴⁶

Now *The Opinions of Paulus* is also the work of a jurist, but of a rather peculiar type. It covers more or less the entire scope of Roman law, civil as well as criminal. In overall organization it follows the pattern established by the first comprehensive treatments of Roman law, the *Digests* of Salvius Julianus and Juventius Celsus written under Hadrian. It thus treats civil law first, following the order of the praetorian edict and organizing the material under rubrics that define the general topic, e.g., 'On Wills' (*The Opinions of Paulus* 3. 4). There then follows a section, dealing mostly with criminal law, in which the rubrics usually refer to specific laws of republican and early imperial date. Hence the chapter of *The Opinions of Paulus* with which we are concerned comes under the rubric of the *Lex Cornelia de sicariis et veneficiis*. Yet we notice immediately that the treatment of this topic in *The Opinions of Paulus* is, despite certain broad parallels, strikingly different from that of Marcian in his textbook. Both begin with citations from the original law, and follow with

⁴⁶ The responses of jurists to particular inquiries by officials could have the force of law, provided that the jurists were unanimous in their opinion (Gaius, *Institutes* 1. 7; cf. Papinian in *Digest* 1. 1. 7. pr.), but the opinions they expressed in their literary works had only the authority of their learning; see in general Kunkel 1973: 105–24.

supplementary material. But whereas Marcian cites specific rescripts by the name of the emperor and pauses to ponder various issues, *The Opinions of Paulus* proceeds with a set of cut and dried rules that baldly list specific crimes and assign specific punishments. This abrupt and summary treatment is what allows for a comprehensive treatment of Roman law in only five books, as opposed, for example, to the ninety of Julianus' *Digest*.

It is this abbreviated and simplistic style, so different from the usual method of Paulus as seen in the remains of his work, that initially raises suspicion of authorship. More detailed examination has served to demonstrate that the text is not in fact a genuine work of Paulus at all, but rather a compilation dating to c.300 CE.⁴⁷ The first advocates of this view believed that the compiler took his material from authentic works of Paulus, and this continues to be the general consensus (e.g. Robinson 1997: 63; note, however, Kunkel 1973: 149). More recently, however, Detlef Liebs has argued that the compiler instead drew on works by a number of classical jurists, as well as the *Codex Gregorianus* and *Codex Hermogenianus*.⁴⁸ The compiler more or less extensively altered his material by greatly simplifying it, sometimes to the point of unintelligibility, and by combining under the same rubric material from different sources.⁴⁹ That he has done this in the passage under consideration is likely enough.⁵⁰

⁴⁷ Levy 1930 and 1943: 18–20; Barnes 1981: 289, n.73 notes that the fragment of the full text discovered in the mid-twentieth century is dated on palaeographical grounds to c.300 CE, and so was presumably written shortly after the composition of the text itself (personal communication). Liebs 1993: 29–43 gives detailed arguments for a date around 300 CE, although his attempt to locate the author in Africa should be treated with caution.

⁴⁸ Liebs 1993: 29–31 and 43–93. Liebs identifies a maximum of forty-seven passages that may derive from Ulpian or pseudo-Ulpian, fourteen from Paulus, thirteen from the *Codex Gregorianus*, seven from Marcian, six from Papinian, four from Modestinus, and three from the *Codex Hermogenianus*. As Barnes has pointed out to me (personal communication), our very fragmentary knowledge of legal literature makes many of these identifications uncertain, although the general hypothesis that the compiler drew on a variety of sources is no doubt correct.

⁴⁹ For example, Liebs argues that the rubric on buying and selling (*The Opinions of Paulus* 2. 17) contains material from Ulpian's commentary on the praetor's edict, the *Responsa* of Papinian and Paulus, and the *Codex Gregorianus* (Liebs 1993: 46, 54–5, 60, and 82–3).

⁵⁰ *The Opinions of Paulus* 5. 23. 12 perhaps derives from Paulus (cf. *Digest* 9. 2. 31 and *Digest* 48. 8. 7), although Liebs (1993: 53) points out that since Paulus himself

It would be quite interesting to know the sources from which the compiler derived the prescriptions on magic, and how he changed them. Unfortunately, there is little to go on. The general severity of the punishments probably reflects the situation after the Severan period, but whether the compiler added these or found them in his sources we cannot say.⁵¹ The only sentence that we can plausibly link to a specific source is that dealing with *sacra impia nocturnave* (*The Opinions of Paulus* 5. 23. 15), which may ultimately depend on the senatorial decree on *mala sacrificia* discussed above in section two. The former is much more specific in describing the purpose of the rites in question as well as in prescribing punishments, but since we do not have the senatorial decree in its full original form, we cannot determine how much the compiler may have changed it.⁵² Regarding the most interesting of these prescriptions, those that deal generally with the *magicae artes* and *magici libri* (*The Opinions of Paulus* 5. 23. 17–18), we can only speculate.

One possibility is that the two sentences in question derive from decrees of Diocletian, since in certain respects they are reminiscent of known Diocletianic measures. First, the lack of a distinction between *humiliores* and *honestiores* in sentence 17 may reflect the developments of the Tetrarchic period, when people of high status began to lose their exemption from harsher penalties.⁵³ Second, its distinction between *magi* and *conscii magicae artis*, presumably those in some

cites Q. Mucius Scaevola another source is also possible. *The Opinions of Paulus* 5. 23. 13 almost certainly derives from Marcian (*Digest* 48. 8. 3. 4–5; cf. *The Opinions of Paulus* 5. 23. 13); see also n. 52 below.

⁵¹ Garnsey 1970: 109–11; MacMullen 1986: 209–10. See especially Marcian in *Digest* 48. 8. 3. 5: 'The penalty under the *Lex Cornelia de sicariis et veneficis* is deportation to an island and forfeiture of all property. But today capital punishment is normal, except for those of a status too high to be subject to the penalty of the law: persons of low status are normally crucified or thrown to the beasts, while their superiors are deported to an island.'

⁵² Liebs (1997: 146–7) proposes that sentences 14 and 19 depend on a senatorial decree mentioned by Marcian (*Digest* 48. 8. 3. 2: 'But as the result of a senatorial decree it is ordered that a woman be relegated who, not indeed maliciously but unadvisedly, has administered a drug for fertility, which caused the death of the woman who took it'). But although similar legal principles are invoked, the differences are so great as to make a direct connection implausible.

⁵³ Liebs 1993: 35; so for example Diocletian's rescript on the Manichees (*Coll.* 15. 3. 7) distinguishes *honestiores* but condemns them to the mines nonetheless.

way involved with magic without being real *magi*, recalls the distinction made by Diocletian in his rescript on the Manichees between the leaders of the movement and their followers: like *magi*, the leaders are to be burnt alive, while their followers suffer capital punishment and confiscation of property (*Coll.* 15. 3. 6). Lastly, the phrase *ars magica* recalls *ars mathematica*, which Diocletian condemned in a private rescript of 294 CE (*Codex Justinianus* 9. 18. 2), although it also has a long pedigree in Latin literature (e.g. Vergil, *Aeneid* 4. 493; Ovid, *Metamorphoses* 7. 195; Manilius 5. 34–5; Curtius 7. 4. 8). The rule in sentence 18 that *libri magici* be publicly burnt likewise recalls several measures of Diocletian: his rescript on the Manichees directed that their leaders be burnt 'together with their abominable writings' (*Coll.* 15. 3. 6), his first edict against the Christians ordered that their 'writings be destroyed by fire' (Eusebius, *History of the Church* 8. 2. 4; cf. *Martyrs of Palestine* praef. 1), and he allegedly ordered that books of alchemy in Egypt be collected and burnt.⁵⁴ We should note, however, that book burning was not novel to Diocletian.⁵⁵ None of these parallels is in any way decisive, however, and the traces of Diocletianic sources in *The Opinions of Paulus* are otherwise slight.⁵⁶

It seems more likely that the compiler instead derived these two rules from an earlier juristic discussion of magic. As we saw in the example from Marcian, it was not uncommon for jurists to cite various specific precedents and then draw from them more general conclusions. For the sake of comparison, we may consider Ulpian's discussion of astrologers and prophets in his handbook for proconsuls (*Coll.* 15. 2. 1–6). Ulpian begins by saying that there is a long-standing prohibition of 'the clever trickery and obstinate conviction of astrologers', and cites as evidence a senatorial decree from the reign of Tiberius that ordered their punishment. He then discusses the

⁵⁴ John of Antioch, in Müller 1885: iv. 601–2, fgt. 165, reproduced in the *Suda* (Adler 1928–38: ii. 104 = Letter D, entry 1156; text and translation are available at <http://www.stoa.org>).

⁵⁵ For example, Augustus collected and burned all books of prophecy in Greek and Latin except those considered genuine Sibylline oracles (Suetonius, *Augustus* 31. 1), and Septimius Severus removed from the sanctuaries in Egypt all books containing secret lore (Dio Cassius 75. 13. 2); see further Speyer 1981.

⁵⁶ Liebs (1993: 80–9) identifies only five sentences that may derive from constitutions of Diocletian, and in no case is the connection entirely secure.

question whether it is only the practice of astrology that is punishable or also the mere knowledge of it, and explains that different sorts of inquiries merit different types of penalties. He next considers the issue of prophets who disturb the peace, citing specific rulings of Antoninus Pius and Marcus Aurelius. Ulpian concludes that 'men of this sort, who under the pretext of divine admonition issue proclamations or boasts or knowingly devise fabrications, ought not to escape punishment'. It is easy enough to read *The Opinions of Paulus* 5. 23. 14–18 as a summary of this sort of discussion, in which the compiler has omitted references, smoothed out complexities, and transformed the concluding observations of the jurist into cut and dried prescriptions.

Although this seems to me a more plausible origin of these sentences than a derivation from decrees of Diocletian, it is no less hypothetical. In either case, however, they demonstrate that by 300 CE the terminology of *magus* and its derivatives had in one way or another entered into the formal language of Roman law. As I discussed above, the trial of Apuleius shows no more than that a Roman governor accepted a case in which the general issue of *magia* came to play a central role. *The Opinions of Paulus*, in contrast, indicates that this charge had become more formally established, through either imperial decree or juristic discussion or both. And since Constantine was to recognize *The Opinions of Paulus* itself as authoritative (*Codex Theodosianus* 1. 4. 2), its own prescriptions soon acquired the force of law.

The extremely concise form of these prescriptions and the lack of any discussion means that we cannot be sure of the issues that underlay them or of the emic categories involved. But general considerations make it likely that they involved a concern with religious deviance as well as with malicious and uncanny actions. In favour of the latter is the organization of these prescriptions under the rubric of the *Lex Cornelia*. Although there were historical reasons for this placement, as I have suggested, the fact that the compiler chose to retain it suggests that he regarded the sentences concerning *magi* and the *artes magicae* as specific examples of the general issue with which the *Lex Cornelia* was concerned. Moreover, some of the prescriptions that precede the general rules on magic clearly address the sorts of uncanny and malicious actions that had long been associated with the *Lex Cornelia*: the use of

venena to cause abortions and create desire (*The Opinions of Paulus* 5. 23. 14), and the use of impious rites to bind someone (5. 23. 15). On the other hand, the ruling about human sacrifice and the pollution of temples (5. 23. 16) suggests a concern with religious deviance. More importantly, the general prescriptions on magic (5. 23. 17–18) do nothing to define a *magus* or the *ars magica*, but merely indicate how an official should handle them once they have been identified. The identification itself was presumably the responsibility of the individual official, who would thus have been faced with the same problem as Claudius Maximus. If so, the issue of religious deviance must again have played at least a part. In both respects, this passage of *The Opinions of Paulus* reveals a later stage in the same development whose beginnings can be seen in Apuleius' *Apology*, when charges of *maleficia* under the *Lex Cornelia* were leading to the more general charge of magic and its associated issues of religious deviance.

SOME IMPLICATIONS

The trajectory that I have charted in this paper could be extended further. Starting in the reign of Diocletian, for example, jurists seem to have reclassified laws on magic, removing them from the rubric of the *Lex Cornelia* and assigning them to a new rubric covering other unacceptable religious activities, including eventually divination; this new classification suggests that the connotations of religious deviance had perhaps finally come to overshadow the original concern with harmful occult actions.⁵⁷ But I hope that what I have already

⁵⁷ A rubric 'concerning evil-doers and Manichees', *de maleficis et Manichaeis*, is attested for the *Codex Gregorianus* of c.292 CE (*Coll.* 15. 3), and the Theodosian Code has a rubric 'concerning evil-doers and astrologers and the others like them', *de maleficis et mathematicis et ceteris similibus* (9. 16); the latter seems to collapse the rubric from the *Codex Gregorianus* with an earlier rubric 'concerning astrologers and soothsayers', *de mathematicis et vaticinatoribus* attested for Ulpian (*Coll.* 15. 2) and in *The Opinions of Paulus* (5. 21). We should note the presence in these rubrics of the term *maleficus* rather than *magus*, which suggests that the notion of harm was still significant; note too Constantine's distinction between those who use the *artes magicae* to attack someone's health or chastity and those who employ medical or weather charms (*Codex Theodosianus* 9. 16. 3).

presented is enough to illustrate the methodological issues that I discussed at the start. The use of 'magic' as an explicitly etic, heuristic category allows us to bring together evidence from different periods and contexts, and thereby to trace a significant shift in emic conceptual categories and in lexical usage. The Roman law on magic that was grounded in the *Lex Cornelia de sicariis et veneficiis* moves from a classification of harmful and uncanny actions denoted primarily by the word *veneficium* to a classification in which the notion of religious deviance played an equally if not more important role, a classification denoted chiefly by the word-groups *magus* and *maleficcium*. The advantage of 'magic' as a heuristic device lies in the fact that it can encompass both 'harmful and uncanny actions' and 'religious deviance', and other concerns as well.⁵⁸

These methodological considerations are not important merely in the abstract. They are important because they allow for a more precise analysis of the Roman legal treatment of magic. As a result, we can see not only that the conceptualization of magic in legal thinking shifted over time, but also that this shift corresponds to significant large-scale developments in the Roman world. I will here mention only two. The first is the emergence of religion as an increasingly autonomous discourse within Graeco-Roman culture (Beard, North, and Price 1998: i. 149–56). With the development of a 'strong view' of magic, certain acts that were already punishable because they were uncanny and malicious, such as *veneficium*, began to be viewed as acts of religious deviance as well; in other words, they were brought into an association with religion that evidently did not exist before. I would suggest that this new association is a byproduct of the emerging discourse of religion, which necessarily involved a discussion of what did or did not fall within

⁵⁸ That these concerns eventually included divination seems clear: see the preceding note. Yet the tendency of some modern scholars to assume that this association held good in all periods, as do Castello 1990 and Fögen 1993, is quite mistaken; Liebs (1997) is right to distinguish cases of *Schadenzauberei*, harmful magic, from those of *Wahrsagerei*, divination. This is not to say that there was no overlap: for example, men called *magi* could act as experts in divination (see above, n. 39). The conceptual relationship between 'magic' and divination in the Graeco-Roman world needs further analysis; Graf 1999 provides a good start.

its parameters.⁵⁹ *Veneficium* and the like were gradually brought within, although neither completely nor unambiguously.

The second development is the transformation of the Roman world from an empire ruled by Rome to an empire of Romans. Although Roman authorities had long made at least periodic attempts to police the limits of acceptable religious behaviour, such attempts were restricted in the republican period to the city of Rome or at most the Italian peninsula. Behind most of them we can discern an underlying concern to maintain the boundary between Roman and non-Roman. For example, the worship of Isis might be ejected from within the *pomerium*, the sacred boundary of the city of Rome, but it was not forbidden in other cities, much less in Egypt. Similarly, Roman authorities might expel Jews from Rome while at the same time recognizing their legitimacy elsewhere. In contrast, once it became standard practice for Roman officials to countenance a charge of being a *magus*, that charge was valid wherever they exercised authority. In this way, the new law on magic, as we see it in the trial of Apuleius, extended official concern with religious propriety to the entire empire. It is perhaps not a coincidence that it developed at much the same time as another empire-wide religious concern, that with Christians: in both cases Roman officials worked to establish empire-wide limits of acceptable religious behaviour.⁶⁰

But the legal handling of magic provided in some respects a more supple and useful instrument than did the persecution of Christians. As we saw in the case of Apuleius, a trial on a charge of magic was to some extent a two-way process: a local inhabitant would bring the charge on the basis of what he considered unacceptable behaviour, and the presiding Roman official would evaluate his arguments according to general precedents as well as his own standards. A trial of this sort accordingly provided a context in which Roman

⁵⁹ See Woolf 2000: 617–21, who sketches an approach to the religious history of the Roman empire that interprets it in terms of 'competing ideas of what a religion is'.

⁶⁰ See Gordon 1999: 166: 'we find during the Principate an inclination to deploy magic... as part of a wider, hesitant, attempt to give substance to the imagined community of the Roman empire... through its negative inversions, atheists on the one hand (that is, Christians and Epicureans), and practitioners of illicit religion, magicians and private diviners, on the other'; on the 'boundaries of Roman religion'; see further Beard, North, and Price 1998: i. 211–44.

authorities and the inhabitants of the provinces could to some extent work together in defining and policing the boundaries of the acceptable, even though the officials acted as final arbiters. It therefore helped to create a consensus about acceptable and unacceptable religious behaviour that could in theory apply to the entire empire.⁶¹

This analysis of the development of the *Lex Cornelia* is not intended to be a comprehensive interpretation of the Roman legal treatment of magic, nor is my identification of a shift in legal focus from harmful and uncanny actions to religious deviance meant to be a comprehensive account of the issues that could arise. Indeed, it is easy enough to think of other significant factors: political concerns, cultural identity, distinctions of status and gender. But an analysis of these issues, I would argue, requires a nuanced awareness of the complex methodological problems involved. I hope that this paper will help further that awareness, as well as provide an account of one significant historical development.

AFTERWORD (2009)

When I wrote this paper, I was still inclined to accept received opinion on two crucial points, although with some qualifications. Further reflection has led me to reject it altogether. The first point is the assumption that the passage from *The Opinions of Paulus* quoted above proves that the *Lex Cornelia* was the basis for the Roman criminalization of magic throughout the imperial period. A more detailed examination of the available evidence, however, revealed that *The Opinions of Paulus* is in fact the only clear-cut evidence for this; all the other evidence, at least through the Severan period, tends to suggest that the *Lex Cornelia* remained limited to cases involving wrongful death. I am thus now inclined to believe that the author of *The Opinions of Paulus*, in including magic in general under the rubric of the *Lex Cornelia*, was either following a late and an otherwise unattested line of legal thought or simply advancing an idiosyncratic

⁶¹ On the importance of consensus in the Roman empire, see Ando 2000.

interpretation of his own (Rives 2006); even in late antiquity the majority tendency was to classify magic not under the *Lex Cornelia* but under the new rubric *de maleficis et mathematicis* (see above, n. 57).

The second point, closely related to the first, is the assumption that Apuleius was charged under the *Lex Cornelia*. Although this remains the *communis opinio* (e.g., Puccini-Delbey 2004: 28; Collins 2008: 152), I have become convinced that it is wrong. If the *Lex Cornelia* remained limited to cases involving wrongful death, then it was effectively irrelevant to Apuleius' case. Two other scholars have recently adopted a similar position, although they develop it to very different ends: Lamberti (2002) to postulate an unattested law that specifically criminalized magic, Riemer (2006) to support her case against the historicity of Apuleius' speech (see also Gaide 2005: 103–4). Both arguments assume that without a specific law on magic there could have been no legal case against Apuleius at all. But this seems to me a faulty assumption. The trial was clearly a *cognitio extra ordinem*, and as such all the prosecution had to do was to argue that Apuleius had engaged in socially disruptive behavior and that the governor should accordingly take action against him; I have elsewhere (Rives 2008) discussed in more detail how this understanding of the legal context affects our assessment of Apuleius' strategy in his defence speech.

I would thus modify the sketch of the legal developments that I outlined here. I remain convinced that changing social concerns gradually resulted in the criminalization of 'magic' as a form of religious deviance, and that this process involved the reclassification of certain practices previously criminalized on other grounds within the new category of magic. But I would now identify as the chief arena for this legal development not so much the ongoing interpretation of the *Lex Cornelia*, although that certainly played a role, as the kind of ad hoc *cognitiones extra ordinem* represented for us by the trial of Apuleius. It was in trials like these, in which the culpability of the accused depended almost entirely on what the presiding official regarded as acceptable or unacceptable behaviour, that the idea of *magia* as a type of legally actionable religious deviance was actually worked out.

On the emergence of a concept of magic in the Roman world (see above, n. 10), see also Marco Simón 2001; on the meaning of *magus* and related terms in classical Latin (nn. 24–5), see my more detailed analysis (Rives 2010).

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4

New Combinations and New Statuses

*The Indigenous Gods in the Pantheons
of the Cities of Roman Gaul*

William Van Andringa

Coexistence, borrowing, fusion: it is in these terms that religious changes in the Roman provinces of Gaul are very often defined. Generally speaking, ever since the work of Jullian, we have been left with an image of harmony between the indigenous and the Roman gods, the fruit of a religious tolerance that was characteristic of the conquerors. And it was Toutain who observed, in his study of *Pagan Cults in the Roman Empire*, that this Roman tolerance goes hand in hand with the favourable welcome given to the Roman gods by the provincials (Jullian 1993; Toutain 1907–20). Among the evidence cited, we find at the top of the list the Pillar of the Boatmen, still seen recently as a 'pictorial catechism', as well as the large number of divine triads and the crouching or horned gods whose presence is recorded here and there in the sanctuaries, alongside deities of classical appearance. The judgement formed, then, from such evidence, is that the 'indigenous gods continued to live for the duration of the Empire in a coexistence born of syncretism and tolerance'.

This reading of religious phenomena poses a number of problems, predicated as it is upon the firm belief, forged by Gallo-Roman studies throughout the 20th century, that the two cultures merged to produce hybrid pantheons (Hatt 1989; Duval 1993). Yet this harmony, like the idea of religious permanence, is an illusion. The illusion is kept up in various ways:

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