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Law and justice in the later Roman Empire

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Caroline Humfress, "Law and Justice in *The Later Roman Empire*", in Gwynn, D. M., ed., *A.H.M. Jones and the Later Roman Empire* (Leiden and Boston: Brill, 2007), 121-142.

I. Introduction.

Jones took a significant decision in *The Later Roman Empire* to give his thematic chapter on Roman law a very specific title: "Justice". A clue as to why chapter fourteen was not entitled "Postclassical Law" (for example) is provided in the very first paragraph of his preface: "I ignore the two major intellectual achievements of the age, theology and law..."¹

What *would* Jones have written about law, one of his twin "major intellectual achievements" of the late empire, had he chosen to face the challenge directly?² Would he have limited Late Roman law's "major intellectual" achievement to the *renovatio* achieved during the age of the sixth-century emperor Justinian - or would he have allowed for a more positive assessment of law as an intellectual enterprise between 284 and 531? Max Kaser's *Römische Rechtsgeschichte*, a textbook of Roman law first published in 1950, had already opened the way for a more positive assessment of intellectual legal development in the fourth and fifth centuries; however there are no direct footnote references to Kaser in Jones. In a preliminary paragraph to his footnotes on chapter fourteen Jones hints that he had consulted many modern Roman law textbooks, but characteristically signals only one general history in particular: "Of the many histories of Roman law I have found H. F. Jolowicz, *Historical Introduction to the Study of Roman law*, Cambridge 1952, the most useful from my standpoint."³ Herbert Felix Jolowicz was Professor of Civil Law and a contemporary of Jones at Oxford; both were fellows of All Souls College. Jolowicz himself, moreover, is generally acknowledged as one of the most historically minded legal scholars of Roman law - hence no doubt Jones' preference for his work. The only other Roman law bibliography mentioned

¹ Jones (1964) v - page references to *The Later Roman Empire* refer to the two-volume 1973 reprint.

² Jones (1960) and (1972) focus on the Republic and the Principate.

³ Jones (1964) 1202.

explicitly is M. A. von Bethmann-Hollweg's three volume 1886 work *Der Römische Civilprozess*, which Jones describes as "...still the most comprehensive work." The fact that Jones directs his readers to the most exhaustive, monumental late nineteenth-century tome on Roman civil procedure underscores his very particular historical approach: Jones was interested in Roman law as action, not Roman law as abstraction. With his statement that he has "ignored" the major intellectual achievement of law, Jones is firmly reminding his audience that he is not to be taken for a historian of ideas.

When Jones' *Later Roman Empire* was published in 1964 it was noted by the leading Italian journals of Roman law, *Labeo* and *Iura*. Both of these periodicals, however, signalled the existence of Jones' volumes under 'general history' rubrics.⁴ In other words, the individuals who were responsible for commissioning the reviews for these major Roman law journals did not note any particular contribution of Jones' 1964 volumes to Roman legal history *per se*. The *Zeitschrift der Savigny -Stiftung für Rechtsgeschichte (Romanistische Abteilung)*, on the other hand does not seem to have noted the publication of *The Later Roman Empire* at all. Taking Jones' own characterisation of his work seriously, perhaps, his contemporary scholars of Roman law classed *The Later Roman Empire* as "...a social, economic and administrative survey of the empire, historically treated."⁵

There is no discussion of substantive late Roman law in *The Later Roman Empire*: there is no sense given of how late Romans would divide their inheritances up, how they would stipulate clauses in a private agreement or how they would argue a case concerning free status, for example. Neither does Jones provide us with any sense of how postclassical legal principles developed or diverged from their classical foundations, aside from a throwaway line that law remained "obscure and uncertain" down to Justinian's great reforms

⁴ *Labeo*, 10.2 (1964), 324 under the heading 'Storia Economica, Storia Politica'; *Iura* XVI.2 (1965), 656-657 under the heading 'Studi di Storia Generale'.

⁵ Jones (1964) v.

and was “riddled with arcane technicalities”.⁶ Instead, chapter fourteen of *The Later Roman Empire* is divided into seven sub-sections, beginning with a short explication of the sources of late Roman law. Notwithstanding Jones' opening salvo that: "It is unnecessary for the purposes of this book to discuss the ultimate sources of the law", he devotes over three pages of detailed analysis to them.⁷ The chapter then moves on to a complex structural analysis of judicial practice, focused especially on the relationship between the various courts of the late empire and the officials engaged in administering their business. In fact, if we return to Jones' preface to the whole volume (quoted above) we can see that he deliberately prepares his audience for this focus: “I ignore the two major intellectual achievements of the age, theology and law, but discuss the organisation and finances of the church, the administration of justice, and the social status of the clergy and of lawyers." Here Jones provides us with a tantalising glimpse of his methodology, together with a fundamental recognition that late Roman legal structures and processes cannot be analysed apart from ecclesiastical and religious developments.

II. Jones on Law: Sources and Methodology.

The primary sources for Jones' chapter fourteen on “Justice” reached far beyond those used by either Jolowicz or Bethmann-Hollweg. One striking example of Jones' use of source material in discussing legal practice will suffice: in a sub-section of chapter fourteen entitled “The Judges” Jones uses a vignette from the writings of a sixth-century Christian ascetic to make an astute and methodologically aware point about late Roman access to justice:

“Governors were, it is true, directed to hear petty cases informally (*sine scriptis*, without the written record which formed a large part of the cost) and even to give free justice to the poor. It may be doubted however whether these directions were often

⁶ Jones (1964) 470.

obeyed. Joshua the Stylite tells of one Alexander, governor of Osrhoene in 496, who put up a box outside his official residence in which complainants could drop their petitions, and sat every Friday in a church administering justice free to all comers. But this was a very exceptional case, worthy of record in a chronicle, and the result was that Alexander was besieged by suitors seeking redress for old wrongs, some dating back forty years, which they had never been able to bring into court hitherto.”⁸

Jones’ footnote reference for this passage cites Joshua the Stylite’s *Chronicle* (section 29), alongside two other textual sources: a Justinianic *Novel* and the papyrological report of a trial proceeding. Jones thus combined late Roman Christian texts with a variety of legal evidence to shed light on processes and practises in action. In his careful analysis of the protocols of church synods he equally demonstrated the impact of Roman legal practices on the Christian Church.

On page vi of his general preface to *The Later Roman Empire*, however, Jones frankly confessed that he ditched theological treatises and commentaries on the scriptures and secular *belles lettres*, as “...many of the best grains have been winnowed by earlier scholars, particularly those of the seventeenth and eighteenth centuries, whose editions of patristic literature are a mine of curious information.” Next, he tells us that he abandoned his reading of late Roman sermons, before emphasising the fact that he “... read *and re-read* (my italics) the Codes and Novels” - as well as staking a claim “... to have at least looked at every published papyrus of relevant date.” Jones also notes that he tried to do the same for inscriptions, but he was frustrated in his attempts: “...many are so cunningly concealed in the *corpora* and periodicals.” This reference to the 'cunning concealment' of epigraphical evidence was in fact an oblique reference to Jones' row with the leading epigraphist Louis Robert - a spat that Jones referred to again in the second edition of his *Cities of the Roman*

⁷ Jones (1964) 470- 474.

⁸ Jones (1964) 499.

empire (published posthumously in 1971). In the introduction to this second edition Jones wrote:

"It is thus clear that in so far as the second edition is better than the first, the credit is entirely due to my collaborators and I thank them heartily for all the work, much of it tedious and unrewarding that they have put into it. I also owe much to the reviewers and critics of the original book, notably Monsieur Louis Robert, but his corrections were made in such an offensive manner that I find it hard to thank him."

Jones' objection to Robert, aside from the personal animosity implied in the quotation above, was that he published inscriptions found in out of the way places in out of the way journals - hence the reference to the 'cunning concealment' of inscriptions in the 1964 *Later Roman Empire* preface. The recent work of Denis Feissel, amongst others, has highlighted the extent to which the discovery of a relevant inscription can change the way in which historians understand late Roman law: not only in terms of reconstituting legal texts from the inscribed evidence, but also with respect to illuminating the particular processes that lay behind the promulgation and permanent display of individual imperial constitutions in a given locality.⁹ Jones had recognised the potential value of inscriptional evidence to the legal historian forty years earlier, however, he felt that Louis Robert had personally thwarted him in his attempts to exploit this material effectively. Jones' difficulties in locating the epigraphic evidence, and his decision not to dig at the cliff face of the theological material, had a significant effect on his general interpretation of the late Roman legal system and judicial practice.

There is no doubt that Jones did indeed 'read and re-read' the *Codex Theodosianus* and the *Codex Justinianus*, alongside the *Novels* (the 'new laws' issued by Theodosius II and later emperors including Justinian himself, that survive outside the two official late Roman imperial *Codes*). We should remember that the *Theodosian Code*, the *Novels* and the Justinianic *Corpus Iuris Civilis* (*Digest*, *Code* and *Institutes*) are major sources for the

‘narrative chapters’ in Part I of *The Later Roman Empire*. We are also told by Jones at the end of his 1964 preface that the Regius Professor of Civil Law at Cambridge had read through chapter fourteen and that J. Martindale had checked all the dates and footnote references to the *Codes* and *Novels* – an accomplishment that would surely qualify as a worthy contender for the thirteenth labour of Hercules. Although not a Roman lawyer himself, Jones took the sources of late Roman law very seriously indeed.

Jones' surviving unpublished papers – in particular the notes that record his preparatory research for *The Later Roman Empire* - illuminate his own working methodology in approaching the late Roman law codes.¹⁰ These unpublished papers include one hundred or so pages of hand written notes on the constitutions of the *Codex Theodosianus* (covering all sixteen books, rubric by rubric), together with a further thirty handwritten pages or so on Justinian's *Codex*. Not surprisingly, perhaps, the constitutions that seem to have interested Jones the most were those on legal status, legal privilege, the development of the late Roman appeals procedure and taxation abuses. Next, Jones re-ordered his most important or relevant notes thematically onto separate sheets, headed by titles such as “Advocates” and “Objections to Imperial Law by Churchmen”. A particularly revealing title in these sheets reads “Popular v. Roman law”, followed by three words in Jones’ handwriting: “not much here”. It is easy to imagine Jones mining these thematically structured handwritten pages when he was frantically writing his endnotes - and Sir Basil Blackwell rolled the rest of the book off the printing press. As Jones candidly admits in his preface, the text of *The Later Roman Empire* went off first, and the footnotes followed later.¹¹ With regard to the editions of the legal sources that Jones consulted, he cites the standard texts: the 1905 Berlin edition of the *Codex Theodosianus* by Theodor Mommsen and Paul Krüger's 1877 Berlin edition of the *Codex*

⁹ Feissel (2000) and (2004); see also Roueché (1984), Corcoran (2002) and Crawford (2002). New epigraphic research relevant to late Roman law is noted annually in *L'Année épigraphique*.

¹⁰ See the paper by Peter Garnsey in this volume – with thanks to him for allowing me to consult Jones’ unpublished notes whilst writing this paper.

Justinianus.¹² However, this reliance on the standard editions has recently laid Jones open to a criticism that would be barely credible in any other context than late Roman law: namely that Jones did not pay enough attention to source criticism.

In a 2003 review article entitled "Sacred Letters of the Law; The Emperor's Hand in Late Roman (Literary) History " Mark Vessey has traced the lineage of three recent 'British' monographs on late Roman law back to Jones' particular bureaucratic conception of it:

“When A.H.M Jones’s three volumes on *The Later Roman Empire* appeared in 1964, a friendly reviewer [Momigliano] compared them to a report by a British Parliamentary commission. Only a British historian, he quipped, would treat the Roman empire as if it were still in working order... Treating *The Later Roman Empire* as a kind of formative anomaly, we can distinguish two lines of development. One impulse has been towards giving expression to the voices, not all of them subaltern, that clamour at the gates of Jones’s stately edifice. Most brilliantly exemplified by Peter Brown, this broadly recuperative strain of late Roman history brings to life whole areas of human experience excluded or downplayed by the official transcripts of empire... Another complementary movement in British late Roman studies follows an almost opposite path. Instead of expanding the interstices of Jones’s text, historians of this slant reoccupy the space of his notes. Theirs is still an “imperial” history, but one that now includes the media and archives of empire itself. Three recent studies afford an opportunity to take stock of it.”¹³

The three “recent studies” which, according to Vessey, ‘reoccupy the space’ of Jones’ endnotes are Tony Honoré’s 1998 *Law in the Crisis of Empire 379–455 AD: The Theodosian Empire and its Quaestors*, Jill Harries’ 1999 *Law and Empire in Late Antiquity* and John Matthews’ 2000 *Laying Down the Law: A Study of the Theodosian Code*. Vessey argues for

¹¹ Jones (1964) ix.

¹² Jones (1964) 1466, under the abbreviations *CTh* and *CJ* respectively.

¹³ Vessey (2003) 345-346

a geographical as well as an intellectual connection between A.H.M. Jones and these recent monographs: a geographical connection in the sense that all four had, or currently have, Oxford associations, and an intellectual connection in that each is focused on the 'Emperor's hand' and its bureaucratic reach in late Roman legal history. Vessey also contends, however, that there is a difference between Jones' approach to the late Roman legal source material and that of Harries, Honoré and Matthews. Jones took the texts of the major late Roman legal sources for granted:

"Of all the abbreviations studding those oddly readable pages [of notes to the *Later Roman Empire*], the most frequent by far are *CTh* and *CJ*. Yet despite their overwhelming importance for Jones's enterprise, the legal collections denoted by these letters receive scant attention in the text... Any questions that might be raised about the composition of imperial laws and law codes had already been answered. The majority of the population of the late empire may have thought little of the Roman law, but modern historians knew what they meant by *CTh* and *CJ*." ¹⁴

In contrast to Jones, however, the monographs under review by Harries, Honoré and Matthews refuse to take the late Roman *Codes* at face value. According to Vessey, this more recent research treats the late Roman laws and *codes* as historical texts in need of (literary) analysis, rather than as a canonical body of authoritative 'literature':

"Forty years after the publication of *LRE* [Jones' *Later Roman Empire*], mainly as a result of the work of other British scholars, that unwritten historiographic "Law of Citations" has been abrogated. Laws and Codes that once formed the invisible bedrock of our histories are now objects of historical description and narrative. It is not just a matter of making room on the library shelf for new and longer prolegomena

¹⁴ Vessey (2003) 346.

and appendices. The history of late Roman legal documents is giving rise to a new late Roman history."¹⁵

Whether we agree or not with Vessey's suggestion that a 'new' history is beginning to be written on the basis of a critical approach to the late Roman legal sources, we should accept his judgement that Harries, Honoré and Matthews are indeed each consciously concerned with how the imperial *codes* came to be composed and how we now come to read them. It is also certainly the case that all four historians, notwithstanding the almost forty year publication gap between Jones and the others, are focused on the emperor and the structures of empire as the most important indicators of late Roman law and the judicial system. Besides this focus on the emperors and their bureaucrats, however, Jones was at the same time well aware that asking questions about late Roman justice demanded reaching out beyond the authoritative letter of the imperial *Codes*. Jones (as we shall see) would have agreed with the premise that late Roman law was bigger than the emperors, their quaestors and their imperial texts.¹⁶ If we wish to understand late Roman justice, we have to focus on legal practice 'on the ground'. It is this emergent bottom-up, rather than top-down, perspective on Roman law that is currently provoking challenging questions concerning both classical and late Roman legal history.¹⁷ Jones himself had already arrived at the beginnings of this perspective in 1964, when he took the decision to frame chapter fourteen as a discussion of "justice" rather than the law(s) of the emperors.

Before expanding on this idea, however, it is worth challenging Vessey's view that Jones himself was not overly troubled by source criticism questions with respect to late Roman law. Vessey's comments about Jones were made by way of an introduction to his review essay of Honoré, Harries and Matthews - he does not claim to be providing a historiographical examination of A.H.M Jones himself. I would maintain, however, that

¹⁵ Ibid.

¹⁶ Garnsey and Humfress (2001); Humfress (2006) and (2007, forthcoming).

¹⁷ For example Nörr (1998); Meyer (2004), Metzger (2004) and Du Plessis (2004).

Vessey has underestimated the extent to which Jones was consciously aware of the complexities surrounding the legal source material and its transmission. In his preface to *The Later Roman Empire* Jones states:

"The abundant legal material presents many difficulties of interpretation. There are some technical problems. The dates of many laws are wrong in the Codes; one often cannot tell from the address whether a given enactment was a general circular applicable to all the empire (or rather to that part of it which the emperor who issued it ruled), or special to a particular diocese or province, whether it represented general policy or was evoked by a particular scandal."¹⁸

These three brief sentences outline an agenda that most historians interested in late Roman legal sources have had to confront at some point, whether explicitly or not. The technical problems concerning the addressees (and hence the intended application) of late Roman imperial constitutions, for example, have been a subject of source criticism since the legal humanists in the sixteenth century. Jones offers a brief working formula for getting a handle on this technical difficulty on pages 472 - 474 of *The Later Roman Empire* and it still remains the subject of significant debate today.¹⁹ Epigraphy has also become very important here (as noted above) - thinking, for example, of Simon Corcoran's careful work on reconstructing the various and different local inscriptions recording Constantine's edict *de accusationibus*.²⁰ Similarly with the much vexed topic of how to spot and identify fourth and fifth -century imperial constitutions with a 'general' rather than a 'specific' character: the scholarly debate over *leges generales* is touched on briefly by Jones on pages 471 and 472 in his discussion of rescripts and edicts, without any direct reference to the secondary literature that he had undoubtedly read. Once again this issue has been repeatedly revisited in scholarly debates

¹⁸ Jones (1964) viii.

¹⁹ See in particular the painstaking reconstructions of individual constitutions and their transmission in Matthews (2000): 200-253.

²⁰ Corcoran (2002).

over the last forty years; although it is tempting to still agree with Jones that any attempt “...to draw a distinction between general and special laws is not very illuminating.”²¹ From the perspective of a legal historian interested in practice and forensic activity, any attempt to divorce 'general' from 'case-specific' in late Roman constitutions misses the point that the one constantly fed into the other. Finally, the question of whom or what prompted the issuing of imperial constitutions - discussed by Jones in the *Later Roman Empire* on pages 504 and 505 - remains very much on the scholarly agenda today. We can thus conclude that Jones was more than aware of the complexity of the legal sources he was handling, even if he chose not to be unduly delayed by it.

III. Jones and late Roman legal practice.

In chapter fourteen Jones painstakingly analysed the legal source material, combing through every book of the *Codex Theodosianus* and the *Codex Justinianus* – as well as bureaucratic documents such as the *Notitia Dignitatum* - in an attempt to illuminate practice and evaluate the effectiveness of late Roman imperial government. A fundamental concern of Jones in chapter fourteen, however, was to judge whether the inhabitants of the later Roman Empire got rough justice, and he seems to have been left in no doubt that they did and, moreover, that they paid dearly for the privilege. To borrow a metaphor from John Pocock, Jones’ methodology in approaching the legal source material was to use the microscope first and the telescope second.²² *The Later Roman Empire* does indeed rely heavily upon, what Vessey terms, the ‘official transcripts of empire’ for its microscopic detail.²³ In chapter 14, however, the ‘microscopic detail’ is frequently lost amidst Jones’ bold, sweeping and

²¹ Jones (1964) 472, with particular reference to Valentinian III’s attempt to define *edicta* in 426. For recent debate see Maggio (1995); Harries (1999) 20-25; Corcoran (2000) 11-12; and Matthews (2000) 16-18 and 65-70.

²² Pocock (2004) 542 (describing the methodology of Quentin Skinner).

evaluative generalisations. Hence the most memorable and oft quoted Jonesian one-liners on late Roman law and the legal system: "The excellence of the Roman Law is justly extolled: but it may be doubted whether under the later Roman empire its virtues were obvious to the majority of the population"²⁴ Under a sub-section entitled "*Praescriptio fori*" Jones summarises his complex and detailed thoughts on the workings of the imperial courts in a single inimitable sentence: "The intricate web of jurisdictions would have been tangled enough if litigants, the courts and the government itself had kept to the already complicated rules, but confusion was worse confounded by the inveterate propensity of all parties to bypass the rules. " To which he adds the laconic statement that "Justinian made some rather half-hearted attempts to clear up the mess."²⁵ Pithy one-liners such as those quoted above give us the Jones we tend to remember from chapter fourteen: the stress on bureaucratic confusion and corruption; the repeated insistence on the obscurities and uncertainties of the late Roman legal system and its excessively slow, inefficient and venal administration. The chapter ends by vibrantly portraying the horrors of criminal justice under the late empire, with an especially unforgettable and damning dismissal: "Roman criminal justice was in general not only brutal but inefficient."²⁶ These are the 'telescopic' views of the late Roman legal system that readers tend to take away from Jones' chapter 14: focused on the emperors, their over-bureaucratised judicial system and its legislative brutality.

Whilst acknowledging Jones' damning general evaluations of the late Roman judicial system there is another Jones in chapter fourteen - if we read between the lines. This other Jones reveals himself in a more positive 'bottom-up' analysis of forensic practice. Let us take Jones' discussions of late Roman advocacy as an example. The section of chapter fourteen entitled 'Lawyers' (spanning pages 507-516) focuses on the structure of the profession of

²³ Vessey (2003) 345.

²⁴ Jones (1964) 470.

²⁵ Jones (1964) 493.

²⁶ Jones (1964) 521.

advocacy, the numbers and social origins of advocates, their distribution and professional attachment to particular courts, their salary, and their avenues for career advancement. Jones seems to say nothing about what advocates actually did in the courtroom, apart from a playful aside that Postumianus (one of the characters in Macrobius' *Saturnalia*), was represented as being so busy with his forensic practice that he was unable to accept an invitation to dinner. Jones, however, does touch upon forensic activity in the courtroom at particular points elsewhere in the chapter - albeit without ever pulling his comments together into a coherent analysis. Two instances will suffice to demonstrate Jones' nascent bottom-up perspective on late Roman advocates.

First, Jones' discussion of the celebrated (so-called) "law of citations": a constitution issued by the Western emperor Valentinian III in 426.²⁷ Jones notes that this 426 "law of citations" reaffirmed the primary authority of the jurists Papinian, Paul, Ulpian and Modestinus and also raised Gaius (described by Jones as "the author of a hitherto not much regarded textbook") amongst their number. Jones then carefully specifies that Valentinian III's 426 constitution also allowed authority to earlier jurists whom the "great five" (namely Papinian, Paul, Ulpian, Modestinus and now Gaius) quoted, provided that the texts were verified by the collation of different copies. Jones goes on to explain that the 426 law also specified a rubric for judges and legal practitioners to use, if they had to resolve conflicts of authority between any of the jurists named. The 'majority' opinion was to be followed; if opinion was equally divided then the jurist Papinian had to prevail; only if Papinian offered no guidance on the subject at hand and the other jurists were equally divided, was the judge to use his own discretion. Jones thus concludes: "This rule has been justly regarded as the low-water mark of Roman jurisprudence", repeating a value judgement which can be found in all the standard Roman law textbooks. Jones, however, immediately adds a caveat to this modern assessment of the 426 "law of citations" as the nadir of Roman jurisprudence. Jones

²⁷ Jones (1964) 471.

states that Valentinian's "law of citations": "...did at least allow a diligent barrister to tell his client what the law was - unless a more ingenious opponent could produce an imperial constitution which affected the issue". Seen from the bottom up, the law of citations did not restrict or curtail forensic debate: according to Jones it perhaps made it easier. Here Jones hints at the ingenuity and resourcefulness of late Roman advocates in pleading the cases of their clients. The 'law of citations' may have been a low-water mark for Roman jurisprudence, but Jones' assessment of its implications also hints at a vigorous and lively forensic culture.

Our second example of a more positive Jonesian view of legal practice occurs during his discussion of the legal implications of the administrative division between East and West.²⁸ Jones begins his analysis with a series of simple statements:

"Further confusion was caused by the divisions of the empire. Theoretically, all laws were issued by the college of emperors, and were, if *leges generales*, valid throughout the empire. Actually, the laws of each emperor were promulgated only in the part of the empire which he ruled."

Jones could have left his analysis here, with the stress on theoretical confusion tempered by effective pragmatism, but once again he adds a caveat:

"Though, however, in the ordinary way the courts of one emperor ignored the legislation of his colleague or colleagues, it was always open to an *enterprising barrister* [my italics] to produce a law issued in the other half of the empire, and the courts could not refuse to admit its validity."

Here again, Jones' gives us a telescopic picture of legal and jurisdictional confusion, balanced by a microscopic assessment that a 'enterprising barrister' could work this 'confusion' to their clients' advantage. Jones was also well aware that advocates were not only for the rich - although he astutely notes that if you could pay more, you could employ a

better one. Jones cites two papyri dated 340 and 350, one recording a case before the *defensor* of Arsinoe and the other a case heard by the *iuridicus* of Alexandria.²⁹ Both papyri record disputes undertaken between citizens of (to quote from Jones) ‘a fairly modest degree’ and all of the parties employ advocates. Jones concludes that:

"Both these records give a favourable impression of the way in which justice was administered in these lowly courts. The procedure is informal. The advocates of both parties – all employ counsel – are allowed to have their say; the judge, prompted from time to time by the advocates, endeavours to elicit the facts by questioning the parties or their witnesses. At Arsinoe there is an interpreter to translate for peasant witnesses who know no Greek. On the face of it there appears to be an honest attempt to elicit the truth and make a fair judgement."

Justice on the ground *could* function fairly in the later Roman Empire, even according to A.H.M. Jones.

A more concentrated microscopic focus on day-to-day legal practice can also open the way for a revision of Jones' more damning indictments of late Roman bureaucratic justice. An argument that runs throughout the thematic chapters of *The Later Roman Empire* is that the continual repetition of imperial laws should be interpreted as a sign of the weakness of late Roman government. Jones even throws down a historiographical gauntlet on this topic in his 1964 preface:

“Many modern historians, it seems to me, have too readily assumed that Roman citizens obeyed the law, and that everything was done as the imperial government directed. My own impression is that many, if not most, laws were intermittently and sporadically enforced, and that their chief evidential value is to prove that the abuses which they were intended to remove were known to the central government. The

²⁸ Jones (1964) 472-473. For a recent treatment of the relationship between legislation issued in the ‘Eastern’ and ‘Western’ halves of the empire see Lepore (2000).

²⁹ Jones (1964) 517

laws, in my view, are clues to the difficulties of the empire, and records of the aspirations of the government and not the achievement.”³⁰

On Jones’ reading the emperors were forced to continually reissue legislation on the same subjects and were under few illusions about the extent to which their subjects took any notice. This argument has in turn been used in recent scholarship to support the related ideas of *lex scripta* as a (rhetorical) mode for articulating power, and late Roman legal codifications as ‘prestige projects’. Whilst there are good reasons to support an understanding of the compilation of late Roman law codes as exercises in imperial theatrics, this should not obscure the fact that they were (at the same time) practical texts designed to be used in litigation. Adopting a microscopic reading, we can see that there is in fact virtually no literal repetition of laws in the Theodosian or Justinianic *Codes*. Even when a new imperial constitution directly refers to a previous imperial law and restates the latter's authority or repeats its text, there is almost always some new applicability specified or some new variation laid down. In fact a text of the third-century jurist Modestinus (included in Justinian’s *Digest* at Book I, title 4, section 4) lays out the relevant principle of forensic interpretation: Modestinus states that later imperial constitutions repeal earlier ones, to the extent that they are inconsistent with them; in other words, later constitutions repeal earlier ones *to the extent that they conflict with them or add something to them*. Rather than simply seeing the continual repetition of laws – and the inclusion of those repetitious texts in the law codes - as a weakness of government, we should perhaps interpret it as part of a legislative and forensic culture that was used to referring to the past in order to make sense of the present.

On balance, of course, any reader of chapter fourteen would be correct to take away the overall impression that, according to Jones, the functioning of late Roman justice was confused and corrupt. However, as Jones' asides on the actual practice of advocates

³⁰ Jones (1964) viii; compare Honoré (2004) 26, citing Gaudemet (1972) 693 and 713-715.

illustrates, there is another story that can be told if we focus on legal practice on the ground. This angle has recently come much more to the fore in late Roman scholarship. For example, Traianos Gagos and Peter van Minnen's *Settling a Dispute. Toward a Legal Anthropology of Late Antique Egypt* (1994) and the final two chapters of Jill Harries' *Law and Empire in Late Antiquity* both focus on law as dispute settlement, using perspectives informed by recent debates in the field of anthropology. Significantly, Jones' chapter fourteen says nothing about dispute settlement out of court, nor about the particular practices of formal arbitration that existed outside of imperial jurisdiction. I would suggest nonetheless, however, that Jones' interest in legal practice and justice has prepared the way for a new emphasis on the activity of 'doing law' in the late Empire.

IV. After Jones: New Perspectives on Late Roman Law.

Few of the following 'new perspectives' are entirely new; a story could be told for virtually all of them which would trace their development back to late nineteenth and early twentieth-century Roman lawyers, or to those elusive seventeenth and eighteenth-century scholars of patristic and ecclesiastical texts whom Jones alludes to in his preface or indeed even further back, to the great early modern humanist scholars Cujas and Gothofredus. It would likewise be misleading to imply that Jones' 1964 *Later Roman Empire* had a major impact on either Anglophone or Continental Roman lawyers (as opposed to historians interested in law). Jones' determination, however, to treat the later Roman Empire as a coherent period in its own right has certainly encouraged both modern Roman lawyers and historians alike to approach postclassical law on its own terms. Late Roman law is no longer treated simply as a codicil to classical jurisprudence.

A major development in scholarship over the last forty years has been the publication of secondary literature that takes developments in substantive late Roman law seriously. In

other words, legal historians and Roman lawyers alike no longer necessarily work within the previous dominant paradigm of jurisprudential ‘decline’ from an early imperial high to a late Roman low (with an Indian summer occurring during the age of Justinian).³¹ There are now textbooks dedicated to late Roman law - a remarkable historiographical advance in itself.³² There are also recent studies that seek to understand late Roman changes in particular areas of substantive law within the context of a development out of, rather than a deviation away from, classical principles.³³ Legal periodisation is also being rethought: lawyers and historians now speak of an ‘epi-classical’ period of Roman law, sandwiched between the end of the ‘classical’ period of Roman jurisprudence and the ‘postclassical’ period proper (namely from roughly AD 223 and the death of Ulpian, until about 310).³⁴ Finally, the intellectual quality of postclassical jurisprudence itself is being cautiously re-evaluated.³⁵ As David Johnston comments in his 1999 *Roman Law in Context*:

“It seems that the postclassical law schools of the fourth and fifth centuries AD, once blamed for wholesale onslaughts on the texts [of existing jurisprudence], actually approached them with restraint; their intervention is likely to have been confined to writing glosses on the texts, some of which, it is true, may have been absorbed into them. There is, however, some evidence of substantial additions to works that were used for teaching in the law schools... the works of the great Severan jurists, Ulpian, Paul and Papinian, are more likely to have been subject to much reworking, in the course of regular new editions.”³⁶

³¹ For discussion see Honoré (1998) and Humfress (2007 forthcoming). This perspective is already evident in Continental scholarship on late Roman law published before 1964.

³² De Giovanni (1999); see also Kaser and Hackl (1996) 517-644.

³³ For example Sargenti (1994), Barone-Adesi (1998) and Pulitanò (1999).

³⁴ Corcoran (2000) 2-3; Liebs (1987), (1989), (2000) 258-259, and 2002; Johnston (2005) and in general Wieacker (1988).

³⁵ See Bianchini (1990) and Wieling (2000).

³⁶ Johnston (1999) 22.

That regular new editions' of the great Severan jurists *were* being produced in late Roman law schools is of course an important recognition in itself.

An interest in postclassical jurisprudence has also been accompanied in recent scholarship by sustained attempts to stabilise late Roman legislative texts by situating them in the contexts in which they were first drafted and posted. We have already discussed the works of Honoré, Harries and Matthews in this respect. The publications and conferences held under the auspices of the *Accademia Romanistica Costantiniana* are part of an ambitious project that aims to reconstruct the entire corpus of late imperial *leges*.³⁷ The *Accademia Romanistica Costantiniana* itself was founded in 1973, with a detailed mission statement drafted by Mario De Dominicis, Jean Gaudemet, Francesco de Martini and Manlio Sargenti. The stated aims of the *Accademia* are twofold: first to produce a collection of all the material necessary for a reconstruction of law in late antiquity and second "...to promote the critical study of imperial constitutions, their style and their content, with particular reference to determining their efficacy in time and space, and identifying their intended audience".³⁸ Manlio Sargenti's explanation of the rationale behind the project brings to mind Vessey's criticism of Jones and his legal sources: Sargenti states that "Students today are too often satisfied by the information furnished from the edition of Mommsen and the *Regesten* of Seeck".³⁹ This concern with stabilising the sources and the complex transmission of late Roman imperial constitutions also forms the backbone of an important British project: *Projet*

³⁷ The *Accademia Romanistica Costantiniana* supports a well-established monograph series, published by Giuffrè Editore, Milan; their annual conference proceedings are published by Edizioni Scientifiche Italiane, Naples

³⁸ Quoted from the "Mission statement of the *Accademia Romanistica Costantiniana*", at http://www.telediritto.it/acca/atti_di_convegni.htm (accessed on 05/04/2004).

³⁹ Quoted from the "Mission statement of the *Accademia Romanistica Costantiniana*", at http://www.telediritto.it/acca/atti_di_convegni.htm (accessed on 05/04/2004).

Volterra I, Law and Empire AD 193-455.⁴⁰ It is worth quoting the rationale and aims of the *Projet Volterra I* (as summarised by its principal researcher, Simon Corcoran) in some detail:

“Given that the general aims of the *Projet Volterra* are to promote the study of Roman legislation, the area of Roman imperial legal pronouncements was identified as one in which current scholarship was less than adequately served in terms of *Regesten*, *repertoria* and bibliographical aids. Within this field the area of later imperial legislation was felt to be particularly poorly exploited by scholars in general. It was decided that access to the material would be most satisfactorily facilitated by the production of a database in an electronic medium which would act not only as a Regest but also contain the basic texts of imperial legal pronouncements (where the *ipsissima verba* of the issuer(s) survive) from whatever provenance, be it an epigraphic, papyrological, juristic or literary source, details relating to each text's transmission (including their fate during successive codifications), the texts of ancient scholia upon them and an annotated bibliography of relevant modern scholarly output. While in no sense providing entirely new editions, the text of laws included in the database are critical, including the checking of original manuscript readings where appropriate.”⁴¹

The *Projet Volterra I* electronic database thus heralds a radical change in research on late Roman law, through the exploitation of newly available information technologies; these

⁴⁰ See <http://www.ucl.ac.uk/history/volterra/pv1.htm> - the *Projet Volterra I* is based at University College, London and was initially funded by the British Academy, then by the Arts and Humanities Research Board until its principal completion in 2004. It has subsequently been adopted as a *British Academy Research Project*, thus ensuring the maintenance and updating of its electronic database. A second five-year phase of the project, funded by the *Arts and Humanities Research Council* and based at University College, London, is now underway. *Projet Volterra II, Law and the End of Empire* is focused on the Carolingian era (ninth century AD); for details and a full description see <http://www.ucl.ac.uk/history/volterra/pv2.htm>

⁴¹ <http://www.ucl.ac.uk/history/volterra/pv1.htm#intro> (accessed on 06/06/2006).

encompass digitalised texts, computerised *palingenesia* and internet resources in general.⁴²

Forty years on from Jones, we thus have incomparably better resources with which to tackle the complex questions surrounding the transmission of legislative texts and their source criticism.

A further major 'perspective shift' in recent legal history encompasses scholarship that seeks to recover the 'actors' and the individuals within late Roman legislative and legal processes. If we begin with the drafters of late Roman imperial legislation, Tony Honoré's 1998 monograph *Law in the Crisis of Empire 379–455 AD: The Theodosian Empire and its Quaestors* summarises decades of research on the office of the *quaestor*, a bureaucratic official whose importance came to the fore in the mid to late fourth century AD. As Honoré explains in chapter six, entitled "Understanding the Theodosian Code":

"An important aim of this book is to persuade those who study the laws of the Theodosian era to read them, when possible, as part of the output of the quaestor who composed them. As we saw in chapter 1, quaestors varied in their literary, political and juristic capacity. Nor did all conceive their role in the same way... These differences should be borne in mind in reading Code texts. A modern court interprets a will drawn up by a lawyer differently from a home-made will. Similar discrimination is called for in reading the laws of the later empire. Contemporaries were aware of this. As the *interpretationes* to the Code show, some laws were thought to need interpretation, while others spoke for themselves."⁴³

Detlef Liebs, on the other hand, has focused on the identification of individual late Roman *iurisperiti* (legal experts or jurists) and in doing so has made an invaluable contribution to the

⁴² For digitalised texts of Roman law see the *Projet Volterra I* database itself at the stable URL <http://www.ucl.ac.uk/history/volterra/perl/volterra.htm> ; for computerised *palingenesia* of imperial legislation see the disks that accompanied Honoré (1994) and (1998), both of which are now also available via the *Projet Volterra I database*; Ernst Metzger's "Roman Law Resources" web-site provides an excellent introduction to the wider internet resources for late Roman law: <http://www.iuscivile.com/>

⁴³ Honoré (1998) 134.

reassessment of provincial legal culture.⁴⁴ John Crook has blazed the trail for a similar identification process that individuates late Roman advocates within their forensic contexts.⁴⁵

This recent focus on ‘actors’ and individuals within late Roman legal processes has also been accompanied by the publication of monographs dedicated to exploring institutions or procedures that were either established or developed significantly in the late Roman period. For example, in *The Later Roman Empire* Jones devoted a brief descriptive paragraph to the late Roman institution of the *defensor civitatis*, stating that it was “...the first radical improvement at the bottom end of the scale.”⁴⁶ This late Roman official is now the subject of an entire monograph by Robert Frakes, entitled *Contra potentium iniurias: the defensor civitatis and Late Roman Justice*.⁴⁷ Likewise for the thematic subject of the appeals structure of late Roman bureaucratic courts: Jones concluded that the late Roman appeal mechanism amounted to “...the weighing of the scales of justice in favour of the rich” and Federico Pergami has now published an entire monograph that explores the complexities of the late Roman appeals procedure and reassesses its social impact.⁴⁸ Newly discovered papyrological and epigraphic evidence, or re-assessments of existing finds, have also contributed to this uncovering of a (provincial) legal world on the ground.⁴⁹

A further aspect of recent research in late Roman legal practice focuses on changes in the documentation of court records after the accession of Diocletian - thus continuing and developing a distinctly Jonesian “social and administrative” perspective. A 1985 monograph by Hans Carol Teitler on *notarii* and *exceptores* (shorthand writers) in the late Roman imperial and ecclesiastical bureaucracy, highlights a series of post-Diocletianic developments

⁴⁴ Liebs (1987), (1989) and (2001).

⁴⁵ Crook (1995).

⁴⁶ Jones (1964) 479.

⁴⁷ Frakes (2001)

⁴⁸ Jones (1964) 481-482 and Pergami (2000).

⁴⁹ For a recent relevant papyrological discovery see D’Ippolito and Nasti (2003) and in general Purpura (1995).

in official record-keeping.⁵⁰ Elizabeth Meyer's 2004 monograph *Legitimacy and Law in the Roman World. Tabulae in Roman Belief and Practice* underscores the importance of these changes for legal practice and procedure in particular:

"Over time, and especially after AD 284, these court records came to include fuller (if not entirely complete) accounts of everything that went on and what the protagonists and witnesses said...Large segments of court records came to be regularly reread in subsequent cases, as a way of accurately reconstructing what had happened, and of checking current testimony against previous acts or words. Concomitantly, court-records became a regularly referred-to type of "proof" in non-legal settings..."⁵¹

As Meyer goes on to argue, these changes in notarial and procedural practices became particularly important in the context of religious disputes (for example Augustine's use of trial records in his polemic against North African Donatists or the recitation of courtroom and synodal records in Church councils). As already noted above Jones' *Later Roman Empire*, published exactly forty years earlier, took it for granted that late Roman legal structures and processes could not be analysed apart from ecclesiastical and religious developments.

In conclusion, Jones' primary focus was on the bureaucratic structures and the efficacy and equity (or otherwise) of the administration of justice, in so far as they are exposed by the official legal documents. However, his remarkable familiarity with a diverse body of source material, including papyrology and Christian literature, gave him access to the workings of the law (and forensic practitioners) in mundane provincial settings and in the back-woods of empire. Jones' encounter with legal activity *on the ground* leaves its mark on both his narrative and analysis, and to some extent undermines his own summary judgements on the nature of the legal culture and the quality of the law experienced by Rome's subjects in the late Empire. Jones may have intended to studiously ignore Law (and theology) as 'intellectual achievements' – but a careful reading of his ideas on 'Justice' reveals an

⁵⁰ Teitler (1985), in Dutch with a summary in English.

understanding of Roman law, its setting and its impact, which is broader, more subtle and more influential than a concentration on the main themes of Chapter fourteen would suggest.

⁵¹ Meyer (2004) 243. See also Lévy (1999), not cited by Meyer.