

The Political Functions of (Premodern) Courts and Procedure and Questions of Comparative Method

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Orit Malka's "Disqualified Witnesses between Tannaitic Halakha and Roman Law: The Archeology of a Legal Institution" is structured around a puzzle. Why did the rabbinic literature produced in Roman Palestine in the early centuries of the Common Era identify a list of four seemingly disparate types of people—dice-players, usurers, pigeon-flyers, and traders in Seventh Year produce—as disqualified from giving testimony in court? Through a learned and creative reading of various Greco-Roman and Jewish legal and political texts, Malka proposes a novel explanation: The disqualification of these four characters stemmed from a rabbinic choice to import aspects of the Roman law of *infamia*, itself grounded in Roman political thought, and more particularly, in the Greco-Roman ethics of self-control. In so arguing, Malka raises a number of fascinating and provocative questions—both methodological and substantive—that transcend the particular context of her study and thus are sure to be of interest not only to specialists in ancient Roman and Jewish law, but also to a much broader readership. Some of these touch on comparative methodology, and in particular, how best to conceptualize and study legal transplants. Others stem from her proposal that we reimagine the purposes of evidentiary and procedural rules (and indeed, of litigation itself) in ancient law. This argument has important implications, I suggest, for all legal systems—like most throughout history—that are not structured around a modern, positivist conception of law and of the role of courts.

To my mind, Malka's most interesting suggestion is that scholars have fundamentally misunderstood the purposes served by witness testimony in classical Roman law (and perhaps, although she is less clear in this regard, in ancient Jewish law as well). As she describes it, the standard

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view in the scholarly literature is that the function of witness testimony in court changed significantly between the archaic and classical periods of Roman law. Although testimony was initially understood to serve a “ceremonial” function—part of a ritual practice engaged in by the community with an eye toward creating political legitimacy—by the time of the classical period, it was viewed as serving a probative function, akin to the way we think of evidence today.¹ Drawing on her study of the ethics of self-control and its relationship to the disqualification of witnesses, Malka questions this standard account. In Roman law, she argues, the linkage between self-control and witness testimony was centered on a particular legal mechanism: *infamia*. Pursuant to this mechanism, those who exhibited a moral failing (including, not least, a lack of self-control) were made to suffer a loss of political capacity, such as the right to testify in court, but also the rights to vote and to hold office. From this perspective, *infamia* was a device targeted first and foremost at regulating the conditions of political citizenship, one (but only one) manifestation of which was the right to testify in court. This suggests, she concludes, that witness testimony in classical Roman law was designed not to serve a probative function (or at least not exclusively so), but instead a political or “authoritative” one.² Malka does not elaborate on this suggestion. But the implication seems to be that testimony was viewed as a means of drawing on and reaffirming the witness’s political authority—an authority grounded on his status as a citizen (exercising self-control), rather than on the probative value of his testimony as someone with knowledge of the relevant facts in dispute.

I leave it to experts in Roman law to opine as to how persuasive they find Malka’s argument from the perspective of Roman legal history itself. But from a comparative perspective, the argument strikes me as both compelling and important. As is true of the historiography of ancient Roman law, the historiography of modern Western legal systems—including that of both the Roman-canon law and the English common law—is structured around a narrative in which earlier, ritualistic conceptions of litigation and procedure (most especially, the ordeals) gave way to a modern conception of these devices as aimed at deciding the case in accordance with the law and the verified facts in dispute. Moreover, as this modern conception emerged, the role of witness testimony came to be defined in narrowly probative, evidentiary terms.³ Implicit in this account of the historical

1. Orit Malka, “Disqualified Witnesses between Tannaitic Halakha and Roman Law: The Archeology of a Legal Institution,” *Law and History Review* 37 (2019): 907, 935.

2. *Ibid.*, 935–36.

3. See, for example, John H. Langbein, *Torture and the Law of Proof: Europe and England in the Ancien Régime*, rev. ed. (Chicago: University of Chicago Press, 2006),

development of litigation and of the procedural and evidentiary rules facilitating it is a narrative of state-building that assumes a trajectory from tribal modes of governance, in which (political) norm-finding or -generating functions and (legal) dispute-resolution functions are intermingled, to modern forms of governance, in which these functions are disaggregated into distinctive institutions (most importantly, legislatures and courts). The development of evidentiary rules that are designed to constrain the role of witness testimony to that of supplying the relevant facts is part and parcel, in short, of the rise of modern courts devoted to the legal (rather than political) function of applying law to the verified facts. But however true this account may be in broad outline, the disaggregation of legal and political functions into distinctive institutions was very slow to occur, and, indeed, as witnessed by, among other things, the rise of what Ran Hirschl describes as “juristocracy,” incomplete to this day.⁴ Accordingly, there are grounds for concern that the effort to trace the origins of modern rules and practices may at times lead to anachronism, obscuring the range of different functions once served by evidentiary and procedural devices, and indeed, more broadly, by litigation itself.

The political functions served by courts and their procedure is a theme that I explored at length in a recent book on the origins of American adversarial legal culture. As I argue there, lawyer-driven adversarial procedure in the nineteenth-century United States—including practices of cross-examination that governed the taking of witness testimony—were viewed as more than just mechanisms for establishing the probative value of evidence and thereby determining the truth of the facts in dispute. In a society in which lawyers held a predominant share of legislative seats and in which local litigation was an avenue to communal authority and ultimately political power, adversarial procedures were also embraced by lawyers as tools for their own empowerment. Such procedures enabled lawyers to grandstand in the courtroom, undertaking theatrical public displays of their civic-minded commitment to fostering virtue and rooting out vice.⁵ As such, they served a fundamentally political purpose, separate and apart from their role in testing the evidence and establishing the facts in dispute. From this perspective, courtroom practice and procedure, and indeed,

55–56, 76–77; and George Fisher, “The Jury’s Rise as Lie Detector,” *Yale Law Journal* 107 (1997): 585–90.

4. Ran Hirschl, *Towards Juristocracy: The Origins and the Consequences of the New Constitutionalism* (Cambridge, MA: Harvard University Press, 2007).

5. Amalia D. Kessler, *Inventing American Exceptionalism: The Origins of American Adversarial Legal Culture, 1800–1877* (New Haven, CT: Yale University Press, 2017), 151–99.

litigation itself, were institutions that contributed not only to dispute resolution in the narrow sense, but also to shaping the political constitution of the community.

A not dissimilar argument about the political functions of courts and their procedural and evidentiary rules might also perhaps be made regarding an earlier period. Consider, for example, the elaborate quantitative system of proof developed within the Roman-canon law tradition to regulate the use of witness testimony in both civil and criminal matters. This system required “full proof” to support a court judgment and assigned any given piece of evidence a certain fractional value of that requisite proof. More particularly, two witnesses were required to constitute full proof—such that each individual witness alone was worth at most a half proof.⁶ Moreover, not all individuals’ testimony was valued so highly. The fractional weight assigned to a given individual’s testimony hinged on such factors as gender, age, and social status.⁷ Indeed, some individuals, such as heretics, Jews, and prostitutes, were (at least in theory, if not always in practice) denied the right to testify at all.⁸

It is a set piece of legal history that the French Revolution marked a momentous transformation away from this formal, quantitative system of proof in which judges were denied discretion, forced mechanically to apply the mathematical rules of proof, to a system of free evaluation of the evidence, pursuant to which they were henceforth able to assess the evidence in a rational fashion, independently weighing the degree of its probative value.⁹ There are important debates in the literature about the extent to which this narrative exaggerates. Mirjan Damaška, for example, has challenged the notion that late medieval judges were significantly constrained by the quantitative rules of proof, arguing that, in practice, they had considerable interpretive freedom.¹⁰ But such debates aside, the literature operates on the assumption that both the Roman-canon methods and the modern, post-revolutionary approach to deploying witness testimony pursued the same core goal: namely, assessing the probative value of the evidence with an eye toward determining the truth of the facts in dispute. Put differently, the reason why the medieval and early-modern

6. Raoul van Caenegem, “History of European Civil Procedure,” in *International Encyclopedia of Comparative Law*, vol. XVI (*Civil Procedure*), ed. Mauro Cappelletti (Tübingen: Mohr Siebeck, 1987), 19–20; and Mirjan Damaška, *Evaluation of Evidence: Pre-Modern and Modern Approaches* (Cambridge: Cambridge University Press, 2019), 34–35.

7. van Caenegem, “History of European Civil Procedure,” 20.

8. Damaška, *Evaluation of Evidence* 93–97.

9. *Ibid.*, 118–19.

10. *Ibid.*, 61–62.

Roman-canon law embraced a different set of evidentiary rules than those that prevail today was not that jurists in this earlier period viewed litigation itself as serving a different function, but rather (at least implicitly) that they failed to see that the methods they had adopted were ill suited to the truth-finding function we continue to pursue to this day. For example, one familiar line of argument explains the quantitative system of proof as arising from scholasticism, a mode of reasoning, dominant in the middle ages, that proceeded deductively to generate elaborate systems of rules from abstract general principles.¹¹ According to this view, jurists living in societies that were profoundly structured by social hierarchies viewed those of low status as less credible than their social betters and thus inherently less capable of delivering testimony of the same probative value. Imbued by scholasticism, they therefore set out to develop a system of rules that captured in as precise terms as possible the relative degree of probative value associated with different levels of social standing. It was only with the rise of Enlightenment science, combined with the French Revolution's effort to replace corporatist governance with the individualist rule of law, that jurists would in time reconfigure evidentiary rules in a more "rational" fashion.

But what if those who developed and implemented the Roman-canon law's quantitative system of proof did not envision these rules as serving a probative, evidentiary function—or to be more precise, not exclusively so? Perhaps, as in Malka's account of classical Roman law, we should re-envision Roman-canon rules governing witness testimony—and, indeed, litigation itself in the premodern world—as serving functions that were at least in part political, rather than probative. Even the briefest review of European legal history highlights the extent to which courts were very slow to divest themselves of political functions. Up until the French Revolution, the highest royal courts in France, the *parlements*, were endowed with various kinds of expressly political authority, including the power to remonstrate against and to refuse to register royal edicts.¹² Moreover, Old Regime judges themselves were key political actors. This was true not only of the elite judges of the *parlements*, whose rejection of royal efforts at reform ended up sparking the French Revolution, but also of local seigneurial judges, who were charged with numerous aspects of local community governance, such

11. See, for example, Barbara J. Shapiro, *Beyond Reasonable Doubt and Probable Cause: Historical Perspectives on the Anglo-American Law of Evidence* (Berkeley: University of California Press, 1991), 3.

12. John P. Dawson, *A History of Lay Judges* (Cambridge, MA: Harvard University Press, 1960), 83; and Jean-Pierre Royer, *Histoire de la justice en France de la monarchie absolue à la République* (Paris: Presses Universitaires de France, 1995), 207–27.

as overseeing street cleaning and repair, presiding over village assemblies, and policing alcohol and prostitution.¹³

Once we abandon a positivist conception of law in which courts exist solely to enforce state-made law (and, most especially, legislation)—a conception of limited real-world applicability prior to the nineteenth century—the notion that evidentiary rules, and indeed, court procedures in general, were intended to serve an exclusively probative function starts to become less obvious. In a world in which courts and their judges played a significant political role, both in and out of the courtroom, perhaps procedural and evidentiary rules were also expected to facilitate this political role? In medieval and early-modern Europe, political and communal action often took the form of efforts to represent and reinforce the corporatist social hierarchy inscribed into the law and traditionally understood to reflect divine will. Whether in France or the Holy Roman Empire, political power was long exercised through assemblies of the estates—assemblies in which each corporatist grouping was carefully positioned in relation to its counterparts so as to reflect the prevailing social hierarchy.¹⁴ So too, at the local level, events of public significance, ranging from religious holidays to town meetings, occasioned processions and other gatherings in which the local community arranged itself in corporatist hierarchy.¹⁵ Because courts were themselves at least in part political institutions of a sort, one way of understanding the quantitative system of proof is as a set of rules designed—like the assembly of the estates or the public procession—to represent and reinforce the prevailing corporatist social hierarchy. From this perspective, assigning greater value to the testimony of those of high status than to those of low status was a way of ensuring that the hierarchical political structure would continue to govern the community. The function of the rules of proof was therefore not exclusively to

13. James Lowth Goldsmith, *Lordship in France, 1500–1789* (New York: Peter Lang, 2005), 56–58; and Jeremy Hayhoe, *Enlightened Feudalism: Seigneurial Justice and Village Society in Eighteenth-Century Northern Burgundy* (Rochester, NY: University of Rochester Press, 2008), 72–83.

14. See, for example, James B. Collins, *The State in Early Modern France* (Cambridge: Cambridge University Press, 1995), xxiv, 34–35, 260; and David M. Luebke, “Ceremony and Dissent: Religion, Procedural Conflicts, and the ‘Fiction of Consensus’ in Seventeenth-Century Germany,” in *The Holy Roman Empire, Reconsidered*, ed. Jason Philip Coy, Benjamin Marschke, and David Warren Sabean (New York: Berghahn Books, 2010), 151–53.

15. See, for example, Amalia D. Kessler, *A Revolution in Commerce: The Parisian Merchant Court and the Rise of Commercial Society in Eighteenth-Century France* (New Haven, CT: Yale University Press, 2007), 247–55; and Barbara Stollberg-Rilinger, *The Emperor’s Old Clothes: Constitutional History and the Symbolic Language of the Holy Roman Empire*, trans. Thomas Dunlap (New York: Berghahn Books, 2015), 30–31.

assess the probative value of any given piece of testimony in the modern evidentiary sense—with the focus on whether the witness in question had relevant and credible knowledge of the facts in dispute. The function was in addition representational in nature: what Malka describes as “ceremonial” and “authoritative.”¹⁶ It was aimed, in other words, at ensuring that the dispute would be resolved in accordance with the views of those high-status people in the community whose opinions mattered. In this sense, witnesses themselves could be viewed as akin to judges—a point at which Malka herself gestures.¹⁷

In addition to pointing in the direction of new lines of research concerning the neglected political function of evidentiary rules and procedures in premodern courts, Malka’s article also raises a number of significant methodological questions concerning the much-debated category of legal transplants. She presents her study as “an important test case for examining the adequacy of metaphors that are used in the scholarly discussions of legal transfer,” noting that it “may deepen our understanding of the various ways in which the adoption of a foreign legal norm actually works.”¹⁸ So too, she explains her preference for the term “legal translation” by observing that the notion of a “legal transplant,” as initially developed by Alan Watson, assumes a direct transposition of the legal rule from one context to another, whereas legal translation allows for the possibility that, as in her study, the rule undergoes “extensive reworking” as it moves across legal systems. Unfortunately, however, Malka never explains exactly how her study relates to other research within the extensive comparative literature on legal transplants or how precisely it serves to “deepen” our understanding of the translation process. That this is the case, despite her stated intentions, would seem to follow almost inevitably from her decision to set aside questions concerning “the rabbis’ motivations in developing these legal institutions, as well as the mechanisms of transmission through which they became acquainted with Roman legal structures.”¹⁹ The key debates underlying the proliferating literature on legal transplants—including the numerous efforts, to which Malka herself alludes, to identify metaphors superior to “transplant”—tend to focus on the nature and mechanics of the transmission process.²⁰ The choice to

16. Malka, “Disqualified Witnesses,” 935–36.

17. *Ibid.*, 935 n. 127.

18. *Ibid.*, 907.

19. *Ibid.*, 906.

20. See, for example, Gunther Teubner, “Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergences,” *The Modern Law Review* 61 (January 1998): 11–32; and Máximo Langer, “From Legal Transplants to Legal Translations: The

eschew these topics thus makes it difficult for Malka to contribute to this literature.

Rather than exploring the rabbis' motivations for adopting elements of the Roman *infamia* and the mechanisms by means of which they learned of these, Malka deploys a method that she describes as "philological." More particularly, she focuses on establishing parallels between Greco-Roman political and legal discourse, on the one hand, and the Tannaitic Rabbinic literature, on the other. But her application of this method raises difficult questions regarding whether such a purely "philological" exercise is indeed possible, or whether instead, the very act of selecting texts to analyze is necessarily predicated on a set of assumptions about possible motivations and mechanisms of transmission.

In asserting a linkage between the Greco-Roman ethics of self-control and the rabbinic disqualification of four types of people, Malka identifies parallels between the Roman and Jewish texts, most especially their shared disqualification of women. More particularly, she emphasizes how the Greco-Roman ethics of self-control was rooted in a model of political citizenship that delineated firmly between, on the one hand, the men capable of exercising political authority, and on the other, women and slaves, who were deemed creatures of passion (and therefore unable to exercise such authority). So too, she observes, the rabbinic text disqualifying four types of people also disqualified women, and indeed, implicitly compared the four to women. But this common disqualification of women from testifying in court is hardly surprising, given that both the ancient Roman and Jewish traditions were patrilineal and disempowered women in a variety of different ways. Much of Malka's argument therefore hinges on the precise grounds asserted in each tradition for disqualifying women. And here Malka is, unfortunately, hampered by the fact that, as she notes, "[m]ost Tannaitic formulations of the rule regarding women's ineligibility to testify are exegetical and technical, refraining from openly discussing the reasoning behind this exclusionary rule."²¹

To demonstrate that the rabbinic disqualification of women from testifying was rooted in the same ethics of self-control that led the Romans similarly to disqualify women, she relies largely on a reading of Josephus, who describes the halakhic disqualification of both women and slaves as grounded in the ethics of self-control. That she turns to Josephus seems to follow from the fact that, as she notes, the self-control discourse itself

Globalization of Plea Bargaining and the Americanization Thesis in Criminal Procedure," *Harvard International Law Journal* 45 (2004): 29–35.

21. Malka, "Disqualified Witnesses," 922.

is “mostly found in Jewish texts that are also expressly Hellenistic.”²² But this very fact, combined with the ongoing scholarly debate to which she alludes concerning the nature and extent of “[t]he infiltration of self-control discourse into rabbinic literature,” raises the question of whether Josephus’s account of Jewish law can be taken as standing in for that of the rabbis.²³ This question is especially salient because she looks to Josephus not for an account of the law itself (namely, that women were disqualified), but rather for the law’s justifications.²⁴ Josephus is known for his efforts to demonstrate the compatibility of Judaism with Greco-Roman thought.²⁵ He therefore had good reason to explain the Jewish disqualification of women from serving as witnesses in terms that would have been familiar to a Roman audience. As this suggests, rather than providing a window into the rabbinic tradition, as Malka argues, Josephus is perhaps better understood as a possible mechanism of transmission, intermediating between Roman legal and political thought, on the one hand, and the halakhic tradition, on the other. More generally, this problem of how to read Josephus highlights the limits of Malka’s “philological” approach and her concomitant disclaimer of any attempt to examine rabbinic motivations and mechanisms of transmission. Her approach, in short, is necessarily contingent on the selection of particular texts to interpret—and that choice, in turn, implicates key questions of context, such as the motivations of those responsible for writing the texts and the lines of transmission linking their ideas to those of others.

Although Malka largely eschews the question of the rabbis’ motivations for embracing elements of Roman law, as well as the related question of how they came to learn of this law, she does address these briefly in passing. In a footnote, she suggests that “[t]hose motivations and mechanisms of transmission probably relate to the colonial condition in Roman Palestine.”²⁶ Citing work by Clifford Ando, she observes that there may be a tendency in empires for “provincial legal systems to come into alignment with imperial ones.”²⁷ More particularly, imperial institutions and

22. *Ibid.*, 922 n. 69.

23. *Ibid.*, 922 n. 70.

24. Interestingly, according to David Weiss Halivni, the rabbis transmitted laws from one generation to the next on the precise understanding that it was for future generations to identify reasons for the laws created by their predecessors. David Weiss Halivni, *The Formation of the Babylonian Talmud*, trans. Jeffrey L. Rubenstein (New York: Oxford University Press, 2013). I thank Yoni Pomeranz for pointing me to this argument.

25. Shaye J. D. Cohen, *From the Maccabees to the Mishnah*, 2nd ed. (Louisville, KY: Westminster John Knox Press, 2006), 138–39.

26. Malka, “Disqualified Witnesses,” 906 n. 9.

27. *Ibid.*, 906 n. 9.

culture (including political thought) have a tendency to spread throughout the empire, as colonized peoples have incentives to comply with dominant institutional practices and cultural values, either freely of their own accord, so as to advance within the imperial system, or because these are imposed in various ways by imperial institutions and elites (including, not least, courts). All of this seems plausible. But of course, empire also breeds resistance, as it did with some frequency in Roman Palestine. And indeed, it is striking that the *infamia* device was not imported by the rabbis in its entirety. As Malka notes, the rabbinic literature adopted the disqualification of witnesses, but did not adopt the other political disabilities associated with *infamia*. So although the imperial context is certainly key to explaining the rabbis' choices, Malka's own evidence suggests a dynamic that was considerably more complex than mere "alignment."

The one other time that Malka touches on the issue of the rabbis' motivations and possible mechanisms of transmission is in the brief and intriguing statement with which she concludes her piece. More specifically, she notes that "by drawing on Roman law, the rabbis were doing much more than excluding liars"; they were also "incorporating characteristic features of Roman political thought into Jewish law."²⁸ The phrasing here is ambiguous. Is Malka implying that the rabbis adopted aspects of the *infamia* device precisely because they were motivated by the goal of importing key features of "Roman political thought"? On to this view, the rabbis' embrace of the Greco-Roman ethics of self-control motivated them to adopt aspects of the *infamia*. Or alternatively, is she suggesting that once the rabbis chose to incorporate the *infamia*—perhaps for reasons having nothing to do with Roman political thought—then as a necessary, but unintended consequence, they ended up importing the ethics of self-control? And does this mean that she sees evidence of such an ethical discourse extending more widely in the rabbinic literature, beyond the disqualification of four types of people? It is unclear which of these arguments Malka intends to make, and all extend well beyond the bounds of her article. But the varying interpretations raise fascinating questions about the possible linkages between legal institutions, practices, and rules, on the one hand, and political thought, on the other. I have already suggested reasons to think of courts and their procedure as serving political functions, rather than purely legal ones—especially (but not only) in the premodern era. This, in turn, suggests that we should conceive of legal transplants or translations as mechanisms for transmitting not only legal rules, practices, and institutions, but also aspects of political thought and culture.

28. *Ibid.*, 936.