Review

RENÉ BROUWER, *LAW AND PHILOSOPHY IN THE LATE ROMAN REPUBLIC*. Cambridge and New York: Cambridge University Press, 2021. Pp. 190 (hbk). ISBN 9781108491488. £29.99/$39.99.

Philosophy and jurisprudence share an interest in many important topics: personhood, causation, harm, fault, responsibility, rights and duties, agreement, and so on. But the two disciplines have traditionally maintained somewhat cautious relations. The reason is not hard to find: ethical philosophers are interested in exploring morally ambiguous situations, while jurists are compelled to resolve ambiguities in the interests of reasonably assigning liability and imposing property reallocation or punishments. Each community has learned to be wary.

In this slender volume (133 pages of text), however, René Brouwer proposes that during the later second and early first centuries B.C.E. there was an unusually close and cooperative association between late Hellenistic philosophy (particularly the so-called Middle Stoa) and the early stages of the emerging juristic community at Rome. He argues (3) that important influences flowed in both directions. Above all, the jurists adopted their concepts of taxonomy and systematisation from the Stoics (ch. 3), while the Stoics picked up methodical casuistry from the jurists (ch. 6). The main locus for their interaction is loosely posited as the 'Scipionic circle' in Rome (33, 98–101).

The subject is, of course, a venerable one, but B. offers a strong version of the idea. Footnotes indicate that he is aware of a broad range of preceding scholarship, but he himself rarely engages in depth with it. Nonetheless, readers who remain curious about prior opinions can get a good start from B.'s citations, and they certainly should be encouraged to do so.

A widespread scholarly consensus holds today that the jurists (and Q. Mucius Scaevola Pontifex Maximus in particular: Pomponius, *Dig.* 1.2.2.41) adopted their arguments *per genus et differentiam* from Hellenistic philosophy, especially the Stoics. The problem, as B. acknowledges (47), is that this method was — as Cicero's *alter ego* Crassus observes in the *de Oratore* (1.187–189) — extremely common in the later Hellenistic period, in disciplines ranging from music and astronomy to grammar and rhetoric. Further, B. much too casually accepts that Crassus's programme for fully systematising Roman private law (*de Or.* 1.188–191) was actually adopted by the jurists (42–3). Here the consensus of scholars is strongly against him, since there is no evidence of any such general systematisation until centuries later. Cicero's aspirations in this regard are related expressly to the difficulty that laypersons, especially litigants and their rhetorically trained advocates, have in comprehending and applying erudite jurisprudence. (It is symptomatic of B.'s problems in this regard that on 17 he translates Ulpian's famous definition of jurisprudence — *ars aequi et boni*, *Dig.* 1.1.1 pr. — as 'the science of the good and the equitable'. Maximilian Herberger's *Dogmatik* (1981) is not in his bibliography.)

Similar difficulties attend his arguments on casuistry. B. freely confounds the *responsa* that jurists gave to their actual clients with the *responsum* as a literary form in their writings (89–94); the former date from the Middle Republic at latest, while the latter are not attested until the mid-second century B.C.E. with the 'founders', especially M. Junius Brutus, Praetor in 142 B.C.E. (Cicero, *de Or.* 2.224). By that date, casuistry was already well developed among the leading Stoics (94–8). But it served quite distinct purposes in the two disciplines. The jurists use casuistry, in the form of brief and stylised hypotheticals, in order to raise legal questions and establish legal rules, not to explore moral ambiguities; Cicero himself observes this considerable difference (*de Off.* 3.68: *aliter*). Such juristic casuistry manifestly originates from the absence, at this time, of a formal Roman appellate system, which would at a later date do the vital work of isolating and resolving questions of law that have been separated from the messy details of actual cases. Paul, *Dig.* 9.2.31, paraphrasing Q. Mucius, is an outstanding example.

Much of B.'s trouble results from his initial decision to exclude rhetorical thought from his discussion (14–17). He is aware that, in the mid-second century, Hermagoras of Temnos had revolutionised rhetoric by 'slicing and dicing' pleadings into all possible arguments pro and con for all general forensic positions. Whether or not Hermagoras initiated the fashion of casuistry, his influence was profound. This becomes evident when B. turns to examine (90–8) Cicero's justly famed description of the development in the later Republic of prohibitions against misrepresentation and concealment by sellers and buyers, *de Officiis* 3.49–72. As Cicero stresses,

the problem had been much debated among Stoic philosophers. But the core of his discussion comes at 3.58–72, in which the progression of late Republican law is described. Here, and perhaps surprisingly, what Cicero emphasises is a series of trial verdicts that step-by-step created the doctrine, with the jurists (in Cicero's presentation) remaining important but largely subsidiary. This is law arising out of precedent based on actual cases and controversies, and not casuistry at all; but the disciplines collided (or colluded) happily. The late Elizabeth Rawson constantly reminded scholars (including me) that the boundaries between intellectual fields, including also history and antiquarianism and even drama and epic, were appreciably more porous and unstable in the second century than they would be in the first.

B.'s argument fares better when he turns to substantive law: persons (ch. 5) and property (ch. 6); both philosophy and law tend to follow the conservative drift of the times. But, in the end, this thought-provoking book suggests the need for deeper research on the entire era.

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