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MAGIC IN THE XII TABLES REVISITED[1]

The investigation of ancient magic is currently one of the liveliest areas in the study of the ancient Mediterranean.[2] Although most studies have focused on magic 'from the inside', so to speak, there is a growing body of work on the way that Greeks and Romans conceptualized and dealt with the category 'magic'.[3] In particular, there has been a recent spate of works on the Roman law against magic that are starting to make obsolete the older standard discussions of this topic.[4] Yet they generally give short shrift to the laws of the XII Tables; for detailed studies of this material, we are still largely dependent on work done in the first quarter of the twentieth century.[5] The recent appearance of new editions of the XII Tables suggests that the time is right for an in-depth reconsideration.[6]

[1] I owe thanks to Matthew Clark, Michael Dewar, and Robert Phillips, who toiled through a turgid first draft of this paper and greatly improved it with their comments, and to the anonymous reader for this journal, whose clear assessment helped me (I hope) to sharpen its focus. Thanks are also due to the editor, Robert Maltby, for his helpful suggestions.

[2] The bibliography is too extensive to list here; see W. Brashear, 'Out of the closet: recent corpora of magical texts', *CP* 91 (1996), 372–83, for a survey of recent work, and the brief overview in J. N. Bremmer, 'The birth of the term "magic" ', *ZPE* 126 (1999), 1–12, at 1.

[3] So for example R. Garosi, 'Indagine sulla formazione del concetto di magia nella cultura romana', in *Magia: Studi di storia delle religione in memoria di Raffaela Garosi* (Rome, 1976), 13–93; C. R. Phillips, 'The sociology of religious knowledge in the Roman empire to A.D. 284', *ANRW* II.16.3 (1986), 2677–773, at 2711–32, and '*Nullum crimen sine lege*: socioreligious sanctions on magic', in C. A. Faraone and D. Obbink (edd.), *Magika Hiera: Ancient Greek Magic and Religion* (New York, 1991), 260–76; R. Gordon, 'Aelian's peony: the location of magic in Graeco-Roman tradition', in E. Shaffer (ed.), *Comparative Criticism: A Yearbook* (Cambridge, 1987), 59–95, and 'Imagining Greek and Roman magic', in B. Ankarloo and S. Clark (edd.), *Witchcraft and Magic in Europe: Ancient Greece and Rome* (Philadelphia, 1999), 159–275; F. Graf, *Magic in the Ancient World* (Cambridge, MA, 1997), 20–88.

[4] Recent discussions: C. Castello, 'Cenni sulla repressione del reato di magia dagli inizi del principato fino a Costanzo II', in *Atti dell'Accademia Romanistica Constantiniana: VIII convegno internazionale* (Naples, 1990), 665–93; H. G. Kippenberg, 'Magic in Roman civil discourse: why rituals could be illegal', in P. Schäfer and H. G. Kippenberg (edd.), *Envisioning Magic: A Princeton Seminar and Symposium* (Leiden, 1997), 137–63; D. Liebs, 'Strafprozesse wegen Zauberei: Magie und politisches Kalkül in der römischen Geschichte', in U. Martha and J. von Ungern-Sternberg (edd.), *Große Prozesse der römischen Antike* (Munich, 1997), 146–58; Gordon (n. 3, 1999), 253–65. The most comprehensive older works are C. Pharr, 'The interdiction of magic in Roman law', *TAPhA* 63 (1932), 269–95, and E. Massonneau, *La Magie dans l'antiquité romaine* (Paris, 1934), 136–241.

[5] Especially P. Huvelin, 'La Notion de l'"iniuria" dans le très ancien droit romain', in *Mélanges Ch. Appleton: Études d'histoire du droit* (Lyon, 1903), 371–499, at 386–454; F. Beckmann, *Zauberei und Recht in Roms Frühzeit. Ein Beitrag zur Geschichte und Interpretation des Zwölftafelrechtes* (Osnabrück, 1923), with the review by E. Fraenkel in *Gnomon* 1 (1925), 185–200 (reprinted in id., *Kleine Beiträge* 2 [Rome, 1964], 397–415). Recent discussions include A. D. Manfredini, *La diffamazione verbale nel diritto romano. I: Età repubblicana* (Milan, 1979), 1–90; F. Zuccotti, '". . . Qui fruges excantassit . . ." Il primigenio significato animistico-religioso del verbo "excanto" e le duplicità delle previsioni di *xii Tab.* VIII, 8', in *Atti del III Seminario Romanistico Gardesano, 22–25 ottobre 1985* (Milan, 1988), 81–211; and B. Biscotti, '"Malum carmen incantare" e "occentare" nelle XII tavole', in *Testimonium amicitiae* (Milan, 1993), 21–51; these do not supersede the earlier works.

[6] D. Flach and S. von der Lahr, *Die Gesetze der frühen römischen Republik* (Darmstadt, 1994), and especially A. D. E. Lewis and M. H. Crawford in M. H. Crawford (ed.), *Roman Statutes* 2 (London, 1996), 555–721; note also O. Diliberto, *Materiali per la palingenesi delle XII Tavole*

Any analysis of the laws on magic in the XII Tables, however, is complicated by two distinct but nevertheless interwoven problems. On the one hand, there is the difficulty of reconstructing a text known only from much later citations and allusions; on the other, there are the well-known methodological problems involved in using 'magic' as an interpretative category.[7] These two problems are interconnected because assumptions about 'magic' have repeatedly shaped the attempts of philologists and legal historians to reconstruct the text. This is hardly surprising, since our sources often implicitly or explicitly associate the passages they cite with the *artes magicae*, and since the actions with which those passage are concerned are undoubtedly what modern Western readers would identify as magic. But although not surprising, the tendency to apply the interpretative category of 'magic' without further reflection has had unfortunate results. First, it has often cut short attempts to examine why these particular actions should have been made punishable in these particular ways: most commentators appear simply to have assumed that their identification as magic is explanation enough.[8] This is by no means the case, since in different contexts 'magic' can mean very different things and can be criminalized for very different reasons. Second, some scholars have tried to explain away or discount some of the scanty evidence available to us, on the grounds that it does not fit their notions of what 'magic' is or is not. Now it is undoubtedly foolish to insist on the validity of evidence without a critical assessment of its value, but it seems even more foolish to assess its value on the basis of a modern interpretative category of doubtful relevance.

In this paper I hope to provide a fresh examination of the evidence and to suggest some new interpretations of these laws. To this end I will avoid, as far as possible, the whole notion of 'magic', except where that terminology is introduced by the sources, and will instead limit my analysis to the more specific terms that were evidently used in the actual laws.[9] After some brief remarks on the XII Tables in general, I will examine in detail the two laws usually associated with magic; I hope to demonstrate that their significance becomes much clearer if we do not in fact think of them as laws against magic. I will then conclude with some reflections on the later interpretation of these laws in the Roman world.

(Cagliari, 1992). In this paper I shall cite the laws of the XII Tables according to the numeration of Lewis and Crawford, but will where appropriate indicate the equivalents in the standard earlier editions of C. G. Bruns, *Fontes Iuris Romani Antiqui*[7] (Tübingen, 1909), E. H. Warmington, *Remains of Old Latin* 3 (Cambridge, MA, 1938), and S. Riccobono, *Fontes Iuris Romani Antejustiniani. I: Leges*[2] (Florence, 1941).

[7] See, for example, M. and R. Wax, 'The notion of magic', *Current Anthropology* 4 (1963), 495–518; D. Hammond, 'Magic: a problem in semantics', *American Anthropologist* 72 (1970), 1349–56; K. E. Rosengren, 'Malinowski's magic: the riddle of the empty cell', *Current Anthropology* 17 (1976), 667–85; S. J. Tambiah, *Magic, Science, Religion, and the Scope of Rationality* (Cambridge, 1990). With particular attention to the ancient Mediterranean, in addition to the works in n. 3 above, see A. Segal, 'Hellenistic magic: some questions of definition', in R. van den Broek and M. J. Vermaseren (edd.), *Studies in Gnosticism and Hellenistic Religions* (Leiden, 1982), 349–75, and H. S. Versnel, 'Some reflections on the relationship magic–religion', *Numen* 38 (1991), 177–97.

[8] Huvelin (n. 5) is a significant exception among older works; in more recent scholarship, see the brief comments of Kippenberg (n. 4), 144–6 and Gordon (n. 3, 1999), 253–4.

[9] In this respect the paper is an experiment in response to the often-cited observation of Versnel (n. 7), 181, that 'you cannot talk about magic without using the term magic'.

I. KNOWLEDGE OF THE XII TABLES

Our knowledge of the XII Tables depends on quotations and references by writers of the first century B.C.E. and later. Since the orthography of the fifth century B.C.E. was in later periods virtually unintelligible, these writers clearly knew the text in an updated form. Yet their citations also display archaic features like the famously terse and elliptical style as well as obsolete words and inflections. Suggestions that our evidence does not at least in part go back to the original XII Tables thus seem hypercritical. The ultimate basis for these citations was probably the text produced sometime around 200 B.C.E. by one of the earliest Roman jurisconsults, Sex. Aelius Paetus Catus, as part of his *Tripertita*.[10] This work was apparently the foundation for all later study of the XII Tables. And study was increasingly needed: although the orthography was modernized over time, some of the vocabulary was so obsolete that Paetus himself had to guess at the meaning of certain words.[11]

But although antiquarian interest grew, the legal significance of the XII Tables dwindled. The increasing importance of praetorian law meant that the old laws had less and less relevance to the practices of the day.[12] From the late republic onwards, the XII Tables seem to have attracted the sustained attention only of antiquarians and jurists with a historical bent.[13] Yet their work meant that the text continued to be available to people whose chief interests lay elsewhere. Thus it is that a range of writers from Cicero to Macrobius cite the XII Tables, usually briefly, either to support an argument by an appeal to antiquity or to elucidate the character of the ancient Romans. In examining the evidence for the laws on magic, we must always keep in mind that these writers' interpretations of the passages they cite may not reflect their original significance.

The key evidence for these laws comes from the elder Pliny. In discussing the question *polleantne aliquid verba et incantamenta carminum?* (*N.H.* 28.10), he asks, *Quid? Non et legum ipsarum in duodecim tabulis verba sunt 'qui fruges excantassit' et alibi 'qui malum carmen incantassit'?* (*N.H.* 28.17).[14] Pliny seems to have quoted accurately from a good source, since in both clauses he apparently used an archaic form that would occur only in an ancient text.[15] There is thus no *prima facie* reason not

[10] Pomponius ap. D. 1.2.2.38: *exstat illius liber qui inscribitur 'Tripertita', qui liber veluti cunabula iuris continet; 'Tripertita' autem dicitur, quoniam lege duodecim tabularum praeposita iungitur interpretatio, deinde subtexitur legis actio*; see in general F. Wieacker, *Römische Rechtsgeschichte* (Munich, 1988), 535–8. G. Radke, *Archaisches Latein* (Darmstadt, 1981), 123–36, concludes that the linguistic features of the extant citations go back to the early second century B.C.E. and thus point to the text of Paetus; cf. Wieacker, 290–1, and Lewis and Crawford (n. 6), 557, 571.

[11] Cic. *Leg.* 2.59: *'Mulieres genas ne radunto neve lessum funeris ergo habento'. Hoc veteres interpretes Sex. Aelius, L. Acilius non satis se intellegere dixerunt, sed suspicari vestimenti aliquod genus funebris*; cf. Sulpicius Rufus ap. Gell. 4.1.20 and Juventius Celsus ap. D. 19.1.38.1. Note also the work of L. Aelius Stilo Praeconinus: Cic. *Leg.* 2.59, *Top.* 10, and *de Orat.* 1.1.

[12] Cicero notes that in his day the Praetorian Edict had replaced the XII Tables as the basis of the legal discipline (*Leg.* 1.17), and that the old practice of requiring schoolboys to learn the text by heart, still observed in his youth, had been abandoned (*Leg.* 2.59; cf. 2.9).

[13] We know of commentaries by M. Antistius Labeo (Gell. 1.12.18, 6.15.1, 20.1.13) and Gaius; see in general Diliberto (n. 6), 29–117.

[14] Pliny perhaps took these quotations not directly from the XII Tables, but from Verrius Flaccus, whom he cites in the next line. F. Münzer, *Beiträge zur Quellenkritik der Naturgeschichte des Plinius* (Berlin, 1897), 259–60, asserted that Varro was the source, on apparently arbitrary grounds; cf., however, Servius on *Ecl.* 8.99.

[15] *Excantassit* and *incantassit* are actually emendations for the manuscript readings *excantasset* and *incantasset*, that is, syncopated forms of the pluperfect subjunctive. They are almost certainly

to accept his quotations as basically reliable. Pliny's use of the word *alibi* before his second citation strongly suggests that he had in mind two separate laws, and in the next two sections I will examine the evidence for each of them in turn.

II. *QUI FRUGES EXCANTASSIT*[16]

Although Pliny is the only author to quote this law in precisely this form, both Seneca (*N.Q.* 4.7.2) and Apuleius (*Apol.* 47.3) clearly refer to it. Seneca does so in a discussion about the ability of mortals to affect the weather (*N.Q.* 4.6.2–7.3). After describing the 'hail wardens' of Cleonae, who gave notice of approaching hail so that the citizens might avert it through sacrifice, he says that although educated people rightly laugh at such practices, the people of Cleonae used to punish negligent 'hail wardens'. He continues:

et apud nos in xii tabulis cavetur, ne quis alienos fructus excantassit. Rudis adhuc antiquitas credebat et attrahi cantibus imbres et repelli, quorum nihil posse fieri tam palam est ut huius rei causa nullius philosophi schola intranda sit. (Sen. *N.Q.* 4.7.2–3)

Although Seneca apparently took this law to prohibit the invocation of storms that would destroy crops, we should note that this is by no means an obvious interpretation of the words he quotes.[17] Apuleius, for his part, refers in passing to this law in his *Apology*. His opponents alleged that he had bewitched a slave boy in the presence of fifteen other slaves. Apuleius mocks this story by arguing that, since magic is illegal, it is necessarily secret as well, and so he would hardly have engaged in such activities before so many witnesses:

Magia ista, quantum ego audio, res est legibus delegata, iam inde antiquitus duodecim tabulis propter incredundas frugum illecebras interdicta. (*Apol.* 47.3)

The word *excantare*, which we may translate clumsily but literally as 'to chant out', was not a common one. Apart from the citations of the XII Tables by Seneca and Pliny, I have found only ten examples prior to the fourth century C.E.[18] Possibly the earliest example occurs in a *carmen* preserved by the late medical writer Marcellus Empiricus:

Exi, <si> hodie nata, si ante nata, si hodie creata, si ante creata; hanc pestem pestilentiam, hunc dolorem, hunc tumorem, hunc ruborem, has toles, has tosillas, hunc panum, has panuclas, hanc strumam, hanc strumellam, hac religione evoco educo excanto de istis membris medullis.[19]

correct, however, since forms in *-assi-* were still common in the early second century B.C.E. (for a full list of examples, see F. Neue, *Formenlehre der lateinischen Sprache*[3] 3 [Berlin, 1897], 507–10), but were obsolete by the time of Cicero (who uses them to give an archaic flavour, for example *Leg.* 3. 6 and 9) and hence likely to be 'corrected' by later copyists. Roman scholars took them to be forms of the perfect subjunctive (for example Festus 190 L, *occentassint*, and Paul. Fest. 26 L, *amasso*), although they do not seem to have much tense at all: see E. Courtney, *Archaic Latin Prose* (Atlanta, 1999), 65.

[16] VIII.4 Lewis and Crawford = VIII.8. The most useful discussion of this law remains Beckmann (n. 5), 5–25, with Fraenkel (n. 5), 185–7; Zuccotti (n.5) includes useful material, but for criticisms of his overall approach, see n. 38 below.

[17] See below, n. 35; on averting hailstorms, cf. Plin. *N.H.* 17.267.

[18] Plaut. *Bacch.* 27 Lindsay; Lucil. 63 Marx; Varro, *Sat. Men.* 151 Buecheler; Hor. *Epod.* 5.45–6; Prop. 3.3.49–50; Luc. 6.457–8, 6.685–6, and 9.930–1; Tert. *Ad mart.* 1; the *carmen* preserved in Marcellus Empiricus 15.11 is generally considered to be archaic in origin.

[19] Marc. Emp. 15.11, cited from Courtney (n. 15), 117–18.

By means of this *carmen*, then, one could 'chant out' ailments from a person's body, a practice known from other cultures.[20] The word otherwise occurs only three times in the extant remains of Republican literature, and even these instances are known only from quotations by later writers.[21] The earliest is from the now lost opening of Plautus' *Bacchides*: *nam credo quovis excantare cor potes* (*Bacch.* 27 Lindsay). It is likely that one character says this while urging another to use her powers of persuasion, but the precise force of the word here is uncertain.[22] The next is from the second book of Lucilius' *Satires*, a burlesque of a famous court case. The quotation is of a relative clause only: *quae ego nunc <huic> Aemilio prae-/ canto atque exigo et excanto* (Lucil. 63 Marx). The sense presumably is that the speaker will draw out from the witness Aemilius the statements that he wants; we should note that this metaphorical use of the verb presupposes the literal sense attested by Marcellus Empiricus' *carmen*. The third example is from one of Varro's Menippean satires: *Ubi vident se cantando ex ara excantare non posse, deripere incipiunt*.[23] This line apparently contrasts attempts to remove something that rely, respectively, on words and physical action. Except for the Plautine passage, then, all the earliest evidence for the word *excantare* clearly suggests the meaning 'to remove through the use of chants', and the later evidence points in the same direction.[24] The action condemned in this law of the XII Tables thus seems clear enough: it was the removal of crops (presumably by someone other than the owner) by means of *carmina*.

Servius quotes a different clause that deals with a very similar issue: *neve alienam segetem pellexeris*.[25] Although there have been some doubts about the authenticity of this quotation, most editors have accepted it.[26] The verb *pellicere* is a compound of the prefix *per-*, here apparently with the spatial force of 'through' or 'across', and the archaic verb *lacere*, 'to deceive, defraud'. In the classical period it normally has the sense of 'to entice, to win over to oneself', especially by deceptive or insidious means. It is very unusual to find it used with a thing, rather than a person, as the direct object; the only other example is in Lucretius, who uses it of the power of a magnet to attract

[20] See, for example, C. McDonough, 'From Parnassus to Eden', *AJP* 120 (1999), 297–301, on 'talking out fire from burns' in rural Appalachia.

[21] Nonius Marcellus (102 M = 145 L) quotes lines of Plautus, Lucilius, and Varro; Servius Danielis (on *Ecl.* 8.71) also quotes the line of Plautus, in a slightly different form.

[22] Nonius took it to mean *excludere*, apparently 'to bring out', whereas Servius Danielis understood it to mean *magicis carminibus obligare*, 'to bind with magical chants'. For a discussion of the scene as a whole, see J. Barsby (ed.), *Plautus: Bacchides* (Warminster, 1986), 93–7; he translates the line as 'I know that you can charm the heart out of anyone', although he does not comment on the word *excantare*.

[23] Varro, *Men.* 151 Buecheler. The subject of the verbs is probably a group of *galli*, the castrated priests of the Magna Mater: cf. *Men.* 150 Buecheler.

[24] Horace (*Epod.* 5.45–6) applies the word to stars that have been 'chanted out' of the sky by a Thessalian witch; Propertius (3.3.49–50) uses it of his ability to teach lovers how to 'chant out' girls shut up by strait-laced husbands; and Lucan applies it variously to insanity caused when one's mind has been 'chanted out' (6.457–8), to infernal deities 'chanted out' from the underworld' (6.685–6), and to snake's poison 'chanted out' from a person's vitals (9.930–1).

[25] Servius on *Ecl.* 8.99: 'Magicis quibusdam artibus hoc fiebat; unde est in xii tabulis "neve alienam segetem pellexeris"; quod et Varro et multi scriptores fieri deprehensum adfirmant'; the last clause is found only in Servius Danielis.

[26] R. Schoell, *Legis duodecim tabularum reliquiae* (Leipzig, 1866), 49–50, citing the use of the second person instead of the third, regarded this as Servius' own paraphrase of *qui fruges excantassit*. Lewis and Crawford (n. 6), 683–4, suggest that the use of the second person was a simple slip, and propose as the original text *quive alienam segetem pellexerit*. Editors since Bruns (n. 6), 30–1, have generally accepted it as an accurate enough quotation.

iron (6.1001). This suggests that in the clause quoted by Servius it may likewise have referred to the power of one substance to attract another. According to Augustine, Cicero referred to this same law. After quoting the same line of Virgil's *Eclogues* on which Servius was commenting (8.99), Augustine asks,

> Nonne in xii tabulis, id est Romanorum antiquissimis legibus, Cicero commemorat esse conscriptum et ei qui hoc fecerit supplicium constitutum? (*De civ. D.* 8.19)

Both Servius and Augustine, then, identified the practice prohibited by this law of the XII Tables with the magical transfer of crops from one person's field to another's, a practice attested by several ancient writers.[27] Although we should not read into this law the language of the *artes magicae* as Servius and Augustine do, the verb *pellicere* strongly implies that the transfer was accomplished by some means other than physical force.

Although the extant citations do not indicate the precise means used to effect the transfer, the law probably specified *venena*.[28] Several pieces of evidence point in this direction. First, the passage of Virgil that led both Servius and Augustine to refer to this law concerns the power of *venena*.[29] Secondly, it is reasonably certain that the XII Tables dealt with *venena* at some point, because Gaius, in his commentary on the XII Tables, discussed the meaning and use of this term.[30] Given the scanty remains of the XII Tables, it is possible that the word occurred in a law that is now completely unattested; the conjunction with the passage of Virgil, however, makes this law the likeliest candidate of those that do survive.[31] The third piece of evidence has the additional significance of being the only record of this law's application. The elder Pliny records the story of a freedman named C. Furius Cresimus, who was envied by his wealthy neighbours because he got a larger return from his modest farm than they did from their large estates, *ceu fruges alienas perliceret veneficiis*. On the day of the trial, he brought all his farm equipment and workers into court, and said, *veneficia mea, Quirites, haec sunt, nec possum vobis ostendere aut in forum adducere lucubrationes meas vigiliasque et sudores* (Plin. *N.H.* 18.41–3).[32] The language that Pliny uses in describing

[27] Tib. 1.8.19: *Cantus vicinis fruges traducit ab agris*; Ov. *Rem.* 255: [*me duce*] *non seges ex aliis alios transibit in agros*; cf. Nemes. *Ecl.* 4.70 and Mart. Cap. 9.928.

[28] So already T. Mommsen, *Römisches Strafrecht* (Leipzig, 1899), 639, n. 4.

[29] Verg. *Ecl.* 8.95–9: 'Has herbas atque haec Ponto mihi lecta venena / ipse dedit Moeris (nascuntur plurima Ponto); / his ego saepe lupum fieri et se condere silvis / Moerim, saepe animas imis excire sepulcris, / atque satas alio vidi traducere messis.'

[30] D. 50.16.236.pr.: 'Gaius libro quarto ad legem duodecim tabularum: qui venenum dicit, adicere debet, utrum malum an bonum; nam et medicamenta venena sunt, quia eo nomine omne continetur, quod adhibitum naturam eius, cui adhibitum esset, mutat. Cum id, quod nos venenum appellamus, Graeci φάρμακον dicunt, apud illos quoque tam medicamenta quam quae nocent, hoc nomine continentur; unde adiectione alterius nomine distinctio fit.'

[31] It has been usual since the early nineteenth century to attribute Gaius' discussion not to this law, but to that on *mala carmina* discussed below; so most recently Lewis and Crawford (n. 6), 678–9. But since there are independent reasons for supposing that the law on enticing crops mentioned *venena*, this seems a more obvious context. Beckmann (n. 5), 52–5, makes a strong case that the term *malum venenum* must have stood in the XII Tables, although I see no need to postulate, as he does, an unattested clause parallel to that on *malum carmen*.

[32] Pliny's source for this story was L. Calpurnius Piso Frugi (F 33 Peter), who wrote his *Annals* probably in the 110s B.C.E.; the date of the trial is uncertain, but it probably took place in 191 B.C.E.: see G. Forsythe, *The Historian L. Calpurnius Piso Frugi and the Roman Annalistic Tradition* (Lanham, MD, 1994), 32–6, for the date of Piso's work, and 376–84 for a detailed discussion of the passage; see also Garosi (n. 3), 33–6; Graf (n. 3), 62–5; and Gordon 1999 (n. 3), 253–4.

the neighbours' suspicion of Cresimus is very close to that of the law quoted by Servius, suggesting that it was under this law that Cresimus was charged. If so, the emphasis on *veneficia*, both in the charge and in the defence, provides further evidence that the law referred explicitly to *venena*.

It is likely that the law quoted by Pliny and that quoted by Servius were originally two clauses of a single law: not only do both deal with similar offences, but Apuleius seems to conflate them in his reference.[33] If that was the case, what was the difference between them? The most popular explanation, which goes back at least to Voigt, is that the difference is the same as that between the later delicts of *damnum iniuria datum* and *furtum*, because 'to chant out' crops is to destroy them, whereas 'to entice' implies a transfer into one's own possession.[34] Yet as the passages quoted above indicate, *excantare* does not really mean 'to destroy', but rather 'to remove by chanting'.[35] The destination of the thing removed was unimportant: in some examples it seems simply to disappear, but in others it seems to enter the possession of the chanter.[36] It is thus rash to assume that the essential difference between *excantare* and *pellicere* was that the latter implies a transfer of goods whereas the former implies their destruction.[37] On the other hand, the two clauses almost certainly distinguished the means, that is, the use of *carmina* as opposed to *venena*. To dismiss this relatively certain distinction in favour of the much more uncertain one between damages and theft seems to me unjustifiable. We may conclude, then, that the original law dealt with the removal of crops from the owner's fields by means either of *carmina* or of *venena*; whether it also distinguished the mere removal from an actual transfer to another person's possession is uncertain.[38]

The last point to be made about this law is that, according to Cicero (ap. Aug. *De civ. D.* 8.19), it established *supplicium*, capital punishment, as the penalty. A potential objection is that Cresimus' trial, which took place under the presidency of a curule

[33] In the phrase *propter incredundas frugum illecebras* (*Apol.* 47.3) he combines the word *fruges*, from the clause quoted by Pliny, with a cognate of the verb *pellicere* in the clause quoted by Servius.

[34] M. Voigt, *Die XII Tafeln: Geschichte und System* 2 (Leipzig, 1883), 803–4; the point is expressed most succinctly by Bruns (n. 6), 30–1: '*excantare* est damnum dare, *pellicere* lucrum facere'.

[35] See Beckmann (n. 5), 8–13; Seneca's association of this law with the destruction of crops by hail is so out of line with the other examples of the word *excantare* that we may reasonably regard it as a mistake. It is also worth noting that Tibullus (quoted above, n. 27) refers to the use of *cantus* specifically for the transfer of crops.

[36] In the *carmen* preserved by Marcellus Empiricus, the ailments chanted out of the body presumably just disappear. In the fragment of Varro, by contrast, the people who first try to chant out and then snatch the objects from the altar presumably want them for themselves. In other cases, the chanter clearly expects to benefit from what is chanted out, as with Lucilius' advocate and probably the character in Plautus, even if it does not enter into their physical possession.

[37] Fraenkel (n. 5), 186, rightly chastizes Beckmann (n. 5), 16, for paraphrasing *excantare* as *fruges ex alieno agro in suum agrum carmine magico traducere*, but he is himself at fault in asserting that the verb never has connotations of 'to acquire'.

[38] Zuccotti (n. 5) argues that the difference between the two clauses is that they dealt with distinct types of magical acts: *excantare* means to remove the 'vital will' of a person or thing so that it is completely in one's power, whereas *pellicere* means merely to seize an object through *fascinatio* (208). Zuccotti's definition of *excantare* is built on an animistic interpretation of magical acts, in which the goal of such acts is to gain control of the spirit believed to exist in everything (see especially 152–9, 185–6, and 194–6). But the once popular notion that the early Roman view of the world was an animistic one has now largely been laid to rest: see e.g. G. Dumézil, *Archaic Roman Religion* (Chicago, 1970), 18–31; moreover, in building up his interpretation Zuccotti goes far beyond the actual evidence he cites.

aedile and before the *comitia tributa*, was almost certainly not a capital one.[39] Since at least 300 B.C.E., laws granting the right of appeal against the death penalty meant that capital cases were normally tried before the *comitia centuriata*. Similarly, although there is a possibility that aediles may at one time have presided over capital cases, virtually all the cases they are known to have handled involved fines, not capital penalties.[40] It thus appears that the trial of Cresimus did not conform to the penalty established by the law. This would not be too surprising, however, since by his day some of the harsh punishments prescribed by the XII Tables had apparently been replaced by lesser penalties such as fines.[41]

What would have been the purpose of this law? On the most obvious level, it was surely meant to protect people's property from damage. Some scholars have in fact seen this as its real focus. As Kippenberg succinctly puts it, it was 'not the incantations but the violation of somebody else's property [that] was punishable. The Twelve Tables aimed at preserving the integrity of Roman citizens: their reputation and property.'[42] This is an important observation, and there is little question that a concern with harm to individuals, and especially to their property, characterizes the wider context in which these two laws apparently occurred. In the reconstruction of Lewis and Crawford, the law on 'malicious chants' (VIII.1) is followed by laws concerning the responsibilities of a person whose animal has caused loss for another (VIII.2) and forbidding people to pasture their animals on someone else's land (VIII.3). The law on crops comes next (VIII.4), followed by a law that people who graze cattle or cut crops by night shall be hanged for Ceres (VIII.5), and then by one that prescribes death by burning as the penalty for arson (VIII.6).[43] If this reconstructed grouping reflects that of the original, then the general issue in this section was undoubtedly that of harming other people's property.

This, I think, is a crucial point. All the same, it does not account for the specific form of this law. The removal of crops from other people's fields is a serious matter in any agricultural society, and few commentators have expressed surprise that the *decemviri* made it punishable by death. But there are other ways to remove crops than to chant them out or entice them away with *venena*: one could simply cut them, load them on to a wagon, and haul them off. Since the law apparently said nothing about this, we must assume that it was not meant to cover the removal of crops in general.[44] So why should it concern removal by means of *carmina* and *venena* to the exclusion of other methods? It is at this point that the temptation to invoke the notion of 'magic' becomes very strong. But we should resist the temptation, and focus instead on the specifics. It is important to note that the XII Tables were not meant to be comprehensive, but only to

[39] Plin. *N.H.* 18.41–3: 'Quamobrem ab Spurio Albino curuli aedile die dicta metuens damnationem, cum in suffragium tribus oporteret ire . . .'.

[40] R. A. Bauman, 'Criminal prosecutions by the aediles', *Latomus* 33 (1974), 245–64.

[41] Beckmann (n. 5), 21–2; for example, the punishment of *verberatio* and *addictio* that the XII Tables established for theft was later replaced by a fourfold penalty (Gaius 3.189, Gell. 11.18.8 and 10).

[42] Kippenberg (n. 4), 146; similar observations were made previously by, for example, Beckmann (n. 5), 23 and Garosi (n. 3), 33.

[43] For discussion, see Lewis and Crawford (n. 6), 677–86; most earlier reconstructions also included in this section the laws on bodily harm and injury (I.13–15 Lewis and Crawford = VIII.2–4).

[44] This kind of *argumentum e silentio* is problematic, given our meagre knowledge of the XII Tables: it is possible that the original law dealt with the theft of crops in general, and that later writers merely noted the clauses they found most interesting. But the fact that none of our sources even hints at a connection with theft makes this possibility less rather than more likely.

cover matters that needed particular attention.[45] Hauling off someone else's crops in a wagon did not call for specific comment because it was an obvious crime, and was moreover presumably covered by the general provisions on *furtum* (I.17–21 Lewis and Crawford = VIII.12–16). Removing crops by means of *carmina* and *venena*, in contrast, was not at all obvious, and could not have been handled in the same way. The trial of Cresimus, even though it took place long after the passage of this law, gives some insight into the sorts of situations that it was meant to address. Cresimus' neighbours were envious and hostile because he was reaping much larger harvests from his small farm than they were from their big ones; they accounted for this by supposing that he was somehow transferring to himself the agricultural abundance that was rightly theirs.[46] In other words, Cresimus was not stockpiling his neighbours' crops, but was instead suspected of channelling the fertility of their fields into his own. This was a very different sort of action from *furtum*, and so would have required a separate provision.

It is furthermore likely that suspicions about such activities were relatively common in Rome during the fifth century B.C.E. Although the value of the evidence is debated, there was apparently widespread tension at that time over agricultural production. The probable small size of many holdings meant that a certain proportion of the population depended for subsistence on access to public land or support from the wealthy. The evidence also suggests that the wealthy at times exploited their control of resources to the detriment of the poor: the sources record fourteen food shortages in the period between 508 and 384 B.C.E., two in the years immediately preceding the passage of the XII Tables, and such food shortages are often as much the result of hoarding as of bad harvests.[47] All this contributed to a high level of social tension over agricultural production and the control of land, that is, discontent with the fact that some people had more than they ought. Given this tension, and given the belief that a man could use *carmina* or *venena* to transfer fertility from others' fields to his own, we would expect people to attribute their own bad harvests, or the unusually good harvests of others, to hidden activities of this sort. The *decemviri*, then, would have merely been responding to current concerns.

We can push this interpretation further by means of a functionalist analysis. As we have seen, the central issue in the trial of Cresimus was not so much damage to property as the feeling that some people had more than they were entitled to. This, I would suggest, illustrates the key issues at stake in this law: not the actual removal of crops, but rather the feelings of suspicion, envy, and hostility connected with agricultural production. The elite were unable, or perhaps more accurately unwilling, to address the underlying problem that caused these tensions, that is, the inequitable distribution of land. Yet the law against the removal of crops did allow for some resolution of the accompanying social tensions by treating the symptoms, so to speak,

[45] See, for example, T. J. Cornell, *The Beginnings of Rome. Italy and Rome from the Bronze Age to the Punic Wars (c. 1000–264 B.C.)* (London, 1995), 279–80. There seems now to be general agreement that XII Tables do not represent a comprehensive and systematic exposition of the law. This should be no surprise: the notions of general legal principles and classification on which such an enterprise depends were themselves the product of a long evolution.

[46] I follow here the important observations of Gordon (n. 3, 1999), 253–4.

[47] In 456 B.C.E. (Livy 3.31.1) and 453 B.C.E. (Livy 3.32.2). For a full list of the evidence and a discussion of its reliability, see P. Garnsey, *Famine and Food Supply in the Graeco-Roman World* (Cambridge, 1988), 167–81; cf. Cornell (n. 45), 267–71. On hoarding, see P. Horden and N. Purcell, *The Corrupting Sea: A Study of Mediterranean History* (Oxford, 2000), 267–8 and 272–3.

rather than the cause. Instead of solving the problem of land distribution, it provided people with a formal outlet for their feelings of envy and suspicion: those who might previously have been merely the object of rumours and communal disapproval could now be formally condemned and publicly executed. The focusing of attention on such people served to distract the poor from their more intractable complaints against the well-to-do; at the same time, it provided a common enemy against which the entire community could unite and thus counteracted divisive tensions by creating a focus for solidarity. In short, we can analyse the function of this law as allowing for the creation of scapegoats: people who could act as lightning-rods for the feelings of suspicion, envy, and hostility that arose over agricultural production, and whose condemnation and punishment could provide some outlet for the social tensions that threatened to destabilize the community.[48]

Despite the general uncertainties of the evidence, then, this law seems relatively unproblematic. It concerned the removal of crops from another person's field, specifically as accomplished through non-physical means. One clause specified the use of *carmina*, the other the use of *venena*. Whether or not the removal was in both cases also a transfer is not entirely clear, although general considerations would suggest that it was. In either case, however, the penalty was death. It is likely that the *decemviri* proposed such a law in response to widespread suspicion that some people were using *carmina* and *venena* to increase their own harvests at the expense of others. Since the general provisions on *furtum* would not have covered such charges, they required a separate provision. Lastly, we might further analyse the law as functioning to provide some outlet for social tensions over agricultural production during a period of stress.

III. *QUI MALUM CARMEN INCANTASSIT*[49]

The second law mentioned by Pliny concerns the chanting of a *malum carmen*. The context in which Pliny cites it makes it clear that he understood it to refer to *carmina* that adversely affect the external world. In this case, however, Pliny is the only ancient writer who alludes to such a law in the XII Tables. Several other writers refer to a law dealing with *carmina*, but they use somewhat different language and, more importantly, interpret it as a law concerning slander.

The most important evidence comes from Augustine, quoting a passage from the now lost fourth book of Cicero's *De Re Publica*. As evidence that Roman law severely punished slander, he quotes Cicero 'word for word, except for a few omissions and slight alterations to ease understanding' (Aug. *De civ. D.* 2.9). The passage comes from

[48] Compare the argument of E. E. Evans-Pritchard, *Witchcraft, Oracles and Magic among the Azande* (Oxford, 1937), 63–106, that the Azande used witchcraft to explain a wide range of misfortunes, and in particular contexts would seek for the responsible witch among their enemies. Even more relevant is Clyde Kluckhohn's analysis of the Navaho belief in witchcraft as providing an outlet for a variety of societal tensions in his *Navaho Witchcraft* (Boston, 1944; repr. 1967, from which I cite), 79–110. Note especially 98–9: 'the idea patterns defining belief in witchcraft provide means of displacing hostile impulses against relatives . . . and against whites . . . on to approved "scapegoats" '. For a critique of Kluckhohn's analysis, see F. M. Cancian, 'Varieties of functional analysis', in *International Encyclopedia of the Social Sciences* 6 (New York, 1968), 29–41, esp. 31–4.

[49] VIII.1; the most substantial discussions are R. Maschke, *Die Persönlichkeitsrechte des römischen Iniuriensystems* (Breslau, 1903), 11–28; Huvelin (n. 5); Beckmann (n. 5), 26–71; Fraenkel (n. 5), 187–99; A. Momigliano, review of L. Robinson, *Freedom of Speech in the Roman Republic*, *JRS* 32 (1942), 120–4; Manfredini (n. 5); Biscotti (n. 5).

a speech of Scipio Aemilianus; after remarking on the excessive license of the Greek stage, he says that

> nostrae contra duodecim tabulae cum perpaucas res capite sanxissent, in his hanc quoque sanciendam putaverunt, si quis occentavisset sive carmen condidisset, quod infamiam faceret flagitiumve alteri. (Cic. *Rep.* 4.12, ap. Aug. *De civ. D.* 2.9)

Cicero cited this law again in the *Tusculan Disputations*. In discussing the existence of poetry among the early Romans, he points out that *quamquam id quidem etiam duodecim tabulae declarant, condi iam tum solitum esse carmen; quod ne liceret fieri ad alterius iniuriam lege sanxerunt* (*Tusc.* 4.4).

Other writers apparently refer to the same law, although the language they use varies. Most importantly, Horace recounts how in early Rome what began as a welcome license at times of festival eventually turned into vicious slander, so that

> lex
> poenaque lata, malo quae nollet carmine quemquam
> describi; vertere modum, formidine fustis
> ad bene dicendum delectandumque redacti.[50] (*Ep.* 2.1.152–5)

Although Horace does not refer to the XII Tables explicitly, the setting of early Rome strongly suggests this, and the language he uses has enough similarities with more explicit citations to confirm it. Indeed, in another briefer allusion to this law he uses the phrase *mala carmina condere*, more or less the same expression that Cicero uses in his citation.[51] Three other sources, all late, mention the XII Tables explicitly, and one of them also refers to cudgels.[52]

The interpretation of this law has been much more controversial than that of the other mentioned by Pliny, in part because of preconceived notions about 'magic'. As a result, not only is the meaning of particular words and phrases much debated, but there is considerable uncertainty as to which words and phrases actually appeared in the original law. We must therefore begin by determining its text as well as we can. A few points are fairly certain. As I have already indicated, there is no good reason to doubt the authenticity of the passage cited by Pliny.[53] Similarly, no one has doubted the first clause cited by Cicero, *si quis occentavisset*.[54] The second clause cited by

[50] Porphyrio comments, *fustuarium supplicium constitutum erat in auctorem carminum infamium.*

[51] Hor. *Sat.* 2.1.82–3: 'Si mala condiderit in quem quis carmina, ius est / iudiciumque.'

[52] Arn. *Adv. nat.* 4.34: 'Carmen malum conscribere, quo fama alterius coinquinetur et vita, decemviralibus scitis evadere noluistis impune, ac ne vestras aures convicio aliquis petulantiore pulsaret, de atrocibus formulas constituistis iniuriis'; *Pauli sent.* 5.4.6: 'Iniuriarum actio aut lege aut more aut mixto iure introducta est: lege duodecim tabularum de famosis carminibus, membris ruptis et ossibus fractis . . .'; Schol. ad Pers. *Sat.* 1.123: 'lege duodecim tabularum cautum est ut fustibus feriretur qui publice invehebatur'. I quote the last passage from Lewis and Crawford (n. 6), 677.

[53] The only scholar to do so is Manfredini (n. 5), 23–9, who argues that *malum carmen* could not have been in the original law because the verb *incantare* can take as its object only the person or thing enchanted. This is true of the extant examples (see below, n. 64), but these are so few and so much later that it would be rash on that basis to reject the evidence of Pliny. On the other hand, in the *Carmen Saliare* (ap. Varr. *Ling.* 7.27) the verb *canere* is intransitive, with the god expressed as the object of a preposition; the same could have been true here. *Carmen* would then function as a cognate accusative, a construction attested elsewhere in the XII Tables (XII.2: *si servus furtum faxit noxiamve nocuit*).

[54] The verb is clearly archaic, occurring three times in Plautus (*Curc.* 145, *Merc.* 408, *Persa* 569)

Cicero, however, has occasioned more debate: *sive carmen condidisset, quod infamiam faceret flagitiumve alteri.* Several scholars have argued that either some or all of this is a later interpretation, and not part of the original law at all; however, they have tended to base their arguments on predetermined ideas about the meaning of the law.[55] In fact, there can be little doubt that the phrase *carmen condidisset* (or more likely *condissit*) stood in the version of the XII Tables that was known to Cicero and Horace: Cicero would hardly have used this phrase as evidence for the composition of poems in archaic Rome (*Tusc.* 4.4) if he did not consider it part of the original text, and Horace is unlikely to have used the same words as Cicero if he had not been thinking of the same text.[56] There can furthermore be little doubt that the noun *carmen* was qualified in some way, since the law could not have prohibited all *carmina* of every sort.[57] We may reasonably assume that Cicero did not substitute a relative clause for a simple adjective, but beyond this it is difficult to go. On the one hand, I know of no cogent reason why the clause given by Cicero, with some modifications of tense and the like, could not have stood in the original text.[58] On the other hand, Fraenkel's attempt to demonstrate its authenticity on stylistic grounds is not entirely persuasive.[59] Nevertheless, the general sense of the clause is likely to have been that given by Cicero, who knew the XII Tables much better than we can. If he paraphrased or modified it in some way, he very probably did so by reformulating it in terms of more contemporary

and then disappearing apart from an entry in Festus (190.32 L). The form *occentavisset* may be one of Augustine's 'slight alterations to ease understanding', replacing an original *occentassit*; the latter is the reading adopted by most editors, most recently Lewis and Crawford (n. 6), 679.

[55] H. Usener, 'Italische Volksjustiz', in his *Kleine Schriften* 4 (Leipzig, 1913), 356–82, proposed (361 and 372) that the original text was *occentassit quo flagitium faceret alteri*, because a *carmen* could not create a *flagitium*, as he understood the word. Beckmann (n. 5), 61–3, regarded everything after *occentassit* as an explanation added by Cicero, who misunderstood the meaning of the verb *occentare*; Biscotti (n. 5), 35–7, rejects the relative clause, which she interprets as a causal clause added by Cicero; both want to explain away Cicero's interpretation of the law in order to interpret it as a law against magic.

[56] Cf. G. L. Hendrickson, 'Verbal injury, magic, or erotic comus?', *CP* 20 (1925), 289–308, at 307–8, and Fraenkel (n. 5), 190. It is possible that Horace, like Cicero, had learned the XII Tables as a boy, despite being some forty years younger. His teacher, L. Orbilius Pupillus, was older than Cicero (Suet. *Gram.* 9) and allegedly made his students learn the *Odusia* of Livius Andronicus (Hor. *Ep.* 2.69–71); he may thus have also maintained the old practice of making them learn the XII Tables. On Orbilius, see further R. A. Kaster, *C. Suetonius Tranquillus: De Grammaticis et Rhetoribus* (Oxford, 1995), 125–37, esp. 129.

[57] Biscotti (n. 5), 35–7 and 48–9, argues that the phrase did indeed stand on its own, without any qualification, because it was an allusion to the law cited by Pliny, *quis malum carmen incantassit*. But there is no other evidence for such allusions in the laws of the XII Tables, and their brevity hardly leads us to expect them.

[58] There is a similar relative clause in I.21 Lewis and Crawford = VIII.16: *si adorat furt<i> quod nec manifestum erit* (Festus 158.32 L). The noun *infamia* looks suspiciously non-archaic, but is at least as old as Plautus (*Bacch.* 381, *Pers.* 347 and 355, *Trin.* 121 and 739); I am not convinced by Usener ([n. 55], 372; cf. Biscotti [n. 5], 35–6), who argued that *flagitium* here originally meant *flagitatio*, and had connotations of physical force. The fact that the technical legal senses of these two words are later developments does not preclude the possibility that they appeared here in a non-technical sense.

[59] Fraenkel (n. 5), 191, notes that the placement of the verb between its two objects has a parallel in Table VI.1, *cum nexum faciet mancipiumque* (Festus 176.5 L); but as Lewis and Crawford (n. 6), 654, suggest, this is probably due to L. Cincius, from whom Festus took his citation. For the dative *alteri*, Fraenkel cites parallels from the XII Tables (I.15 Lewis and Crawford = VIII.4) and Lex Aquilia ch. 3 (from Ulpian ap. D. 9.2.27.5), to which we may add Lex Repetundarum 87, in M. H. Crawford (ed.), *Roman Statutes* 1 (London, 1996), 74. But it also conforms to Ciceronian usage, for example *Off.* 3.23: *eodem modo constitutum est, ut non liceat commodi sui causa nocere alteri.*

concepts; but he is unlikely to have fundamentally misunderstood and hence misrepresented its general significance. We may thus be reasonably certain that something fairly close to this clause stood in the version of the XII Tables known to Cicero and Horace. The one possibility for significant error is that this version incorporated later material, for example scholarly notes, in which case the entire clause might merely be a later interpretation. But this is unlikely. The edition of the XII Tables known to Cicero, and perhaps Horace as well, was probably that in Paetus' *Tripertita*, and the little we know of this work suggests that it kept the text and the interpretation distinct enough for people to be unlikely to mistake the latter for the former.[60]

If Cicero and Horace were not misled by a faulty text, we must postulate that the original law of the XII Tables included at least three distinct clauses. Pliny cites clause A, *qui malum carmen incantassit*, and Cicero cites the two clauses B, *si quis occentavisset*, and C, *sive carmen condidisset quod infamiam faceret flagitiumve alteri*; Horace, however, uses the term *malum carmen* from clause A in the sense of clause C (*Ep.* 2.1.153), and actually interweaves terms from both A and C when he writes *si mala condiderit in quem quis carmina* (*Sat.* 2.1.82).[61] Although it is possible that Horace conflated two entirely separate laws, it is more likely that he combined two clauses of a single law.[62] Thus, if we know from Cicero that clauses B and C were together, and we can deduce from Horace that clauses A and C were together, it follows that all three clauses were part of one and the same law, and represented three alternatives within one general category.[63] The problem of interpreting the law thus becomes that of determining the nature of that general category. To answer this, we must turn from establishing the text to determining the meaning of the individual clauses.

As I have argued, the meaning that Cicero assigns to the clause *sive carmen condidisset* is unlikely to be too far from the original. Similarly, Pliny understands the clause he cites to deal with the power of words, and there is no good reason to dispute this. *Incantare* is another compound of *cantare*, with an etymological sense of 'to chant into or against'. It is a surprisingly rare word: apart from its use by Pliny, I have found only four examples prior to the third century C.E.[64] In all these cases, the verb is used with a person or object as the direct object, and it clearly denotes chanting in such a way as to alter that person or object. In this clause of the XII Tables, it is instead used

[60] In at least one case Cicero was certainly able to distinguish Paetus' interpretations from the actual text (*Leg.* 2.59, quoted above, n. 11).

[61] This conflation may in fact be deliberate, since Horace concludes this poem with a pun on the adjective *malum* (*Sat.* 2.1.83–4): after noting that there is a law available against those who write *mala carmina*, he asks, 'what of those who write *bona carmina*'?, that is, good poetry.

[62] Cf. Lewis and Crawford (n. 6), 679.

[63] These three clauses were probably joined by some form of the disjunctive particle *-ve*, as suggested by Cicero's use of *si . . . sive*. Several laws in the extant remains of the XII Tables contain words or phrases joined by *-ve* or a compound thereof, and in all cases these indicate alternatives within one general category: so, for example, different types of structures (VI.6: *tignum iunctum aedibus vineave †et concapit† ne solvito*), witnesses (VIII.11: *qui se sierit testarier libripensve fuerit*), or damages (XII.2: *si servus furtum faxit noxiamve nocuit*), or different ways of disposing of corpses (XI.1: *hominem mortuum in urbe ne sepelito neve urito*; cf. X.8). There are no exact parallels for the threefold alternative suggested here, but cf. II.2 (*iudici arbitrove reove*) and X.7 (*qui coronam parit ipse <familia>ve eius virtutis ergo duitur ei*). It is worth noting that *-ve* typically links items that belong together: *OLD* s.v. 2.

[64] Hor. *Sat.* 1.8.48–50, Apul. *Apol.* 42.3 and *Met.* 8.20, [Quint.] *Decl. Mai.* 10 tit. (note that *incantare* and its derivatives do not appear in the declamation itself); cf. *incantamentum* in Plin. *N.H.* 28.10 and 19.

with a cognate accusative, and the person or object affected was presumably indicated by a dative or a prepositional phrase.[65] The phrase *malum carmen incantare* thus presumably refers to the use of verbal formulae intended to bring about some negative change in people or things, just as Pliny suggests.

It is on the meaning of the word *occentare* that debate has focused. The problem lies in the evidence, which is contradictory as well as meagre. Like *incantare* and *excantare*, it is a compound of the verb *cantare* with a prefix, in this case *ob-*; the general meaning is thus 'to chant at or against'. It is important to note that the phrase *sive carmen condidisset quod infamiam faceret flagitiumve alteri* does not function as a gloss of this word, despite frequent assumptions to the contrary.[66] Hence we must look elsewhere for evidence of its meaning. The only sources, as I noted above, are the three occurrences of the word in Plautus and the gloss of Festus.[67] These sources, however, are not easy to reconcile. Plautus twice uses the phrase *occentare ostium*, 'to chant at the entrance (of a house)' (*Merc.* 508, *Pers.* 569), and in the third instance the verb has as its implied object the noun *fores* (*Curc.* 145). The last of these passages indicates most clearly the meaning of the phrase. The protagonist Phaedromus is standing before the locked house of his beloved, vainly seeking entry; he asks his slave, *quid si adeam ad fores atque occentem?* (*Curc.* 145). He then proceeds with the following *carmen*:

> Pessuli, heus pessuli, vos saluto lubens,
> vos amo, vos volo, vos peto atque opsecro,
> gerite amanti mihi morem, amoenissumi,
> fite causa mea ludii barbari,
> sussilite, opsecro, et mittite istanc foras
> quae mihi misero amanti ebibit sanguinem. (*Curc.* 147–52)

Occentare here apparently has the sense 'to chant at (the door in order to charm it)': Phaedromus chants a *carmen* in order to win the goodwill and co-operation of the bolts. The two passages in which the phrase *occentare ostium* occurs deal with similar situations, and it presumably has the same general force.[68] Festus, in contrast, says that

[65] See above, n. 53.

[66] For example, by Maschke (n. 49), 12–13; Beckmann (n. 5), 61–3; and Lewis and Crawford (n. 6), 677. But as Fraenkel (n. 5), 190, rightly insisted, the fact that Cicero connects these two clauses with the word *sive* clearly implies that they are two distinct alternatives; as far as I can determine, Cicero nowhere uses *sive* as an equivalent to *id est*.

[67] *Occentare* in Amm. Marc. 30.5.16 is simply an intensive form of *occinere*: Usener (n. 55), 359, n. 5; Beckmann (n. 5), 42–3. The form *obcantare* appears in Apul. *Apol.* 84 and *Paul. sent.* 5.23.15 with the meaning 'to enchant'; the late date and difference in orthography, however, suggest that this was an imperial coinage, created on analogy with other compounds of *cantare*, and has nothing to do with the archaic *occentare*. A medieval glossary has two entries of some interest: G. Goetz (ed.), *Corpus glossariorum latinorum* 5 (Leipzig, 1894), 228.28–31. One is reminiscent of the clause quoted by Cicero: *occentare id est infame carmen cum certo nomine dicere*. Another cites the verb in the pluperfect subjunctive, as it appears in the text of Augustine (*De civ. D.* 2.9): *occentavisset concinnasset composuisset condidisset centonizasset*; this is also interesting in giving a less obvious definition of the verb, which is much more commonly glossed as *contra cantare* (e.g. Goetz 228.30, 471.20, 508.22, 636.15).

[68] Usener (n. 55), 359–60, argues that *occentare* denoted an old type of popular justice, in which people raised a public outcry before the door of a person who had wronged them, but as both Beckmann (n. 5), 37–41, and Hendrickson (n. 56), 296–9, point out, this interpretation simply does not fit the context of these passages. Hendrickson himself argues that *occentare ostium* was the Latin equivalent of the Greek κωμάζειν ἐπὶ τὰς θύρας, and that *ostium* is the

occentassit antiqui dicebant quod nunc convicium fecerit dicimus, quod id clare et cum quodam canore fit ut procul exaudiri possit. Quod turpe habetur quia non sine causa fieri putatur.
(Fest. 190.32 L)

The problem in this case is to determine the value of the evidence. Fraenkel plausibly argued that Festus' source was a juristic commentary on the XII Tables.[69] Although some scholars have disputed this identification, their arguments are not very convincing.[70] We cannot therefore dismiss Festus' evidence out of hand. In short, Plautus and Festus attest to two quite different meanings of *occentare*: the former uses it to mean 'to chant at in order to win over or persuade', and the latter implies that it means 'to chant at in order to abuse'. Both meanings are etymologically plausible, and are not necessarily mutually exclusive. In the end, it is simply not possible to say which, if either, was meant by the framers of the XII Tables.

We are thus in effect left with Pliny's clause, *qui malum carmen incantassit*, and Cicero's second clause, *sive carmen condidisset, quod infamiam faceret flagitiumve alteri.* And herein lies the key problem, as most scholars have formulated it: did the original law deal with magic, as Pliny implies, or with slander, as Cicero implies? There have been three responses to this problem. The first has been to eliminate it entirely by assigning these two clauses to separate laws; this was the practice for much of the nineteenth century, and has also received support from more recent scholars.[71] The problem with this, as we have seen, is that the evidence of Horace strongly suggests that they belong together, and almost all editors from Bruns onward have in fact assigned them to the same law.[72] The second response has been simply to note that the law included one clause on magic and another on slander without trying to explain how

object not of the verb but of the verbal prefix *ob-*; he thus translates it as 'to serenade at the door'. But he fails to note that in *Curculio* the door itself, not his beloved, is the object of Phaedromus' *carmen*.

[69] Fraenkel (n. 5), 191–4; he argued that the commentator explained the archaic term *occentare* by reference to its analogue, *convicium facere*, in the more contemporary Praetorian Edict (ap. D. 47.10.15.2: 'Qui adversus bonos mores convicium cui fecisse cuiusve opera factum esse dicetur, quo adversus bonos mores convicium fieret, in eum iudicium dabo').

[70] Manfredini (n. 5), 51–7, followed by Biscotti (n. 5), 39–41, points out, first, that Festus does not attribute this term to the XII Tables, as is his usual practice; second, that the noun *canor* is not part of Republican vocabulary; and third, that Festus nowhere implies that the action described was a crime. The last point carries little weight, since an excerpt from juristic writings need not refer explicitly to the legality of an action. As for the second, although *canor* itself appears only once before the Augustan period (Lucr. 4.181), the adjective *canorus*, in the sense 'resonant, ringing, loud', is more common (*OLD* s.v. 3), and someone other than Lucretius may well have used the related noun. The first point is the most cogent, since Festus is indeed almost entirely consistent in naming the XII Tables whenever he cites them. There is, however, one definite exception, and that is when he cites a clause of the XII Tables not directly, but from a work of the constitutional antiquarian L. Cincius (176.5 L = Table VI.1; cf. 470.20 L). He may thus have done the same in his entry on *occentassit*, which would after all have been a citation not of the XII Tables themselves, but of a commentary on them.

[71] Schoell (n. 26), 140 and 151, prints the passage of Cicero as VIII.1, and the clause from Pliny as VIII.26. Voigt (n. 34), vol. 1, 58–61; cf. vol. 2, 802–3, associates the two clauses from Pliny with the clause from Servius as VIII.10, and assigns Cicero's evidence to another section altogether. More recently, Fraenkel (n. 5), 195, and Momigliano (n. 49), 121, deny any need to bring together the clauses cited by Pliny and Cicero.

[72] Bruns (n. 6), 28–9, prints the clause from Pliny as VIII.1a and the passage of Cicero as VIII.1b; this is already the case in the third edition of 1876, the earliest that I have been able to consult. Riccobono (n. 6), 52, follows Bruns exactly; Warmington (n. 6), 474–5, reverses the order.

the two fit together.[73] As I have suggested, however, the use of alternative words and phrases in the XII Tables generally implies some unifying category, which on this approach is left unexamined. The third response has been to argue that Pliny alone was correct, and that Cicero, Horace, and the rest all misinterpreted the passages they cite, which in fact came from a law against magic.[74] But this argument assumes that *occentare* must originally have meant 'to cast a magic spell' vel sim., and that the second clause in Cicero's reference to the law is his own mistaken gloss of the word's meaning. As we have seen, however, it is impossible to determine the precise meaning of *occentare* in the original law; it therefore cannot on its own serve as the basis for an interpretation. As we have also seen, the second assumption is simply unacceptable. Cicero was not glossing the word *occentare*, but was citing a text of the XII Tables that included the phrase *condere carmen* along with a clause defining the *carmen* as insulting or abusive. Consequently, efforts to explain away the evidence of Cicero and the rest are unconvincing.

Attempts to resolve the apparent inconsistency in the evidence have thus resulted in a stalemate, as scholars push the same data back and forth only to come up against the same objections. The reason for this unsatisfactory situation is that the question has been badly posed. Rather than postulating a mutually exclusive choice between magic and slander, we should dispense with these categories altogether and look instead for a category that could encompass all these clauses. In other words, we should see 'magic' and 'slander' not as exclusive alternatives, but as points on the same spectrum.[75] The lack of a firm distinction between 'curse' and 'abuse' is found in several languages. In English, for example, the verb 'to curse' can mean both 'to consign to the powers of darkness' and 'to rail at or abuse', and even 'to utter profanities and obscenities'. The early Irish used the same words, generally translated as 'satire', both for poems of abuse and for chants that could cause physical harm.[76] There is a similar tendency in Latin as well to use the same terminology for both curses and abuse. For example, *male*

[73] This seems to be the solution of Bruns (n. 6), 29: 'Utramque vocem "incantassit" et "occentassit" in XII tab. scriptam fuisse, earumque alteram ad artes magicas alteram ad convicia famosa spectasse, e locis supra allatis patet.' He is followed most recently by Flach and von der Lahr (n. 6), 165, and Lewis and Crawford (n. 6), 677–9.

[74] This argument was first advanced independently by Maschke (n. 49) and Huvelin (n. 5), and developed further by Beckmann (n. 5); despite the cogent objections of Fraenkel (n. 5) and Momigliano (n. 49), it has been accepted by a number of more recent scholars, for example Pharr (n. 4), 277–8; Massonneau (n. 4), 137–50; F. Wieacker, 'Zwölftafelnprobleme', *RIDA* 3rd series 3 (1956), 459–91, at 462–3; E. Pólay, 'Iniuria-Tatbestände im archaischen Zeitalter des antiken Rom', *ZRG* 101 (1984), 142–89, at 170–4; and Biscotti (n. 5).

[75] I am here developing observations made by Hendrickson (n. 56), 293; A. Ronconi, '"Malum carmen" e "malus poeta"', in *Synteleia: Vincenzio Arangio-Ruiz* 2 (Naples, 1964), 958–71; and, most importantly, H. S. Versnel, '*Κόλασαι τοὺς ἡμᾶς τοιοῦτους ἡδέως βλέποντες*, "Punish those who rejoice in our misery": on curse texts and Schadenfreude', in D. Jordan et al. (edd.), *The World of Ancient Magic* (Bergen, 1999), 125–62, at 136. Maschke (n. 49), 23–5, tried to retain the categories of magic and slander, and explained their conjunction in this law by the observation that a person who cursed another would include in his curse the ways in which that person had injured him, thus bringing him into bad repute. This suggestion was accepted by both G. Pugliese, *Studi sull' 'iniuria'* (Milan, 1941), 22–5, and M. Kaser, *Das römische Privatrecht*[2] (Munich, 1971), 155; but if the law was 'really' about magic, this strikes me as too tenuous a connection to explain the emphasis of the sources on slander. We should note, however, the tradition of 'slander magic', in which slander of one's enemies is central to the efficacy of one's spells against them: see, for example, *PGM* 4.2475–90, 2574–604, and 2641–74, and cf. S. Eitrem, 'Die rituelle Diabole', *SO* 2 (1925), 43–58.

[76] F. N. Robinson, 'Satirists and enchanters in early Irish literature', in *Studies in the History of Religions presented to Crawford Howell Toy* (New York, 1912), 95–130, esp. 112–21; for further

dicere generally means 'to speak ill of, insult, abuse', but in at least two passages of Plautus it means 'to curse'.[77] Similarly, the phrases *mala lingua*, 'a malicious tongue', and *mala verba*, 'malicious words', are used of curses as well as slander.[78]

Viewed in this light, the difference between the clause reported by Pliny and those reported by Cicero does not seem so great: both alike refer to 'maledictions' in this larger sense. A *malum carmen* was a chant that had a bad effect on a person or thing. *Incantare* and *occentare* both have the etymological sense of 'to chant against', and so presumably described different ways of using a *carmen* against someone or something, that is, with a bad effect; a *carmen* that would create *infamia* and *flagitium* for someone, if indeed those terms existed in the original text of the law, was yet another example of the same sort of thing. In short, we may suppose that the action condemned by this law was the use of *carmina* to harm people or things in various ways; although we might distinguish these as very different sorts of actions, for example slander and magic, for the early Romans they may have instead been variants of the same general action, 'malediction'. Over time, however, this older notion of 'malediction' would have faded and been replaced by the idea of *convicium* that we find, for example, in the Praetorian Edict. Naturally, as the general concept faded, so too the original distinctions made by the three clauses ceased to be understood; this was no doubt already the case in the time of Sex. Aelius Paetus. In a sense, then, Pliny and Cicero were both correct. The confusion arose from the fact that each of them, in pursuing his own interests, emphasized a different aspect of what had originally been a more unified concept.

One advantage of this interpretation is that it neatly answers some of the objections raised on both sides of the 'magic/slander' debate. One of the main arguments brought against the evidence of Cicero is that slander could not have been an offence at the time of the XII Tables, and certainly not an offence punishable by death. Huvelin argued that the notion of injury in the XII Tables encompasses only physical acts, and that repression of verbal injury developed only during the middle and late republic. Moreover, in the XII Tables broken bones and bodily injuries were compensated by fines or, at most, retaliation in kind.[79] How then, asks Beckmann, could injuries to reputation have been punishable by death? The lack of proportion surely indicates that this law dealt with something much more serious, which he argued could have only been magic.[80] The problem with these arguments, as Fraenkel stressed, is their assumption that the actions condemned in this law were considered a type of injury. This was undoubtedly how later Romans thought of slander: by the late Republic, *convicium* was starting to be classed as a type of *iniuria*, and this thinking clearly coloured

discussion, with examples from a range of cultures, see R. C. Elliott, *The Power of Satire: Magic, Ritual, Art* (Princeton, 1960), 3–99.

[77] For example, *Men.* 308–9, after Sosicles has arrived in the town where, unbeknown to him, his twin brother Menaechmus lives: a slave who mistakes him for his brother so irritates him that when the slave asks whether he lives in Menaechmus' house, Sosicles bursts out *di illos homines qui illic habitant perduint!*, to which the slave replies in an aside, *insanit hic quidem, qui ipse male dicit sibi.* Cf. *Amph.* 769–72, Tib. 1.2.11–12.

[78] Catull. 7.12: *possint nec mala fascinare lingua*; Verg. *Ecl.* 7.28: *ne vati noceat mala lingua futuro*; Prop. 4.5.77–8: *quisquis amas, scabris hoc bustum caedite saxis, / mixtaque cum saxis addite verba mala!*

[79] Huvelin (n. 5), 388–403. The laws are I.13–15 Lewis and Crawford = VIII.2–4: for a *membrum ruptum*, the perpetrator must either make a settlement satisfactory to the victim or suffer *talio*; for an *os fractum*, monetary penalties are set at 300 *asses* for a free man and 150 *asses* for a slave; for other *iniuriae*, the penalty is 25 *asses*; see further Lewis and Crawford (n. 6), 604–8.

[80] Beckmann (n. 5), 22–3.

Cicero's interpretation of the law in the XII Tables.[81] But there is no reason to suppose that the Romans of the fifth century B.C.E. considered the use of *mala carmina* as an act of the same general type as the inflicting of bodily harm. If anything, the evidence points in the opposite direction.[82] In short, as scholars have long recognized and as Huvelin himself insisted, the actions condemned by this law were classed in an entirely separate category from bodily harm and injury. But it does not therefore follow that they could not have involved the sort of abusive and defamatory language that was later defined as *convicium*.[83]

But just as the 'slander' condemned by the XII Tables was not the *convicium* of later times, so too was the 'magic' not the *artes magicae* of later times, and arguments based on the latter are no more valid than arguments derived from later notions of *convicium*. So, for example, Fraenkel argues that the *carmina* condemned in the clauses cited by Cicero were public ones, intended to be heard or read by others. But magical practices, as we know from Apuleius (*Apol.* 47.3) and others, were always private and secret; hence, concludes Fraenkel, the law cited by Cicero could not have concerned magic.[84] There is no question that secrecy is characteristic of magical practices in the imperial period, and is often urged in the magical papyri.[85] But there is no reason to think that it necessarily characterized the use of *carmina* in fifth-century Rome as well. The general association of secrecy with the *artes magicae* seems in fact to be a later development, reflecting on the one hand the influence of mystery cults, and on the other hand the very illegality of magic in later periods. In the passage that Fraenkel cites, Apuleius' point is that, since magic is illegal, it is secret and, since it is secret, what he did in the presence of fifteen slaves could hardly be magic. Obviously, none of this rather specific reasoning need have applied to the situations handled by the law of the XII Tables.

But why would 'malicious chants' of this sort be punishable by death? The objection raised by Huvelin and Beckmann retains considerable force: if this law was concerned merely with 'the integrity of Roman citizens', as Kippenberg puts it, why should it have established the death penalty, when the laws on bodily harm and injury established a system of fines and retaliation? Surely the death penalty suggests that something more was at stake, and the language strongly suggests that a concern with the power of *carmina* was that 'something more'.[86] It seems to me that Mommsen and Fraenkel

[81] Fraenkel (n. 5), 197–9; cf. *Tusc.* 4.4: *xii tabulae declarant condi iam tum solitum esse carmen, quod ne liceret fieri ad alterius iniuriam lege sanxerunt*. The earliest evidence for insult as a type of *iniuria* is *Ad Her.* 4.35: *iniuriae sunt, quae aut pulsatione corpus <aut> convicio auris aut aliqua turpitudine vitam cuiuspiam violant*; cf. D. 47.10.15.3: *convicium iuniuriam esse Labeo ait*. See further Lewis and Crawford (n. 6), 679.

[82] Lewis and Crawford (n. 6), 654–7, argue that the laws on bodily harm and injury should be assigned to the first rather than to the eighth table, as all earlier editors have assumed; if so, they were in an entirely different section of the XII Tables from the law on *carmina*.

[83] Cf. Pugliese (n. 75), 22–3.

[84] Fraenkel (n. 5), 194–5.

[85] For example, *PGM* 1.130–1, 4.851–7, 12.321–2 and 334; see further H. D. Betz, 'Secrecy in the Greek magical papyri', in H. G. Kippenberg and G. G. Strousma (edd.), *Secrecy and Concealment: Studies in the History of Mediterranean and Near Eastern Religions* (Leiden, 1995), 153–75, and, more briefly, Graf (n. 3), 99–100.

[86] Usener (n. 55), 357–9, who interpreted *occentatio* as a type of self-help, argued that the state was arrogating to itself the authority to dispense justice, and so had to punish harshly all cases of self-help as infringements on its own authority; but his interpretation of *occentatio* is not well supported by the evidence (see n. 68 above). Huvelin (n. 5), 407–9 and 431–3, argued that the use of malicious chants constituted an artificial disruption of the cosmic balance of good and evil, and for this reason had to be strictly repressed. His interpretation, however, relies too heavily on questionable assumptions about the 'primitive' world-view, and is moreover overly elaborate in its interpretation of the evidence.

point in the right direction when they argue that the issue was primarily one of public order, and not simply of private injury.[87] I would suggest that one of the chief differences between the harm caused by words and that caused by physical force is that the latter is more immediately graspable. If someone breaks another person's arm, the damage, albeit serious, is easily identifiable and clearly delimited. The effects of *carmina*, in contrast, are more insidious and less predictable, and their workings are much less apparent; this is true regardless of whether their effects are physical, mental, social, or some combination of the three. This, I would argue, accounts for the difference in punishments. Because those in authority could more easily assess a physical injury, they were able to work out a system of compensation that involved only the affected parties and so keep the effects of the disruptive action from spreading through the community at large. It was simply not possible, however, to control *carmina* in the same way; consequently, the use of *mala carmina* represented a much more significant threat to public order than did physical violence, and so required a harsher penalty.

Although the reconstruction and interpretation of this law involves many more problems than does that in the previous section, a few points seem clear enough. The original law in all probability contained at least three clauses: that quoted by Pliny and the two quoted by Cicero. Since the evidence for the meaning of *occentare* is contradictory, we are left with Pliny's interpretation of the clause *si malum carmen incantassit* as evidence for the ancient belief in the power of words, and Cicero's interpretation of the *sive carmen condidisset* clause as a law against slander. The best way to reconcile their evidence is to assume an original concept of 'malediction' that combined ideas that later generations would distinguish as 'magic' and 'slander'; the problems arise only when we try to read back these later concepts into the earlier period. Because the effects of these 'maledictions' were unpredictable and difficult to control, they posed a more significant threat to public order than did acts of physical violence. It was for this reason that the *decemviri* established a much more serious penalty for 'malicious chants' than they did for bodily harm and other injuries.

IV. THE XII TABLES AND THE ROMAN LAW ON MAGIC

I hope that I have demonstrated that by dispensing with the problematic notion of 'magic' we can analyse more clearly and effectively the evidence for and significance of these two laws. The usual connotations of the word 'magic' do nothing to illuminate the issues that are likely to have informed these laws, and in at least one case, I have argued, are positively misleading. In short, despite my title, these laws do not seem originally to have been laws on magic at all.

Should I, then, have changed my title? Perhaps not. Roman culture was not static: a variety of developments in Roman society meant that the later writers who cited these laws brought to them concepts and concerns that did not exist in the Rome of the fifth century B.C.E. On the one hand, the influence of Greek science, as it developed in the fourth and third centuries B.C.E., meant that old beliefs in the power of *carmina* and *venena* became more contested.[88] We see this clearly in Seneca's dismissal of the belief that words can affect the weather: this simply did not accord with the way that a

[87] Mommsen (n. 28), 794–5; Fraenkel (n. 5), 198–9.

[88] See most notably the Hippocratic treatise *On the Sacred Disease*, with the discussions of G. E. R. Lloyd, *Magic, Reason and Experience: Studies in the Origins and Development of Greek Science* (Cambridge, 1979), 10–58, and J. Braarvig, 'Magic: reconsidering the grand dichotomy', in Jordan et al. (n. 75), 21–54, at 37–40.

philosopher, or at least a philosopher like Seneca, understood the world to work. For Seneca, then, the law he cites from the XII Tables is evidence for the primitive beliefs of the early Romans. For Pliny, the problem was more complex. He too was wary of unphilosophical and hence foolish beliefs, but was also keenly aware that the traditional rites of Roman cult laid great stress on the efficacy of words. It is perhaps significant that he never explicitly answers his own question of whether words have power. He surveys the importance of prayers in public ritual and the need for precision in following the prescribed wording (*N.H.* 28.11–14), the importance of exact words in reporting omens (*N.H.* 28.15–17), and the efficacy of verbal formulae for various medicinal or apotropaic ends (*N.H.* 18–24), but his discussion eventually dissipates into a general review of superstitions.[89] At any rate, both Seneca and Pliny were concerned with an aspect of these laws that in the fifth century B.C.E. was probably unremarkable.

This calling into question of old beliefs in the power of *venena* and *carmina* was one of the things that contributed to the development of what Richard Gordon has called a 'strong view' of magic in antiquity. This development was highly complex, and as a whole cannot be reviewed here.[90] Of particular relevance to our topic, however, is the fact that the transfer of crops by means of *venena* or *carmina* was eventually identified as a typical feat for someone with knowledge of the *artes magicae*.[91] It is this that led Apuleius to interpret this law of the XII Tables as a law against magic. Indeed, it was only in his day that such an interpretation was possible. The *Lex Cornelia de sicariis et veneficiis*, sometimes said to have condemned magic, dates to a period before a 'strong view' of magic had become established at Rome. Evidence suggests that in the first century C.E. actions liable under this law were becoming closely associated with the *artes magicae* (for example Tac. *Ann.* 12.22 and 59, 16.30.1), but in extant literature it is only in the speech of Apuleius that we see magic *per se* being treated as an actionable offence. It is thus not surprising that no earlier writer refers to these laws as laws against magic: such a notion simply did not exist.[92] Later, however, it came to be enshrined in the precepts of jurists (*Paul. sent.* 5.23.17–18) and the decrees of emperors (*C.Th.* 9.16.4–7, etc.), so that by the early fifth century C.E. Servius and Augustine could readily assume that any law on the 'enticement' of crops must have been a law on magic. Indeed, it was perhaps this law of the XII Tables that led Servius to declare that the Romans had always condemned magic.[93]

We must keep in mind this diachronic dimension to the Roman law on magic, if only because Roman scholars like Servius ignored it. Although I have argued that these laws

[89] For a thorough discussion, see T. Köves-Zulauf, *Reden und Schweigen* (Munich, 1972).

[90] The best discussions of this development are the two papers of Gordon and the earlier study of Garosi (n. 3); see Gordon (n. 3, 1999), 229–31, for his remarks on the 'strong view' of magic; also important is M. W. Dickie, 'The learned magician and the collection and transmission of magical lore', in Jordan et al. (n. 75), 163–93.

[91] The passage of Virgil's *Eclogues* discussed above (8.95–9) is a key document in this development; see n. 27 above for other references. It is worth noting in this connection that Virgil is also the earliest extant Latin writer to use the term *magicus*, in something like our sense of 'magical' (*Ecl.* 8.66), and the first to use the phrase *magicae artes* (*Aen.* 4.493); see further Graf (n. 3), 36–41.

[92] Pliny comes close: in a later discussion of *magicae vanitates* (*N.H.* 30.12), he claims that in an earlier book he presented evidence from the XII Tables for their existence among the peoples of Italy: by this he presumably means the passage under discussion.

[93] *Aen.* 4.493: *cum multa sacra Romani susciperent, semper magica damnarunt; ideo excusat*; he is explaining Dido's feigned reluctance to resort to the *artes magicae*.

of the XII Tables did not originally concern magic, the sorts of actions that they did concern were later redefined as magical acts. Consequently, the laws themselves were seen as precedents for the laws current in the later empire, and were in this way incorporated into the history of the Roman law against magic. The fact that the XII Tables had long been obsolete by Servius' day, or even by Apuleius' day, was incidental. It was not the laws themselves, but the things which they apparently revealed about the consistency of Roman attitudes, that were important to later writers. Hence the same men who preserved these fragments of an earlier age by connecting them with contemporary concerns also, by that very act, obscured their distance from their own age. But we, by keeping before our eyes these changes over time, can see how these laws of the XII Tables both did and did not concern magic.

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