

## Gellius' Dilemma at *Noctes Atticae* XIV 2: Legal and Ethical Approaches in the Court

Benjamin Adam Jerue

Universidad San Jorge

[bjerue@usj.es](mailto:bjerue@usj.es)

ORCID iD: <https://orcid.org/0000-0002-6385-4922>

### El dilema de Gelio en *Noctes Atticae* XIV 2: enfoques legales y éticos en los procesos judiciales

At *Noctes Atticae* XIV 2, Aulus Gellius describes a case over which he presided and in which he was unable to reach a final verdict. His indecision revolves around the mismatch between the moral characters of the litigants and the state of evidence (or lack thereof). This paper takes a close look at the role of Favorinus, who quotes Cato the Elder in an attempt to help Gellius make a decision. Linking the anecdote to larger debates about character-based argumentation in the court, the present paper argues that Gellius is not exactly confused by a contradiction in the evidence, but rather that he cannot decide between two different evaluative frameworks that could be used for resolving the problem: ethics and the law.

*Key words:* Aulus Gellius; Favorinus; Cato the Elder; ethics; character; court; evidence.

En sus *Noctes Atticae* XIV 2, Aulo Gelio describe un caso que presidió como juez, y en el que fue incapaz de pronunciar un veredicto. Su indecisión está relacionada con el desequilibrio entre las características éticas de los litigantes y las pruebas (o la falta de ellas). Este trabajo examina el papel desempeñado por Favorino, que cita a Catón el Viejo con la intención de influir sobre Gelio para que, como juez, tomase su decisión. Enlazando esta anécdota con los debates modernos en torno a los *argumenta ex persona* en los juicios, este artículo defiende que Gelio no estaba confundido por una contradicción entre las pruebas, sino que, simplemente, no podía escoger entre ética y ley, los dos marcos de evaluación que podía haber utilizado para resolver el problema.

*Palabras clave:* Aulo Gelio; Favorino; Catón el Viejo; ética; carácter; proceso judicial; prueba.

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#### 1. Introduction

In a remarkable chapter of the *Noctes Atticae*, Aulus Gellius tells a tale that legal historians have taken to be representative of the experiences of young,

well-educated Roman elites in the mid-second century CE<sup>1</sup>. There remain, however, aspects of the story that rightly strike readers as idiosyncratic: prosaic details about legal norms and procedure set the stage for an anecdote that Gellius thought notable enough to include in his hodgepodge miscellany of the outstanding things that he encountered throughout his life<sup>2</sup>. One can certainly question the veracity of Gellius' autobiographical sketch, though most scholars have not done so. For convenience's sake, we will proceed as if the story were in fact a true one<sup>3</sup>.

The present analysis turns to Gellius' description of his early career as a *iudex privatus* and his experience in deciding a «relatively simple» case on a disputed loan<sup>4</sup>, with a particular interest in what the story reveals about Roman attitudes to character and its evidentiary value in the court. Scholars have long maintained that Romans understood character as something fixed or immutable. As May has influentially put it,

The Romans believed that character remains essentially constant in man and therefore demands or determines his actions. Since character does not evolve or develop, but rather is bestowed or inherited by nature, an individual cannot suddenly, or at will, change or disguise for any lengthy period his ethos or his way of life; nor is it wise to attempt such alteration<sup>5</sup>.

Reflections of this idea abound in Ciceronian oratory, where the orator trots out arguments about the past life of defendants and plaintiffs in order

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<sup>1</sup> Many have noted that the passage offers nearly unique evidence. Crook 1976, p. 133, however, is correct to connect the passage to the story of C. Fimbria, who had refused to judge a case based on character the litigants' characters (cf. CIC., *Off.* III 77). For other instances of judges not reaching a decision, see Paricio 1988.

<sup>2</sup> See Gel. I 2 where the author explains his mode of composition and collection of information: «I have used a fortuitous ordering of the material, in fact the same order in which I encountered the information in the first place. So whenever I got a Greek or Latin book into my hands or heard something worth noting, I took notes on whatever I liked wherever it happened to come from, but I did so in a haphazard way» (trans. Rolfe 1927).

<sup>3</sup> Most scholars take Gellius at his word: see Holford-Strevens 1988 and de Francisci 1961, p. 594 for a discussion. Despite some skepticism on my part, like Nörr 1995, p. 34, I will proceed «come se fosse vera».

<sup>4</sup> For the role of the *iudex privatus*, see Scevola 2004, who provides an in-depth discussion. For the case as quotidian, which I think is correct, see Frier 1985, p. 226.

<sup>5</sup> May 1989, p. 6. For a fuller account of this position, see Riggsby 2004.

to make a probabilistic argument about the case at hand. While I am critical of aspects of this conception of fixed character, it undoubtedly does encapsulate one extremely important way that Romans could—and often did—judge the actions of strangers<sup>6</sup>. This type of thinking certainly permeates the recommendations laid out for aspiring orators in the rhetorical handbooks (e.g. Cic., *Inv.* II 32-7). My interest, however, is to contextualize the use of character-based thinking rather than assuming that it fully embodied Roman «folk models of character», as others have argued<sup>7</sup>. There is reason to be skeptical of such arguments about Roman psychology<sup>8</sup>, and Gellius' story about his time as a judge provides an excellent opportunity to revisit the question of the importance of a defendant's character in determining his guilt or innocence.

## 2. *The case in question: Noctes Atticae XIV 2*

While the chapter heading for *Noctes Atticae* XIV 2 prepares the reader for a philosopher's take on the duty of a judge, the passage itself provides a broader story about an inexperienced judge who does not feel properly equipped to carry out his job<sup>9</sup>. While there can be no doubt that the praetor often added citizens to the *album iudicorum* who had very little legal knowledge or know-how<sup>10</sup>, Gellius' self-induced anxiety may not be so representative: judges, after all, had legal experts at their disposal for consultation (the so-called *consilium*)<sup>11</sup>.

<sup>6</sup> See Jerue 2016, pp. 130-202 for an in-depth discussion of the issue and further references.

<sup>7</sup> For this view, see especially Riggsby 2004, p. 166.

<sup>8</sup> For a discussion of the Greek situation, see Lanni 2006, chapter 3 and Dover 1994. For philosophical and psychological approaches to the issue at large, see Doris 2002; Jones 1990; Merritt et al. 2010; Prinz 2009.

<sup>9</sup> The notice reads: «How Favorinus, when I asked, discussed the duty of a judge». Gunderson 2009, pp. 68-71 pays special attention to the ways in which the passage does not deliver on what this notice promises.

<sup>10</sup> For the often-remarked fact that judges did not need to have deep legal training, see Kaser and Hackl 1996, p. 277 and Meyer 2004, pp. 3-4, who helpfully contrasts *iudices* with jurists. Also see Harries 2007, p. 5 for further observations.

<sup>11</sup> For the judges and the *consilium*, see McGinn 2010, p. 275 n. 40. As he and others have rightly pointed out, the presence of a jurist is nowhere suggested in our passage. Gellius also discusses the use of the *consilium* at Gel. VII 12, where the legal experts themselves cannot come to a decision and *aporia* takes the day.

As an *adulescens* undertaking a new duty<sup>12</sup>, Gellius realizes his limitations and wants to better prepare himself for the task at hand: he has spent his school days studying the poets, oratory and declamation —not law<sup>13</sup>—. Being especially scrupulous, he attempts to teach himself what a judge is supposed to do: his reasoning is theory first and then practice. Luckily, there are a variety of legal books available for consultation, so that is where Gellius starts preparing<sup>14</sup>. This research, however, does not prove satisfactory: while legal texts help Gellius decide some cases, there are others where he runs into trouble and is unsure how to proceed (*in ancipiti rationum diuersarum circumstantia*, Gel. XIV 2.2). Ultimately, the books prove to be of little assistance.

To illustrate these more general observations, Gellius launches into a sketch of a specific case which presented him with particular difficulties: a plaintiff claims that a man owes him a sum of money without being able to furnish any evidence to back up his assertion<sup>15</sup>; in an attempt to make his case, he resorts to some «rather unimpressive arguments»<sup>16</sup>. The alleged creditor's attorneys, on the other hand, provide a full and compelling legal

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<sup>12</sup> What *adulescens* refers to precisely has been a matter of debate. It certainly does not mean young in today's sense, but rather seems to refer to people who have not yet begun the *cursus honorum*. For a good discussion, see Evans and Kleijwegt 1992. See Paricio 1988, pp. 418-419 for the age at which one could be added to the *album*.

<sup>13</sup> Gel. XIV 12.1, *a poetarum fabulis et a rhetorum epilogis ad iudicandas lites uocatus*. This is certainly not unusual.

<sup>14</sup> *Ibid.*, *libros utriusque linguae de officio iudicis scriptos conquisiui, ut homo adulescens a poetarum fabulis et a rhetorum epilogis ad iudicandas lites uocatus rem iudicariam, quoniam uocis, ut dicitur, uiuae penuria erat, ex mutis, quod aiunt, magistris cognoscerem*. The books studied have often been debated and discussed, but are of little importance to us here; for a discussion, see Nörr 1995, pp. 42-44. See Frier 1985, chapter 5 for the larger legal context and further bibliography.

<sup>15</sup> For the potential problems with *tabulae*, which could be forged, see Quint., *Inst.* V 5.1-2. Meyer 2004 provides a fundamental study of the role and history of *tabulae* in Roman society beginning in the Republic and stretching into Late Antiquity. While I do think her treatment of the Quintilian passage does not fully acknowledge that the validity of *tabulae* could be —and sometimes were— challenged, the study remains invaluable. She only makes passing mention of our Gellian passage (p. 228), because (perhaps) Gellius' anecdote sits somewhat uncomfortably with her close connection of *tabulae* and *fides*. As we shall see momentarily, the good man in the passage, who has no *tabulae* on his side, is nevertheless characterized by his extreme *fides* (Gel. XIV 2.5).

<sup>16</sup> Gel. XIV 2.4: *...neque tabulis neque testibus id factum docebat et argumentis admodum exilibus nitebatur*. «He was not teaching us a thing about the fact at hand through tablets

defense based entirely on the state of the evidence: without any real proof of the loan the plaintiff, they argue, simply has no case! Gellius takes the defense's point, but his philosophically inclined disposition provides a further complication: it is clear that the plaintiff is a good man<sup>17</sup>, while the defendant is a top-notch scoundrel. This is where things begin to look «in two different directions», as Gellius had put it.

Sed eum constabat uirum esse firme bonum notaeque et expertae fidei et uitae inculpatissimae, multaque et inlustria exempla probitatis sinceritatisque eius expromebantur; illum autem, unde petebatur, hominem esse non bonae rei uitaeque turpi et sordida conuictumque uolgo in mendaciis plenumque esse perfidiarum et fraudum ostendebatur.

«But it was agreed that the man was a truly good one who was known and shown to be trustworthy and who led a most blameless life; this was all elaborated with many impressive examples of his goodness and sincerity. The defendant, however, was shown to be a man of bad life and habits, convicted of lying and filled full of perfidy and fraud» (Gel. XIV 2.5-6).

This realization bothers our judge. What is he to do? While the evidence points in one way, he finds himself pulled in the other due to a consideration of the men's respective characters. Indecision sets in. Exactly what lies at the heart of the judge's indecision is what is at stake for the present argument: is it that a good man can do no wrong or, alternatively, that we are willing to excuse a good man when he does wrong? If Riggsby and May's thesis of fixed character were correct, Gellius would certainly decide in favor of the good man, the direction in which he is being pulled anyway. Put differently, if Gellius were victim to the reductive mode of thinking implied in the belief in fixed character, there would be no lack of evidence in the case, since the plaintiff's good reputation and standing would constitute very strong evidence indeed. But the plaintiff's arguments from char-

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or witnesses». Nörr 1995, p. 49 is right that these arguments that are «troppo esile» are the *argumenta a persona*.

<sup>17</sup> The phrase *uir bonus* does, of course, have a Catonian ring to it and recalls the phrase *uir bonus peritus dicendi* (for the phrase see Winterbottom 1964); As Scafuro 1997, pp. 146-148 points out, in the early second century BCE *uiri boni* could function as arbiters. Notably in Cato and the jurists, the *uir bonus* was not able to make a decision, but just assessed monetary values along objective criteria (ibid.).

acter make something crystal clear to the judge: the good man has nothing good going for him when it comes to the matter at hand. The passage's language importantly bears out the point: when added up, the abundance of arguments from character (*multaque et illustra*) nevertheless amounts to nothing impressive, but rather are quite inadequate (*argumentis admodum exilibus*). It is worth stressing that Gellius does not say that the plaintiff's claim to moral and ethical superiority is questionable; on the contrary, the plaintiff's standing as a good man characterized by *fides* and blamelessness is taken for granted (*constabat*).

Though Gellius is ethically inclined toward the good man, he cannot do what he wants to do in good faith. The bad man's loud and clamoring lawyers remind the judge that they are not in the presence of a censor, but are trying to arrive at a legal decision before a judge. According to the defense, there is a slew of admissible evidence that the plaintiff should be able to produce to bolster his case: a personal account book (*expensi latio*)<sup>18</sup>, a document that keeps track of loan payments (*mensae rationes*), another type of document that records the terms of an agreement written in the first person and subsequently signed and sealed (*chirographi exhibitione*)<sup>19</sup>, unopened *tabulae* (*tabularum obsignatione*), or finally direct witness testimony (*testium intercessionem*)<sup>20</sup>. Yet the plaintiff cannot produce any of these things. Although there were no established rules about what kind of evidence were considered irrefutable in court<sup>21</sup>, already in Cicero's day a lack of documentary evidence could look rather sus-

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<sup>18</sup> This is the only example of *latio* cited in the *OLD* with this meaning; de Francisci 1961, p. 597 connects this with the *nomina arcaria* mentioned by Gaius at III 128 which «ogni buon amministratore romano usava tenere aggiornato». For a more recent discussion of the *nomina arcaria*, see Meyer 2004, pp. 134-137, especially with n. 21 with reference to Gröschler 1997.

<sup>19</sup> For this kind of document in the early 1st century CE (wrongly translated in the Loeb as «by producing a signature»), See Meyer 2004, pp. 148-158. By Gellius' time this type of document would have been written on a triptych tablet, tied up and sealed. This type of document was used for *bona fide* contracts (often enhanced by a stipulation).

<sup>20</sup> Meyer 2004, p. 126 argues that *tabulae* could never be contested in court, though in the Republic other sorts of documents could be (but cf. Quint., *Inst.* V 5.1-2). An early example of this is found in Cicero's fragmentary and elusive speech *Pro Q. Roscio Comoedo* 8 where there is talk of *adversariae* (day-books), *tabulae* and *codices accepti et expensi*. But in the early empire, Meyer 2004, pp. 127-128 argues, other types of documents gained credibility in the court, though the *tabulae* remained the most authoritative.

<sup>21</sup> See Kaser and Hackl 1996, pp. 276-284.

picious<sup>22</sup>. Unsurprisingly, this is exactly the argument that the defense pursues in Gellius' court. Life and character, they claim, are irrelevant in this sphere,

quod de utriusque autem uita atque factis diceretur, frustra id fieri atque dici; rem enim de petenda pecunia apud iudicem priuatum agi, non apud censores de moribus.

«[They argued] that anything claimed about the lives and deeds of the litigants was presented to the judge in vain: for they were in the presence of a private judge concerning a loan, not in the presence of the censors about way of life» (Gel. XIV 2.8).

If this line of defense sounds familiar, that is because the argument is lifted directly out of the rhetorical textbooks of the first century BCE. The phrasing itself parrots a passage from the *Rhetorica ad Herennium* where the anonymous author explains what a lawyer ought to say when his client is unsavory, but nevertheless innocent<sup>23</sup>. For Riggsby, this argument about the irrelevancy of character was a Roman advocate's absolute last line of defense and was unlikely to succeed<sup>24</sup>. This interpretation, however, may overstate the matter<sup>25</sup>. The passage from Gellius certainly suggests that this is not the case:

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<sup>22</sup> Meyer 2004, p. 220, «*tabulae* were expected and failure to procure them was very suspicious». For evidence of this, she cites a handful of Ciceronian passages: *Ver.* II 3.112 and 4.36; *Flac.* 35; *Cael.* 17; *Font.* 11-12.

<sup>23</sup> *Rhet. Her.* II 5, *sin nihil eorum fieri potest, utatur extrema defensione: dicat non se de moribus eius apud censores, sed de criminibus aduersarioum apud iudices dicere.*

<sup>24</sup> See Riggsby 2004, pp. 170-171 especially n. 13, where he acknowledges the potential weakness of the argument. He tries to draw a distinction between «logical» and «legal relevance». He suggests that the claim in the rhetorical handbook is that the argument from character is true but not admissible via the *status translatiuus*. I suggest that the claim is rather that the argument from character can be true but is nevertheless irrelevant, since it need not have any bearing on the question at hand.

<sup>25</sup> The phrase *extrema defensione* can indeed be understood as the 'weakest defense' (*OLD* s.v. *extremus* 5), but can also reasonably be taken more neutrally to just mean 'last' or 'final'. Whatever the irrelevancy of the argument's relative merit is, it makes perfect sense for this argument to be presented last, since it nips all the previous arguments at the bud: I would summarize the thought of the section thus: you can use character in these several ways, or, if you cannot make an argument from character, simply say that this whole line of argumentation is tangential and questionable. Furthermore, the argument that character is irrelevant would not necessarily have to be employed at the exclusion of the other arguments. Cicero often argues a point that he says does not even apply or have relevance to the case at hand. For

when a plaintiff has no evidence and launches an ethics-based argument instead, the defense should point out that this is all beside the point<sup>26</sup>. In conjunction with substantial evidence, the fixed-character argument can indeed be persuasive; in Gellius' court, however, the character argument on its own is taken as a rather weak one that ought to be dismissed. Here, we should remember that there are no charismatic defense lawyers seducing Gellius with flashy words or arguments—they had, in fact, made a bad impression on the judge<sup>27</sup>—. The essential point is that Gellius is *not* won over by the plaintiff's uprightness, though that uprightness importantly catches the judge's eye<sup>28</sup>.

Yet Gellius is not simply persuaded by the defense's legal arguments; he cannot purge the ethical aspect of the case from his mind. As he says in the preface to the story, he was overcome by «an inexplicable ambiguity in delivering a decision» (*inexplicabilis reperiendae sententiae ambiguitas*)<sup>29</sup>. So he postpones his decision and seeks some further advice on the matter. As was the accepted custom in the period, he consults some friends (*amici mei*) who have a better grasp of legal proceedings<sup>30</sup>. These men, being rather busy, hastily take

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one example, see *Planc.* 30-31, where Cicero argues that his client did not commit an alleged rape, but even if he had done it, the act would not have constituted something unsanctioned by tradition or local custom. We could call this a sort of counterfactual defense. In short, this line of argumentation could be combined with other arguments. Something close to this happens at *Cael.* 6 where Cicero deals with criticism (*maledictio*) and substantial accusations (*accusatio*): although he claims that criticism cannot form the basis for a charge, Cicero famously goes on to show that the irrelevant material also happens to be untrue (also see *Rhet. Her.* II 5: *uituperatio eorum quae extra id crimen erunt non debeat adsignari*).

<sup>26</sup> This, of course, is not to suggest that the defense would not have made a character-based argument, if they reasonably could have done so; rather, when they cannot, they do not feel at a loss.

<sup>27</sup> The defense is not portrayed in a positive light. The plaintiff is depicted as operating on his own, while the defense is comprised of a series of yelling lawyers: *is [uir malus] cum suis multis patronis clamitabat...*

<sup>28</sup> As Kaser and Hackl have put it, «[n]icht mehr die persönliche Vertrauenswürdigkeit der Person soll bewiesen werden, sondern die Wahrheit ihrer Behauptungen». The same authors go on to point out that judges did have a good deal of leeway in determining the admissibility of types of evidence.

<sup>29</sup> This central phrase will be discussed below in more detail.

<sup>30</sup> *Gel.* XIV 2.9, *uir exercitati atque patrociniis et in operis fori celebres*. Here I take issues with some of the implications in the analysis of Holford-Strevens 2005, pp. 294-295,

the side of the defendant's lawyers and suggest that Gellius sticks to the facts and acquit the defendant without wasting any more time<sup>31</sup>. If there is no real proof (*nulla probatione sollemni*), that's all there is to it. In Gellius' portrayal of this frustratingly curt exchange, character-based arguments do not even enter the conversation. The case, in his friends' view, should be straightforward.

But Gellius does not heed this advice and decides to look for a different perspective<sup>32</sup>. He goes to visit another friend, the philosopher Favorinus, who appreciates Gellius' thoroughness in dealing with such an insubstantial case<sup>33</sup>. The business of being a judge is indeed complex, Favorinus consoles; in fact he had just been reading all about the topic in Aelius Tubero's *officium iudicis* —interestingly just the sort of book that Gellius has already told us was of little assistance—. Unfortunately, Favorinus says, they cannot tackle the larger abstract topic of a judge's duty in any detail. Apparently, the philosopher, like the lawyers, is also in a hurry. Bigger questions will have to be addressed later on *in otio*<sup>34</sup>. When it comes to the case at hand, however, Favorinus urges Gellius to follow the advice of Cato the Elder. Favorinus then paraphrases a Catonian saw, which Gellius goes on to quote verbatim at the end of the chapter,

Quod autem ad pecuniam pertinet, quam apud iudicem peti dixisti, suadeo hercle tibi, utare M. Catonis, prudentissimi uiri, consilio, qui in oratione,

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who claims that the *iudex* in these cases had many legal resources at hand. There was indeed the *consilium*, but Gellius paints the whole affair as rushed. His inquisitiveness is depicted as exceptional. The point is that we do not get an overwhelming positive representation of the institution. See Keulen 2009, p. 176 for Gellius' tacit dismissal of these legal friends who resemble the disqualified readers from *Preface* 19.

<sup>31</sup> Gel. XIV 2.9: ... *asoluendus foret, quem accepisse pecuniam nulla probatione sollemni docebatur*.

<sup>32</sup> According, Gellius has to delay his decision and had two more days to make up his mind; see Paricio 1988, p. 420 on the *diffissio*.

<sup>33</sup> Gel. XIV 2.12. For the role of Favorinus in the Gellius' work, see Holford-Strevens 2005, pp. 98-130; Keulen 2009, pp. 155-189.

<sup>34</sup> Here the philosopher raises several interesting questions that he does not answer: should a judge make a decision based on knowledge acquired from outside the presentation of arguments and evidence? Should a judge dismiss a case and take a more informal role as an arbiter? Should a judge ask questions and make demands of the advocates or just passively receive information? Should a judge betray which way he is leaning during a case? All of these questions, of course, have some relevance to Gellius' situation.

quam pro L. Turio contra Cn. Gellium dixit, ita esse a maioribus traditum observatumque ait, ut si, quod inter duos actum est, neque tabulis neque testibus planum fieri possit, tum apud iudicem, qui de ea re cognosceret, uter ex his uir melior esset, quaereretur et, si pares essent seu boni pariter seu mali, tum illi, unde petitur, crederetur ac secundum eum iudicaretur.

«But when it comes to the money which was sought before you as judge, I urge you, by god, to use the advice of that most prudent of men, Cato! In his own speech on behalf of Lucius Turius against Gnaeus Gellius he said that the ancestors observed and passed down the following advice: if what has transpired between two men is not elucidated by written documents or witnesses, *then* it should be considered before the presiding judge which of the two is the better man; if the men are either equally good or bad, the defendant should be trusted and the case decided in his favor» (Gel. XIV 2.21).

Cato's advice, taken from a forensic speech that was delivered over three centuries earlier, certainly appears pertinent<sup>35</sup>. If there is no evidence of substance, *only then* judge by character. Furthermore, if all parties involved are equally good or bad, one should give *the defendant (unde petitur)* the benefit of the doubt. Here talk of evidence closely resembles Gellius' own language when he first sketched out the case (*neque tabulis neque testibus*)<sup>36</sup>. The importance of the conditional nature of Cato's advice, however, has often been overlooked or even misconstrued in scholarship<sup>37</sup>. Given this clear advice from Cato who represents a venerable tradition<sup>38</sup>, Favorinus continues in a

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<sup>35</sup> For Cato the Elder in Gellius generally, see Ceaicovschi 2009; for a brief discussion of our passage which complements my interpretation, see *ibid.*, p. 34-35.

<sup>36</sup> Gellius gives the actual fragment from Cato's speech at the end of the chapter, *Verba ex oratione M. Catonis, cuius commemorat Favorinus, haec sunt: Atque ego a maioribus memoria sic accipi: si quis quid alter ab altero peterent, si ambo pares essent, siue boni siue mali essent, quod duo res gessissent, uti testes non interessent, illi, unde petitur, ei potius credendum esse* (Gel. XIV 2.26).

<sup>37</sup> In haste or perhaps in a desire to simplify the passage, many have misrepresented the fragment from Cato and Favorinus' advice. Gunderson 2009, p. 71 and Holford-Strevens 2005, p. 297 are misleading. Keulen 2009, p. 177 represents the passage in an inaccurate manner perhaps to better pair it with the Xenophon passages that interests him. Of the more literary approaches to the passage, Nörr 1995, p. 35 is one of the recent commentators to put emphasis in the right place: «se testimoni e prove non producono chiarezza, se deve decidere sulla base delle caratteristiche personali delle parti».

<sup>38</sup> Cato, of course, is a synecdoche for the *mos maiorum*, but notably he himself attributes the recommended practice to the *maiores*. Despite substantial changes in the legal system,

surprising and ingenious manner: the defense, the philosopher argues, has no evidence to prove that the loan *never* existed; hence Gellius can accept arguments based in the litigants' morality. In a word, the «burden of proof», to use a very slippery notion<sup>39</sup>, has been turned completely on its head! Accordingly, Cato's advice does not actually apply to the situation at hand. Nevertheless, Favorinus continues by drawing a faulty or incomplete logical transposition based on Cato,

In hac autem causa, de qua tu ambigis, optimus est qui petit, unde petitur deterrimus, et res est inter duos acta sine testibus. Eas igitur et credas ei qui petit, condemnesque eum de quo petitur, quoniam, sicuti dicis, duo pares non sunt et qui petit melior est.

«But in the present case about which you are hesitating, the plaintiff is the best, the defendant the worst. The case is pled without any witnesses. So get on back to court and trust the plaintiff and condemn the defendant, because, as you say, the two are not equal and the plaintiff is the better of them» (Gel. XIV 2.22).

While Cato had outlined a situation in which the defendant must be given the benefit of the doubt, Favorinus tries to suggest that the conditions in Gellius' court provide sufficient grounds for condemnation. The philosopher's sophistic spin on the Catonian dictum provides an incredibly strong (and frightening!) version of the fixed-character thesis: one deemed superior does not need evidence to bring against one deemed inferior in court. In other words, Favorinus provides the elite with *carte blanche* for defrauding those from more marginal groups. If one does not pay close attention, it can appear that Cato provides a precedent for Favorinus' advice. Upon more careful reflection, he does no such thing.

While the defense had called the plaintiff's bluff by stressing that there was no evidence, Favorinus puts a sophisticated spin on the argument in an attempt to give Gellius an apparently *legal* precedent to do what he wants to

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continuity was stressed despite the problems that this continuity presented. As Harries 2007, p. 26 explains, «continuity with the past reinforced the authority of the legal tradition against competing pressures, not least from emperors whose legal grasp, from the third century onwards, was open to question».

<sup>39</sup> The classic discussion is found in Pugliese 1965; also see Nörr 1995; McGinn 2010, p. 277 with n. 44.

do for *ethical* reasons<sup>40</sup>. Favorinus' argument in favor of the good man 'from precedent' borders on the absurd<sup>41</sup>: if the man never had borrowed money, Favorinus seems to expect him to have physical evidence saying that he never borrowed the money! Through repeated and shared language with the source text, the philosopher contorts what Cato had recommended to say something quite different<sup>42</sup>. This should not be lost on the reader. After leaving Favorinus, Gellius emphatically states that this is exactly the sort of reasoning you would expect to hear from a philosopher<sup>43</sup>. This sort of intellectual acrobatics, after all, is not out of character for Favorinus, whom Gellius represents clashing with jurists elsewhere. At *Noctes Atticae* XX 1, for instance, Favorinus criticizes the *XII Tables*. Specifically, he claims that they are very obscure and often too harsh or too lenient. In a lengthy response (§§20-50), the jurist Sextus Caecilius sets things right. He systematically shows how Favorinus, who has a reputation for stubbornly arguing in line with his personal desire<sup>44</sup>, has consistently misrepresented or misinterpreted a handful of laws from the *XII Tables*. The jurist's response is devastating and no one can doubt—not even Favorinus—that the legal expert has outmaneuvered the philosopher<sup>45</sup>. As others have pointed out<sup>46</sup>, Favorinus is more than happy to tinker with laws to uphold what he thinks to be ethically correct. Gellius is certainly not the only author to present philosophers clashing with the law and legal norms: Pliny the Younger, for example, memorably discusses with Trajan the case of Flavius Archippus, a philosopher, forger and

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<sup>40</sup> Gel. XIV 2.22-3, *In hac autem causa, de qua tu ambigis, optimus est qui petit, unde petitur deterrimus, et res est inter duos acta sine testibus. Eas igitur et credas ei qui petit, condemnesque eum de quo petitur, quoniam, sicuti dicis, duo pares non sunt et qui petit melior est.*

<sup>41</sup> This has previously been overlooked. See, for instance, McGinn 2010, p. 272, who merely states, «Favorinus advises following his [Cato's] lead».

<sup>42</sup> Cato could and did at times argue on his own behalf with reference to character (see *ORF* 8 ff. 58 and 173 with May 1989, p. 6).

<sup>43</sup> Gel. XIV 2.24, *ut uirum philosophum decuit.*

<sup>44</sup> Gel. XX 1.21, *Sed quaeso tecum tamen, degrediare paulisper e curriculis istis disputationum uestrarum academicis omissoque studio, quicquid lubitum est, arguendi tuendique, consideres grauius, cui modi sint ea, quae reprehendisti...*

<sup>45</sup> Gel. XX 1.55, *Haec taliaque alia ubi Sextus Caecilius omnibus, qui aderant, ipso quoque Fauorino adprobante atque laudante disseruit, nuntiatum est Caesarem iam salutari, et separate sumus.*

<sup>46</sup> As Harries 2007, p. 55 rightly points out, «the criteria on which Favorinus' argument is based are social and moral, not juristic».

convict at large<sup>47</sup>. We could almost say that through his perversion of the Catonian axiom, Favorinus is living up to a certain philosophical reputation that is opposed to the law.

At *Noctes Atticae* XIV 2, then, Favorinus tries to provide his friend Gellius with a sort of loophole, where an ethical judgment can parade as part of the established legal tradition<sup>48</sup>. Even with Favorinus' blessing, however, Gellius cannot stomach the idea of awarding the good man the money. The philosopher's game does not meet Gellius' own scrupulous standard of conduct. Judging the issue on character just doesn't sit right (*de moribus, non de probationibus rei gestae*, XIV 2.25) —especially not for a young judge<sup>49</sup>—. After receiving advice from lawyers and a philosopher that urges him in two very different directions<sup>50</sup>, Gellius recuses himself from deciding the case<sup>51</sup>.

### 3. Aliter Leges, Aliter Philosophi: *Character in Context*

In this aporetic story, Gellius is confronted with a conflict between two strangers and is supposed to form an opinion about the litigants and the case

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<sup>47</sup> The very amusing case of Archippus is found at Plin., *Ep.* X 58-60. Trajan, who despite character-based evidence (supplied by a notorious forger!) does not let the philosopher off the hook. Though Domitian had recommended Archippus, Trajan suggests that Domitian may have done this from a position of relative ignorance (*potuit quidem ignorasse Domitianus, Ep.* 60.1), which is incidentally evidence against Roman ideas of «evaluative integration» (see n. 51 *infra*). For the difficulty in disagreeing with an imperial decree, see Meyer 2004, pp. 229-230.

<sup>48</sup> This is one way to explain Favorinus' refusal to address the legal questions and the approach advocated by the jurist Sabinus (*descriptio ista multiugae et sinuosae quaestionis...*, Gel. XIV 2.13): he is employing certain arguments that could support Gellius' desire to award the money, while eliding discussion of arguments that would recommend against such a decision.

<sup>49</sup> Gel. XIV 2.25, *Sed maius ego altiusque id esse existimaui, quam quod meae aetati et mediocritati conueniret, ut cognouisse et condemnasse de moribus, non de probationibus rei gestae uiderer*. See Gunderson 2009, p. 72 with n. 37 on Gellius not wanting to play the censor; in his analysis, Gellius leaves the question open to the reader; similarly, see Holford-Strevens 2005, p. 24. Nörr 1995, p. 38 and Keulen 2009, pp. 224-225 both analyze the passage in light of the preceding chapter, in which Gellius touches on Xenophon's *Cyropaedia*.

<sup>50</sup> For Keulen 2009, p. 176 the legal advocates and Favorinus define a spectrum ranging from extreme *negotium* to extreme *otium*. But note Gunderson 2009, p. 71 on Favorinus' lack of *otium*.

<sup>51</sup> Gel. XIV 2.25, *Ut absoluerem tamen inducer in animum non quivi et propterea iuravi, mihi non liquere, atque ita iudicatu illo solutus sum*. For a discussion of judges being unable to make a decision, see Paricio 1988.

at hand. How can it shed light on debates about Roman understandings of character and the use of character-based arguments in the court? The story complicates a position that some scholars have taken for granted<sup>52</sup>.

Were the notion of fixed character absolute, the plaintiff, the *uir bonus*, would have provided indisputable arguments, thus providing the judge with relevant and conclusive information: the good man cannot do bad and the bad man cannot do good. In the story, Gellius does not have an established relationship with either litigant. This is relevant in light of psychological research that suggests that people are most susceptible to purely ethical arguments when dealing with strangers: human beings are more likely to marshal general arguments based on simplistic ethical notions when passing judgement on strangers, especially since individuals are unlikely to be given the opportunity to realize that their judgments might have been mistaken<sup>53</sup>. Were the strong and absolute notions about fixed character in Roman society correct, Gellius, equipped with what psychologists call a ‘globalist’ conception of the good man, should not need more specific details about the contract or loan<sup>54</sup>; instead, he should be able to follow Favorinus’ advice. This, however, is not the case. Gellius undoubtedly feels sympathetic for the plaintiff, but he is not convinced. As noted long ago by de Francisci, the fact that the defense threatens to charge the plaintiff with *calumnia* for having brought a false charge against the defendant suggests that Gellius wants to shield the plaintiff from any legal backlash<sup>55</sup>: acquitting the bad man may be tantamount to condemn-

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<sup>52</sup> For a longer discussion of the topic and an analysis of character arguments in Cicero’s *Pro Sulla*, see Jerue 2016, pp. 131-203.

<sup>53</sup> For a brief discussion of this point with further references, see Doris 2002, pp. 101-102; Jones and Nisbett 1971, p. 80 famously have argued, «there is a pervasive tendency for actors to attribute their actions to situational requirements, whereas observers tend to attribute the same actions to stable personal dispositions». Also see Jones 1990, p. 153 for further observations on cognitive misers.

<sup>54</sup> I borrow the term ‘globalist’ from Doris 2002. In short, globalism «construes personality as an evaluatively integrated association of robust traits» (Doris 2002, p. 22). Globalism stresses consistency, analogy and evaluative integration, e.g. the honest man is always honest and honest in all types of situations; furthermore, since he is honest, it follows that he must also be brave, loyal and noble, because these are all entwined virtues. See Doris 2002 for a fuller discussion.

<sup>55</sup> Gel. XIV 2.8, *ex quibus omnibus si nulla re probaretur, dimitti iam se sane oportere et aduersarium de calumnia damnari*. For the argument, see de Francisci 1961, p. 598, «pertanto, in mancanza di quelle prove, il convenuto avrebbe dovuto essere assolto. Ma il giudice, che era convinto dell’onestà e della veridicità dell’attore, doveva essere stato scosso anche

ing the good one. This furthers the impression of sympathy for the plaintiff. The good man has somehow gotten himself into a tight situation and Gellius has the unfortunate task of deciding if—and how—he can lend him a hand. An additional consideration strengthens this impression of sympathy: the defense, in marked contrast to the plaintiff, is equipped with a whole team of lawyers. The story leaves the impression that the good man speaks on his own behalf. Gellius implies that a man inexperienced in the law is being preyed on by a school of experienced (and correct) legal experts. As one who has already stressed that he did not possess the requisite juridical knowledge, the judge has implicitly aligned himself with the plaintiff<sup>56</sup>.

Gellius is well aware of what is the right decision from the legal point of view, but he is being pulled in another direction by ethical, extralegal considerations. For *de Francisci*, this provides evidence of the adverse effect that philosophy has on legal practice and the growing separation of the two discourses in the mid-second century CE<sup>57</sup>. Along such lines, we can make better sense of Gellius' crucial phrase *inexplicabilis reperiendae sententiae ambiguitas*. It is not so much that Gellius does not understand what happened in the case<sup>58</sup>, but rather that two evaluative frameworks have come to a head. His indecision (*ambiguitas*) cannot be unraveled (*inexplicabilis*), simply because he is using two sets of criteria that cannot be reconciled with one another<sup>59</sup>. Cicero—albeit in a slightly different situation—put it this way: *aliter leges, aliter philosophi*<sup>60</sup>. Gellius never says that he cannot imagine the

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dall'annunciato proposito del convenuto di iniziare, in seguito all'assoluzione, un processo per calumnia». For other reasons that plaintiff could be charged *calumnia*, see Harries 2007, pp. 21-22; also cf. Alexander 1982 on double prosecutions.

<sup>56</sup> Gunderson 2009, p. 69 has aptly noted that the portrayal of the bad man gets progressively worse throughout the story. This only throws Gellius' identification with the plaintiff into sharper relief. The ungrammatical uses of the superlative in Favorinus' advice (quoted above) strengthen this observation.

<sup>57</sup> *de Francisci* 1961, pp. 592-593. Philosophical reflection leads to a legal impasse, «il conflitto, sorto nella coscienza del giudicante, fra sua personale convinzione morale e le risultanze del processo, conflitto che esso non sa superare e che lo induce a sottrarsi alla propria responsabilità con un *non liquet*».

<sup>58</sup> Contra Gunderson 2009, p. 69.

<sup>59</sup> Also, remember the phrase *in ancipiti rationum diuersarum circumstantia*, where the word *anceps* suggests that the *rationes* are in opposition to each; they are 'looking different ways'.

<sup>60</sup> Cic., *Off.* III 68; also See Cicero's discussion of *ius ciuile* and *naturae ius* at *Off.* III 69.

bad man being innocent of the debt, but simply that he could not be persuaded to acquit him (*nequaquam adduci potui ad absoluendum*). In other words, he has a hard time working within the confines of the legal system. In the introduction to the anecdote, Gellius had already suggested so much,

Etsi consilia iudicibus ex praesentium causarum statu capienda sunt, generalia tamen quaedam praemonita et praecepta sunt, quibus ante causam praemuniri iudex praepararique ad incertos casus futurarum difficultatum debeat.

«Although judges ought to make decisions based on the circumstance of the cases at hand, there are certain general warnings and rules with which the judge, when hearing a case, ought to protect himself against unforeseen causes of future sticky situations» (Gel. XIV 2.3).

Our judge does not seem to have fortified himself against a story about a good man in a pinch: if he does not rule in favor of the good man, the judge may be setting the plaintiff up for serious legal repercussion and this would certainly constitute «an unforeseen cause of difficulty». We do not usually expect—or like—to see the good acting badly. But that is very different from saying that we cannot recognize this unpleasant situation when it stares us in the face.

Gellius is more or less in agreement with the defense's argument taken from book 2 of the *Rhetorica ad Herennium*, but admitting so much is complicated by more general considerations. He tries to act like judge while wearing the philosopher's cap. Yet he cannot check that cap at the court's coatroom and so he finds himself trapped between competing discourses and systems of evaluation. On this reading, the facts of the case are not at all in question: the good man has no legal grounds to claim the money and his goodness does not provide a persuasive argument in his favor. Gellius has been inundated with examples (*multaque et industria exempla*) of the man's uprightness as well as the defendant's baseness. Yet the judge does not even attempt to project probabilistic arguments from life or character onto the case. He does not say that these considerations provide some sort of evidence that can be used to make arguments from probability (e.g. that thanks to character alone one can decide which man is dishonest and which is telling the truth<sup>61</sup>).

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<sup>61</sup> The closest he comes to making this argument is at Gel. XIV 2.10. Though his friends have pointed out that no normal argument in the plaintiff's favor is on the table, he pauses

This would be a perfect place to decide the case on the basis of globalist conceptions of character, if there ever was one. But Gellius does not do so.

This analysis in which Gellius is trapped between a legal and ethical approach to the problem challenges existing readings of the passage. In a recent discussion of the story, for instance, Thomas McGinn has argued that the evidence is contradictory and that Gellius has reached a sort of intellectual impasse because of an «asymmetry of evidence»<sup>62</sup>. He explains this with recourse to the notion of fixed character,

Gellius, however, is able to view the contrast presented by the lack of evidence for the loan presented by the plaintiff with the dramatic difference in the characters of the litigants as signifying not that the plaintiff has failed to prove his case, but that the contradictions in the evidence are so great that he cannot make sense of it (pp. 277-278).

This reading strains the sense of the narrative and Latin<sup>63</sup>. As McGinn later suggests, judgments from character were largely a matter of convenience in a society where evidence was often lacking<sup>64</sup>. This is in line with the Catonian fragment discussed above and cautions us against seeing an insurmountable contradiction in Gellius' eyes. McGinn's explanation seems to assume that Gellius is making a decision strictly on the basis of a predetermined set of legal criteria and does not give proper place to the competition between the legal and the ethical frameworks that I have sought to outline. As we have seen, the depiction of Favorinus elsewhere in the *Noctes Atticae* furthers this impression. Evidence is not at odds, but rather modes of analy-

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with *Sed enim ego homines cum considerabam, alterum fidei, alterum probri plenum spurcissimaeque uitae ac defamatissimae, nequaquam adduci potui ad absoluendum*. Despite the man's *fides*, Gellius never says or suggests that he believes this man in this instance.

<sup>62</sup> McGinn 2010, p. 274.

<sup>63</sup> He goes on to support this claim by suggesting that if the case were «weak» the Praetor would never have accepted it. This would be a fair consideration, if only we assume that the law would be fully known. Also, see Paul., *Dig.* XLVII 18.2 for a description of a similar case: even with the testimony of a single witness (*unum testem*) for lent money, the evidence is not considered weighty enough to secure a conviction or even the torture of the defendant's slave.

<sup>64</sup> McGinn 2010, pp. 290-291 is to this effect: «This suggests much about the practical limits on the ability of a finder of fact, whether a public official or a *iudex priuatus*, to acquire good information about a case before him, and just how dependent he was on the representations of parties to a suit».

sis. Instead of offering a convincing legal precedent, Favorinus unsuccessfully tries to translate the ethical solution into a legal one: the philosopher's sophistical operation just cannot satisfy the judge. While the law seems to require unethical action, Gellius cannot completely part with the rules governing the legal process<sup>65</sup>.

Gellius' dilemma provides challenges strong and absolute versions of the fixed-character argument. As all contemporary jurors —myself included— have had hammered into their heads time and time again, sympathy is a powerful thing. Yet those who have written off the theory of fixed character as mere rhetoric that fools the audience have also missed something important. The rhetorical recommendations about the importance of character in the Roman court at best holds a kernel of the truth, but are far from sufficient on their own: rhetoric works for a reason and makes good use of widespread biases and beliefs. In Gellius' case, however, that rhetoric has fallen completely flat. Although for the judge arguments based on relative moral status are not actually convincing, they do have a potent effect on Gellius' view of the case. The good man's argument does not replace the evidence, but rather attempts (unsuccessfully) to shift the discussion to a totally different key. Had there been something of more substance in the plaintiff's favor, these ethical arguments would certainly have held more water than they did on their own. Alone, however, they cannot bear all the weight.

I do not want to claim that Gellius' reaction is typical or can be simplistically mapped onto the legal culture of Cicero's time. This would be a dangerous argument, since the law had certainly developed and evolved in the 200-year period that separated Gellius from Cicero<sup>66</sup>. Wading into such issues, however, would swell this article well beyond its limits. Though I am

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<sup>65</sup> Scholars have indeed pointed out the tensions between the ethical and legal in this period. As McGinn 2010, pp. 278-279 has put it, «Some Romans might have sympathized with Gellius' assertion of ethical principles against a rise in the authority of legal norms and of legal professionals that was especially characteristic of the period in which he wrote. A few perhaps might have even agreed that in principle at least this was a question of morality, not law, whatever the views of sundry jurists and trial lawyers, not to say philosophers, to the contrary».

<sup>66</sup> Though see Frier 1985, pp. 212-214 who suggests, «The quandary in which Gellius found himself may not have been totally dissimilar to that into which the *recuperatores* of Caecina's lawsuit had fallen, at any rate if they accepted Cicero's evaluation of the relative characters of plaintiff and defendant».

drawn to the influential arguments of Pugliese, who suggests that systematic ideas of evidence were beginning to be solidified near the end of the first century CE<sup>67</sup>, this Gellian passage does have relevance for an earlier period. It is easy to forget that the central role of Cato in the story stresses continuity with an earlier age, although Favorinus tries to overstretch the value of the Catonian *exemplum*. If all this were not the case, we would have to assume a radical change in the way that people conceived of character. The fact that Gellius does not act on his ethical bias is evidence for different, conflicting models for making decisions, rather than for the emergence of a new conception of causality altogether. Gellius tries to push a bias aside that others may very well have acted upon. As Dieter Nörr has argued, it seems that one could have decided for the plaintiff in this case<sup>68</sup>. This, however, does not mean that the character argument is a good legal argument, but rather that in a system filled with nonprofessionals you might encounter someone not as scrupulous —yet just as sympathetic— as Gellius. And this is one of the chief points of the anecdote: rather than a weakness of legal reasoning<sup>69</sup>, Gellius' actions demonstrate both his ethical superiority and his principled commitment to not abuse his power as a representative of the Roman legal apparatus.

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<sup>67</sup> Pugliese 1964; Nörr 1995, p. 56 also sees this period as an important stage in «[la] linea di sviluppo di una teoria giuridica delle prove».

<sup>68</sup> Nörr 1995, p. 55. As Harries 2007, p. 35 has put it, when it comes to giving a decision, «the skills of advocates and legal advisers, the standing of the litigants and their supporters, and the will of the crowd and the prejudices of the judges had as much bearing on the fates of the accused as did the letter of the law».

<sup>69</sup> For arguments in favor of this view, see Harries 2007, p. 51 with further citations. While Harries does not think highly of Gellius, she does give him some credit (e.g. p. 53).

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