

Proposer:       Adriaan Lanni  
Assistant Professor of Law, Harvard Law School  
(Program committee member)

### **Rational Choice Approaches to Ancient Law**

In recent years, scholars have increasingly turned to rational choice theory or law and economics to shed light on ancient history and law. This panel brings together papers that make use of or discuss these methodologies in addressing a variety of issues in ancient Greek and Roman law. The larger aim of the panel is to provoke a discussion about the potential benefits and limits of these new approaches for the study of ancient law.

1.

*Voting and judgment in assemblies and juries in classical Athens*

Melissa Schwartzberg  
Associate Professor of Political Science, Columbia University

Whereas the Athenian assembly voted by show of hands (*cheirotonia*) and the majority was determined by estimation, jurors in Athens voted by secret ballot in the form of bronze disks, which were counted. Further, whereas the assembly deliberated prior to voting, jurors in Athens did not discuss the case prior to rendering a verdict. What is the relationship between a deliberative process and a public decision procedure based on estimation, on the one hand, and between a non-deliberative process and a secret decision procedure based on a counted vote, on the other? Here I suggest that ancient views of judgment in the two different contexts drove the decision of whether to deliberate, the choice of voting mechanism, and the process of ascertaining the outcome. In essence, I argue that independence of judgment was not prized in the context of the decree-making power of the assembly (and further in the law-making power of the *nomothetai*); instead, the capacity to learn from others up to (and including) the very moment of raising one's hand was considered attractive. Further, because obedience to enacted decrees (perhaps especially in the foreign policy context) required collective action, the presence of an enumerated minority may have seemed to pose a threat to compliance. In the context of a jury trial, however, independence of judgment was considered to be of paramount importance; further, since the enforcement of penalties was generally decentralized and did not require collective action, the presence of an enumerated minority would not threaten the authority of the verdict.

2.

*Economic Incentives and Risk in Roman Contract Law*

Dennis Kehoe

Professor of Classics, Tulane University

In recent years, scholars have recognized the potentially complex role that law and legal institutions could play in the Roman economy. The Roman law of contract is clearly important in this connection, since it established the basic parameters within which countless economic transactions were conducted. The question is whether Roman law, as developed and interpreted by the Roman jurists and the imperial government in responding to petitions, enhanced the performance of the Roman economy. It would have done so by fostering governance structures surrounding contracts that created incentives for people to enter into mutually beneficial business arrangements. In this paper, I will examine the likely economic effects of an important element of the Roman consensual contracts of lease-hire and sale, namely that legal disputes resulted solely in monetary damages, with no provision for specific performance. I will explore how this situation affected the incentives of people to enter into contracts, in particular those involving the building industry, labor, and farm tenancy. In investigating the economic aspects of Roman contractual law, I will draw upon the rich literature in the field of law and economics on the economic advantages and disadvantages of the various remedies available in contemporary contract law.

3.

*Institutional Constraints on Rational Choice:  
The Case of Roman Dowry.*

Bruce Frier

Distinguished University Professor of Classics and Roman Law, University of Michigan

In Roman society, dowry was recognized, along with the market and inheritance, as a principal mechanism for the movement of property between families and generations. In form, Roman dowry always involved the transfer of property from the bride's family to her husband's; but if the marriage ended through divorce or the husband's death, the dowry normally had to be returned entirely or in substantial part. The Roman jurists establish numerous rules that rather closely police the boundaries of this institution, with individual attempts to vary from the norm (e.g., by limiting the husband's right to profits from dowry property) being deemed void. Can such legal restrictions be explained within the parameters of rational choice theory?

Discussant: Joshua Tate, Assistant Professor of Law, SMU Dedman School of Law  
Chair: Mark Sundahl, Assistant Professor of Law, Cleveland-Marshall College of Law, Cleveland State University