Why was it that the Romans, during the last fifty years of the second century BC, departed from previous practice and began to establish a system of permanent courts (*quaestiones perpetuae*), rather than continuing with *ad hoc* proceedings?

by

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Abstract

This thesis addresses the overarching question of why the Romans began to adopt from 149 the structure of permanent tribunals by reviewing, initially the judicial procedures to which the Senate had recourse in the previous quarter century. The Senate looked to these procedures with limited success in its efforts to stem the ruthless depredations visited on *peregrini* by its generals and provincial governors.

The discussion is taken up in chapter one and provides an introduction as to the reasons for the creation in 149 of the first permanent court, the *quaestio de pecuniis repetundis*. In this chapter the hypothesis is advanced that the purpose of the creation of the court was more than just the desire to allow allies and friends of the Roman people a right of restitution. Rather it had a diplomatic rationale, namely to maintain existing foreign relationships and to provide the opportunity for forging new accords. The continual involvement of the Romans in foreign wars far from home with consequent stretched supply lines dictated the need for strategic alliances.

In the succeeding chapters, three to seven, each court and its enabling statute is individually considered. It is argued that whilst with some courts other reasons may also have existed the primary reason can be found in the desire of the Senate as the foreign relations organ of Rome to pursue the diplomatic rationale. Thus, for example, the separate criminal courts, *de sicariis* and *de veneficiis* were established to deal with the unsettled conditions prevailing in Rome after the destruction of Carthage. However, the attempt thereby to restore a semblance of law and order is also to be seen as intended to encourage *peregrini* to ventilate their rights in a Rome in which their personal safety was not at risk.

In chapter eight it is contended that Sulla clearly accepted the permanent system. He did not seek to change it nor to consolidate or reconstitute the permanent courts. Rather he adopted a piecemeal approach in “tacking” on to existing enabling laws measures which made moderated adjustments.

Declaration

I, Ian Gerald Betts, certify that the work in this thesis entitled "Why was it that the Romans, during the last fifty years of the second century BC, departed from previous practice and began to establish a system of permanent courts (*quaestiones perpetuae*), rather than continuing with *ad hoc* proceedings?" has not previously been submitted for a degree nor has it been submitted as part of requirements for a degree to any other university or institution other than Macquarie University. This thesis is an original piece of research and the work and assistance of others are duly acknowledged where appropriate.

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Chapter 1. Introduction

1. Preliminary

In dealing with wrongdoing which threatened the fabric of the state the Romans had had, prior to 149, recourse to a variety of initiatives. These included the people's judicial assemblies (*iudicia populi*), the extraordinary courts usually created by the Senate, or by the people's *plebiscita*, to cope with a major crisis such as the Bacchanalian conspiracies in 186, as well as the occasional praetorian tribunal set up to handle a specific problem.[1] The major part of the judicial work was effected in the *iudicia populi*,. The absence of a regular police force meant that the detection and bringing before the courts of wrongdoers became the responsibility of the victims, never an inviting proposition. Moreover, the convening of the *iudicia populi* was a cumbersome and time-consuming process. In addition, the tribunals, untutored by any statutory provision, lacked formality in their procedure. Decisions depended on the whims of the people and this made for inconsistent verdicts.

The overarching question, the subject of this study, is why it was that the Romans saw fit to depart from their previous practice of using these *ad hoc* tribunals for dealing with conduct which was inimical to the interests of the state and began to establish and rely on permanent courts (*quaestiones perpetuae*)? The study examines the period from 149 through to 81.

The Roman people established the permanent courts by statutes passed in the *concilium plebis* which was the principal legislative body..[2] These statutes

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[1] The aborted prosecution of M. Popilius Laenas in 172 before a praetorian court provides an example.

[2] In the *consilium plebis* the laws were initiated by tribunes and referred to as *plebiscita*. Most of the laws discussed in this thesis were introduced in this assembly. There are differing views as to whether there was only the one popular legislative body, the *consilium plebis* or two, the *comitia tributa* being the other.

Sandberg (1993) 74 at p. 96 argues that there was only the one, the *concilium plebis* and that that patricians could not vote in this assembly. Sandberg (p.80) regards the *comitia tributa*, the other name for a popular assembly, as essentially identical with the *consilium plebis*. However, Lintott (1999) 53-54 provides evidence that is at odds with Sandberg's opinion that there was no assembly

reflected the will of the people, although it is likely that the terms of the *rogatio* for each statute were hammered out in the boisterous atmosphere of the *contiones* and therefore represented compromise legislation. Each of these statutes set down the jurisdiction and procedure governing the operation of its court and a definition of the offence.

In 149, the people passed the *lex Calpurnia* which created the *quaestio de pecuniis repetundis*, the first permanent court. In the ensuing years the people established six other courts, all by enabling statutes. These courts were in turn, the *quaestiones de sicariis* (probably 142), *de veneficiis* (142–123), *de pecuniis repetundis* (set up in 123 under the *lex Acilia*[3] attributed to Caius Gracchus), *de ambitu* (120), *de peculatu* (106) and *de maiestate* (103) (the *lex Appuleia de maiestate* of L. Appuleius Saturninus). The courts respectively were concerned with extortion, assaults with a deadly weapon and murder, poisoning, provincial extortion (a more sophisticated procedure), electoral bribery, embezzlement and treason.[4] The dates given are not, save for the laws of Calpurnius Piso, Caius Gracchus and, possibly, Saturninus, entirely secure.

Whilst some scholars have strongly questioned whether it is appropriate to assume that the Romans had any concept of crime, they do accept that the introduction of the permanent courts heralded the beginning of a criminal justice system based on statute.[5] However, it was a system limited to the defined offence, leaving room for the continuation of the jurisdiction of the *iudicia populi*.

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other than the *consilium plebis* where the tribunes introduced laws. Lintott refers to cases where consuls and praetors legislated before the tribes, in particular the law creating the twenty quaestors attributed to Sulla. Lintott's views, expressed later than those of Sandberg, are to be preferred and have the weight of authority.

[3] Lex Acilia CIL I^2.583.

[4] In 81 the Roman people appointed Lucius Cornelius Sulla dictator for the enactment of such laws as he himself might deem best and for the regulation of the commonwealth. App.BC.1.99. In this capacity and as part of his reform of the permanent courts, Sulla procured the passing of laws setting up two further standing courts, namely, the *quaestio* de *falsis (testamentaria/nummaria)* (forging of wills and debasing the coinage) and a court which combined the functions of the poisoning and assassination courts, the *quaestio de sicariis et veneficiis*.

[5] Gaughan (2010) 67. She takes her cue for the existence of crime from the date of the *lex Calpurnia*. Of course, she is not privy to our argument developed in Chapter 3 that there was a permanent criminal court created in 142.

2. Rationale for this study

The overarching question is not one which yet appears to have been the subject of any discrete and comprehensive investigation by scholars. Our study ought therefore to have some small contribution to make.

The period being investigated is one of great significance for the development of Roman criminal law. In the creation of their first permanent court in 149, dealing with *res repetundae*, the Romans took a pivotal step in progressing their justice system. They had reached a stage where they realised that the unstructured court system on which they had relied for so many years was facing serious challenge. Their identification of permanency, the ability to assemble a statutory court expeditiously as an answer to the problems presented by the existing framework, therefore represents a sophisticated advance. The significance of the establishment of the 149 court and of the gradual creation of later permanent courts cannot be sufficiently stressed. Moreover, we cannot overlook the initiation of a criminal justice system with the creation, in 142, of the *quaestio de sicariis* and the passing of the *lex Acilia* of Caius Gracchus, which established an elaborate adjudication procedure and the bench mark for the permanent courts.

This study then is concerned with a unique and formative period in the Roman criminal law. Addressing the overarching question in relation to each of the seven standing courts beginning with the 149 court leads to the consideration of a number of serious questions. An understanding of the reasons for the 149 court dictates that we treat with the deficiencies and *lacunae* in the forensic framework which existed in the quarter century preceding the *lex Calpurnia*. The study then proceeds with an analysis of the purposes of the standing courts established intermittently thereafter up to and including the review in 81 by Sulla. The study also considers whether the adoption of permanent courts was used by the Romans to progress particular policies, especially in foreign affairs. It allows for inferences to be drawn as to what broader Roman policy might have been over and above the ostensible objectives, apparent from the enabling statute for the court, or deducible from comments in the sources.

In summary, the issues we discuss in this study are of major significance because the creation of the first permanent court was a unique step in the Roman legal system. It set a precedent for the development of a criminal justice system and

paved the way for the passage of enabling laws for the establishment of further permanent courts whose jurisdictions were directed at particular conduct which the Romans wished to proscribe.

3. Scholarship

The overarching question is not one which appears to have been the subject of any comprehensive investigation by scholars to date. Thus, we may observe the comment of Zetzel:

> "A fair amount has been written on criminal courts and procedures and on the *quaestiones* of the late Republic, both in terms of substantive law and in connection with the political implications of criminal trials; beyond that, aside from studies of very specific laws and trials, there is little. The most comprehensive study of Roman criminal law remains Mommsen's massive *Römisches Strafrecht.*"[6]

Modern scholarship on Roman criminal law owes a debt to Mommsen for his analysis and reconstruction of those meagre sources which have survived. Yet his explanation for the creation of the standing courts is unsatisfactory.[7] Mommsen argue that there were three stages in the development of the criminal system.[8] First the judgement (*iudicatio*) by a magistrate with *imperium* to impose a punishment. Next the resort by the accused to *provocatio*, whereby the accused appealed to his fellow citizens against the exercise by the magistrate of his power to inflict punishment. Finally there was the review of the magisterial decision by the *iudicia publica*, which operated as a trial court in deciding whether the decision should be sustained or expunged.[9] *Provocatio*, appeal to the people was the necessary impetus to the initiation of *iudicia populi* to try alleged wrongdoing.[10] Mommsen's concept of *coercitio* followed by comitial trial stands

[6] Zetzel (1996).
[7] Cloud (1964) 876.
[8] Cloud (1964) 876; Alexander (2007) 242.
[9] Alexander (2007) 242 citing at n. 20 Mommsen (1899),..151–174.
[10] Bauman (1996) 10

in sharp relief to the procedure in the standing courts, Cloud stresses that there is no link and could be no stronger contrast between the two procedures.[11]

Kunkel attacks Mommsen's logic. He argues that *provocatio* was valid only against *coercitio* (summary disciplinary action). This might or might not lead to a hearing by the people. The *iudicatio* of the magistrate was not appealable. Thus it was the tribunes who developed, probably after interceding with the magistrate, the popular jurisdiction by submitting cases for trial where the victim made *provocatio* to the tribunes.[12] Still more relevant to this study is Kunkel's contention that the brake on magisterial abuse of power and the consequent protection of the accused Roman citizen was the fact that the magistrate was bound by the decision of an advisory body of citizens (*consilium*) with whom he sat. He accused and investigated, but the *consilium* operated effectively as a jury. The magistrate pronounced a verdict, which was that of the *consilium.*[13] Kunkel regards the procedure of the later standing criminal courts as a direct descendant of these earlier courts.[14] Alexander finds the arguments of Kunkel persuasive in relation to the stages of development of the standing courts in the second century but not for beginnings of the Roman criminal law.[15]

Gruen has provided a prosographical study of the ambitions and machinations of the Roman aristocracy in the period in question.[16] He contends that the governing class used the weapon of prosecution in the permanent courts as the means for harming the aspirations of rivals and advancing their own interests. He explains that the permanent courts became politicised and that manoeuvring for political power became increasingly a feature of the proceedings before these courts: "Politics and the courts met at almost every turn".[17] In his conclusions, Gruen succinctly reminds his readers that whilst the sporadic growth in the number of the permanent courts arose out of politic pressures, it did lead eventually to a

[11] Cloud (1964) 876.
[12] Bauman (1996) 10.
[13] Sherwin-White (1964) 208.
[14] Alexander (2007) 242.
[15] Alexander (2007) 242.
[16] Gruen (1968).
[17] Gruen (1968) 6–7.

gradual systemisation of the procedures therein and the step by step organization of the Roman criminal justice system.[18]

Jones, in his posthumously published work, outlines the judicial machinery for trying criminal offences which supports Mommsen's views. He cites Cicero's claim that the procedure was a magisterial judgement, an appeal and a vote of the people for all criminal trials.[19] Jones does not appear to provide any suggestion that assists the overarching question, notwithstanding the fact that he is analysing the operation of the *iudicia populi* and the *iudiciae publicae.*

Bauman, in his major work on the *iudicia publica*,[20] is concerned with analysing and interpreting the language in which offences tried in these tribunals are cast, particularly the terminology of the jurists. In a later study,[21] he gives an overview of, and discusses the creation and procedures in, the standing courts but does not comment on the reasons for the courts apart from the trite assertion that the primary purpose of the first three extortion laws was restitution.[22] Bauman makes clear that his study is primarily concerned with the verdicts and sentencing of these courts..

Cloud, in his seminal chapter in the Cambridge Ancient History (*CAH*), provides the most detailed and perspicacious analysis of the development and jurisdictions of the *quaestiones perpetuae*, as is to be expected having regard to its context.[23] Unlike other more reticent scholars, Cloud provides a number of suggestions as to the aim of the enabling statutes and their courts, particularly those dealing with *res repetundae*, *ambitus* and *maiestas*.

Robinson argues that the Romans never developed anything resembling a judicature act instead they provided in the enabling statutes for the form of the permanent courts, their range of offences and the penalties, which were varied by new statutes periodically.[24] Robinson also outlines the jurisdiction and procedures

[18] Gruen (1968) 286.
[19] Jones (1972) 11.
[20] Bauman (1980).
[21] Bauman ((1996).
[22] Bauman ((1996) 23.
[23] Cloud (1994).505; 530.
[24] Robinson (1995) 2.

of the permanent courts[25] but without indicating reasons in detail for their creation. She appears to focus more concern on their later operation since she draws considerably on the jurists for information.

Lintott also outlines the development of the permanent courts. He notes that there was never an organised corpus of Roman criminal law. In the last two centuries of the Republic, the burgeoning legislation dealt only with single crimes.[26] However, some comments he makes present anomalies for the traditional position. Lintott suggests that the murder, poisoning, bribery and embezzlement courts were not permanent courts even though they acted on a regular basis and followed the 149 court. He also argues that the procedure of the *lex Acilia* may have been extended to the last two abovementioned courts, but makes no suggestion about the first two. He follows by saying that Sulla reorganised the existing criminal *quaestiones* on the model of the *lex Acilia*.[27] These propositions, at first sight, seem inconsistent.

More recently, Lintott has provided a comprehensive analysis of the origins of the Roman criminal law and the procedures in the standing courts.[28] He argues that there was never a systematic code and that the creation and reform of criminal justice was generally reactive as it was dictated by political imperatives. Nevertheless, he does find occasions where matters of principle were involved, such as the decision to adopt large juries for the standing courts to eschew suggestions of partiality.[29]

Riggsby[30] conducts an examination into the functions of the *iudicia publica* and examines the features of four offenses, the charges of *res repetundae, ambitus, de sicariis et veneficiis* and *vis.* His interest is primarily in speeches Cicero gave in court proceedings where these offences were germane. He concedes that he is less interested in legal structures of the courts than their functioning as part of the broader social community.[31]

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[25] Robinson (1995) 74; 81–88.
[26] Lintott (1999) 149.
[27] Lintott (1999) 158–160.
[28] Lintott (2015) 302–330.
[29] Lintott (2015) 326,
[30] Riggsby (1999).
[31] Riggsby (1999) 2.

Harries[32] is interested in exploring how the Romans understood the concept of crime. She explains that her work is not intended as a manual of criminal law. Harries deals in some detail with the courts for *res repetundae*,[33] *ambitus*[34] and *maiestas*,[35] and suggests some reasons for their creation most of which reflect the approach adumbrated by earlier scholars.

4. Assessment of scholarship

It is a reasonable assessment of the scholarship to say that it deals satisfactorily with the development of the permanent courts and the circumstances in which each court was created. Scholars advert to the relationship between the permanent courts and the variety of tribunals, which were tried by the Romans before Piso's law in 149, and to the continuation of the people's judicial assemblies in tandem with the permanent courts. *Locus standi*, particulars of the offences and the penalties which might be imposed, as well as the availability of flight into exile to escape a capital penalty all feature. The substantial discussion, as might be expected, centres on the *lex Acilia*, which is the fundamental source for our knowledge of the procedures in the permanent courts. Considerable attention is given in the studies to the way in which Caius Gracchus structured the jury system and the procedural steps are elaborated. There is also discussion of the significance of the control of the juries in the permanent courts to the political influence of *equites* and senators.

5. The direction of this study

As we have already suggested, what appears to be missing from the scholarship to date is detailed research directed specifically to the reasons for the passing of the enabling statutes and for the creation of the permanent courts themselves. When they do posit reasons, scholars tend to identify what may be seen as the obvious.

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[32] Harries (2007).

[33] Harries (2007) 61; 70–71. *The lex Calpurnia* of 149 was passed in order to provide an opportunity for Roman citizens to obtain redress against provincial governors, later extended to a wider range of provincials by the *lex Acilia*. Robinson (1995) 81 as well.

[34] Harries (2007) 70–71. She argues that the concern of legislators to tackle electoral bribery indicated a need the Romans felt for reforming the process,

[35] Harries (2007) 72; 83–84. The law was aimed not at conduct, which constituted a threat to the security of the state, but at conduct, which tended to diminish the *maiestas* or greatness of the Roman people, a deliberately elusive concept.

The Romans created the *repetundae* courts to rein in the unscrupulous plunder of the property of peregrines by provincial governors and to provide a remedy, initially of restitution and, subsequently, of double the amount stolen. The *ambitus* court was designed to deter men from engaging in electoral bribery. These reasons appear trite. There is little further plumbing into the purposes of the courts.

In our investigation of the overarching question we move in a different direction. We raise possible reasons for the establishment of the permanent courts. We note in particular that over most of the period of this study the Romans were engaged in hostilities and often hard pressed on a number of foreign fronts. Moreover, the borders of the then empire were extended and thus vulnerable. We argue that this would have led to strains on supplies and communication lines and often to a lack of adequate shelter from inclement weather for legions stationed in far flung destinations. We further contend that the Romans would appreciate that the maintenance of continuing stable relations with existing friends and allies of Rome and, where possible, the fostering and building of new alliances or networks with *peregrini* would assist in no small measure to providing support and protection for Rome's interests. We propose that this was the diplomatic policy of the Senate and that the Senate intended that it should be extended as well to vanquished enemies, possibly by the old custom of *deditio*.

In our analysis of each of the standing courts we posit a nexus between the ostensible purpose(s) of the enabling statute and the diplomatic policy. We argue for a common purpose in the creation of the various standing courts (with the possible exception of the *de sicariis* court and the *de veneficiis* courts) comprising the cultivation of the goodwill of *peregrini* by seeking to instil confidence in the Roman criminal justice system.

Chapter 2. The *Lex Calpurnia* and the *Quaestio de Pecuniis Repetundis* — 149

1. Prefatory comments

In the year 149 the tribune of the plebs, L. Calpurnius Piso Frugi ("Calpurnius"), secured the passage of the *plebiscitum* known as the *lex Calpurnia de pecuniis repetundis* (*lex Calpurnia*), pursuant to which the first standing court of the Romans, the *quaestio de pecuniis repetundis*, was established. There is scant authority as to the *lex Calpurnia* and the court set up thereunder in 149. Save for:

(i) the various comments of Cicero about this being the first permanent court;[1]

(ii) references in the *lex Acilia*[2] to those prosecuted under the *lex Calpurnia* and the *lex Julia*;

(iii) passing remarks by Tacitus and by the Scholiast;[3] and

(iv) inferences to be drawn from the *lex Acilia*

there is nothing more in the sources to elucidate the nature or content of the *lex Calpurnia*.

The *lex Calpurnia* was intended to provide a remedy for the misappropriation of money or property, to the detriment of the local populace, by *imperatores* in those provinces to which the Senate had assigned them. Comfort was in the form of simple restitution[4] of the assessed value of the property misappropriated. *Peregrini* had endured extremes of violence in the previous 30 years or so at the hands of Roman *imperatores*. Many of these cases had been the subject of legal proceedings. However, no provision was made in the *lex Calpurnia* for penalties to deter the repetition of such conduct, nor for reparations which might go to

[1] Cic. *Brut*.106: "*Nam et quaestiones perpetuae….constitutae sunt quae antea nullae fuerunt — L. enim Piso tribunus plebis legem primus de pecuniis repetundis Censorino et Manilio consulibus tulit*". See also Cic. *De Off.* 2,75; Cic. *Verr*. 2.3.195; Cic. *Verr*. 2.4.56.

[2] *Lex Acilia CIL* I²583 This is the *lex repetundarum* engraved on the Urbino tablets, which is identified with the tribunate of Caius Gracchus in 123 (referred to in this thesis as the "*lex Acilia*").

[3] Tacitus *Ann*.15.20: "*L. Piso, qui legem de pecuniis repetundis tulit*"; Schol.Bob.in Cic. *Pro Flacco* 10, 96 Stangl.

[4] II. 58–59 of the *lex Acilia*.

relieving the suffering of those exploited. To this extent the framers of the *lex Calpurnia* followed precedent. In earlier proceedings, such popular judgements or such decrees of the Senate as were given or passed did not fully compensate *peregrini* for the consequences of the brutality of the *imperatores*.

In considering the overarching question we shall begin with the *lex Calpurnia* Why was it was passed, why was the remedy it provided so restrictive, why was the court styled as permanent, did only the *peregrini* have the right to sue and not Roman citizens, and what was the effect of the *legis actio sacramento*?[5]

2. Tralatitious provisions — the *lex Calpurnia* and the *lex Acilia*

Certain provisions of the *lex Acilia* are significant. The statute contained stipulations about trials, which had been or would have been completed under either the *lex Calpurnia* or the intervening *lex Iunia*.[6] A man who had been condemned under these laws was not at risk of being prosecuted again under the *lex Acilia*.[7]

It can be inferred that conduct, which transgressed either or both of the earlier laws, could also have transgressed and been triable under the *lex Acilia*, but for the specific proviso excluding this possibility. Trial and conviction could have been for any kind of conduct prohibited by the earlier laws. We do not have any knowledge of the scope of the behaviour constituting extortion under the earlier laws. However, were it not for the exclusionary provisions of the *lex Acilia*, any conduct for which a man might have been tried and convicted under the earlier laws could have exposed him to action under the *lex Acilia.* This means that the provisions of the *lex Acilia* in relation to the nature of the offending conduct, the person who could be sued and the person who could sue, would have to have been co-extensive with those of the earlier laws and therefore tralatitious.[8] It would

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[5] This was the procedure adopted for resolving disputes in the court.

[6] The *lex Iunia* is known to us only through the references to it in the *lex Acilia* ll. 73–74; 80–81. From these we can determine that it related to *res repetundae*.

[7] *Lex Acilia* ll.73–74; 80–81.

[8] This position appears to be accepted by modern scholars. Alexander (1984) 523 notes:

> "The relevant extortion statutes were tralatician in nature; that is each statute contained many clauses drawn directly from its predecessor, while introducing some modification or innovation."

follow that there were well-defined descriptions of wrongful conduct in the earlier laws.

On this analysis, there would have been provisions in the *lex Calpurnia* and also in the *lex Iunia* which would, because those of the *lex Acilia* are tralatitious, have given *locus standi* to applicants of the same description as those set down in the *lex Acilia*. The reasoning would also allow for the defendants and the proscribed conduct to be the same or substantially similar. The significance of the tralatitious effect is considered in Section 8 below.

3. Cases and events before 149

For more than 25 years before the *lex Calpurnia*, Rome had been involved in debilitating wars with the insurgent inhabitants of Hither and Further Spain, Gaul, Istria and Sardinia. The Celtiberians and Lusitanians, in particular, were a constant concern.[9] By 173 the Romans were also facing the imminent threat of war with Perseus.[10] Livy's laconic descriptions show the breadth of Rome's commitment.[11]

Ongoing hostilities were a godsend to Rome's imperious elite. Military conflicts provided the opportunity for aristocrats to profit from provincial commands. Status and social identity were derived from a successful military career in a province.[12] Consuls, usually appointed to provinces, which were theatres of war, were best placed as they had the real prospect of acquiring booty for themselves and their armies from a campaign.[13] The pressure on praetorian commanders was greater. Six praetors competed for two consular positions. As Drogula has made

[9] The difficulty was that the Celtiberians were barbarians who, even though pacified, were not yet accustomed to suzerainty. Livy 40.36. However, after their defeat by Appius Claudius in 174, Livy 41.26 notes, "they quietly submitted to authority".

[10] The threat matured into the Third Macedonian War which was to last for four years from 171 until 167 with the defeat of Perseus by the redoubtable L. Aemilius Paullus.

[11] Livy faithfully records details of the campaigns. Livy 40.38; 40; 40.48–50; 42.11.8–9; 41.12; 41.12; 16; 41.17; 41.26. He notes at 41.19 that the uprisings in Gaul and Liguria in 175 were quickly repressed "now the anxiety as to the Macedonian War beset them".

[12] Initially, a province was a sphere of influence, rather than a defined geographic area, in which a commander exercised his *imperium* against enemies of Rome. A victorious campaign might earn the Roman general a triumph in which there would be a public recordal of enemies slain or captured, towns ransacked and plunder derived, all to the benefit of the commander's prestige. Drogula (2015) 273.

[13] Consuls would already have gained by an earlier stint as a praetor in a province. But the consular appointment still represented their final chance to garner wealth.

clear, praetors tended to draw the more peaceful spheres of influence (*provincia*).[14] Praetors were dependent on deriving material benefits from their provinces to enhance their prospects for election to the consulship.[15] He whose consular prospects were slim would be left with the praetorian command as his last chance to enrich himself, his reputation and his family.

Booty could result from a successful campaign. But in provinces which were relatively peaceful, or whose inhabitants provided no opportunity for war, a commander might seek to exact money and property from the local inhabitants to feather his nest. Some commanders were even prepared to provoke hostilities for their own glory or profit[16] or to wrong provincials who were allies of the Roman people.[17]

For the Senate as the custodian of Rome's foreign policy,[18] measures which might assist with the orderly administration of provinces could conflict with the pursuit by governors of their own self-interests. Roman commanders were men of senatorial rank. Diplomatic measures promoted by the Senate, however opportune, which impeded the career prospects of its members, could place the Senate in a position of conflict. This could lead to opposition from within senatorial ranks.[19]

Disputes began to arise between the Senate and commanders in this period.[20] The Senate found itself casting around, without luck, for legal machinery or a tribunal, which might resolve the conflicts.

3.1. M. Popilius Laenas

In 173, the consul M. Popilius Laenas triumphantly reported to the Senate his bloody victory over the Statellates,[21] which he had provoked,[22] no doubt in the

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[14] Drogula (2015) 273.

[15] Wealth was obviously necessary to grease voters' palms and to provide electoral largesse.

[16] See the conduct of M. Popilius Laenas discussed in Section 3.1.

[17] The conduct of C. Lucretius Gallus towards the inhabitants of Haliartus and Chalcis in 171 makes the point. Livy 43.4.6–7.

[18] The Roman Senate was responsible for the diplomatic relations with *peregrini*. Polyb. 6.13.

[19] Again the issue is illustrated by the machinations of M. Popilius Laenas.

[20] Between 173 and 149 essentially.

[21] Livy 42.7.8–9.

[22] Briscoe (2012) 177 suggests it is likely that Popilius' attack was unprovoked. This is a reasonable inference from Livy's account at 42.7.4–5.

expectation of gain.[23] The Senate expressed its outrage at Popilius' conduct and decreed that reparations be made.[24] The Senate was aggrieved by the arrogant self-serving war which Popilius had engendered. Livy makes clear that the Statellates were not declared enemies — they had never waged war with Rome and had been attacked by Popilius on this occasion even though they had not commenced any hostilities. This had resulted in the brutal treatment of the *peregrini*. However, more important still to the Senate was the damage Popilius might have done to the strategy Rome was seeking to achieve in its foreign policy. This strategy can be seen as the provision of legal protection for allies, who had suffered at the hands of Roman generals, in the expectation of thereby establishing new alliances or maintaining the loyalty of already friendly nationals.

Added to this was the fact that the Statellates had invoked *deditio*. Livy tells us that the Statellates:

> "surrendered without, indeed, making any stipulation (*dediderunt sese nihil quidem illi pacti*); nevertheless they had hoped that the consul would treat them with no greater severity than former commanders had shown."[25]

What did *deditio* entail?

The expression Livy uses of the action of the Statellates — *dediderunt sese nihil quidem illi pacti* — amounted to simple *deditio*, which meant unconditional surrender.[26] There is no mention of *fides populi Romani* or similar terminology. Nevertheless, to the Romans, there was little difference between unconditional surrender and surrender to the faith of a victor.[27] Unconditional surrender involved those capitulating (*dediticii*) giving up everything and being left with nothing.

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[23] No doubt from the sale of the Statellates (probably the 700 to whom Livy refers) as slaves with their effects. Livy 42.8.5.

[24] Livy 42.8.7–8.

[25] The Statellates were probably looking, optimistically, to the precedent of Cornelius and Baebius, the consuls in 180, who resettled without bloodshed at Samnium the Ligurian Apuani, who had surrendered. Livy 40.37.8–38.9. Richardson (1986) 109.

[26] Eckstein (1995) 271. See also Gruen (1982) 53.

[27] Polybius 20.19–10 makes this clear in his discussion of the confrontation between M. Acilius Glabrio, consul 191, and the Aetolian League ambassadors. They had deceived themselves into believing that by surrendering to the faith of Rome they would receive better treatment. Glabrio rapidly disabused them of this misconception.

Livy records the hoary terms of the ritual, which the *imperator* to whom surrender was made, was wont to repeat to the *deditícii*.[28] Polybius, confirms that any surrender to Rome in 173 and subsequent years would have attracted the consequences of the ritual Livy describes.[29]

The final declaration by which the Roman commander accepted a surrendering nation — *at ego recipio*[30] — might be seen as an implied promise that if the *dediti* behaved properly, they would not suffer extreme penalties.[31] Otherwise Eckstein asks, what was the point in invoking *deditio*? [32] However, while the declaration may have had moral force, it was not a guarantee. The question of what constituted moral force in such a situation was a matter for the more powerful party. That indeed was the Roman *habitus*.

Deditio was not founded in law. It had no means of enforcement; nor was it based on any custom between nations (*habitus*).[33] It was a procedure frequently but not universally applied:

> "The Romans had a custom which they called *deditio*. This ritual, by which a foreign state surrendered unconditionally to the power of Rome, often occurred after defeat by Roman forces or when a polity sought the protection of Rome from the threat from a third party."[34]

There was no contract and the *deditícii* had no enforceable rights.[35]

Ultimately and tragically, the well-being of the *deditícii* was a matter for the general.[36] In his treatment of the Statellates, Popilius went beyond the traditional consequences of *deditio*. Whilst the Statellates, their bodies, their arms and all

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[28] Livy 1.38.2. Eckstein (1995) 253 notes that the discovery in Alcantra (Further Spain) in the 1980s of a bronze tablet describing the *deditio* of a Spanish people, called the Seano [censes], to the Roman commander, Lucius Caesius, at a date equivalent to 104 BC, shows that Roman generals were prepared to give credence to the *deditio* ritual.

[29] Polyb. 36.3.9.

[30] Livy 1.38.2.

[31] Eckstein (2009) 262.The Alcantara tablet records that the tribe which made a *deditio* to L. Cassius in 104 were permitted, after surrendering certain possessions, to go on their way. The Statellates were not so blessed.

[32] Eckstein (2009) 261.

[33] Eckstein (2009) 254.

[34] Eckstein (2009) 253.

[35] Eckstein (2009) 266.

[36] Eckstein (2009) 254; 261.

their property as *deditícii* belonged to the Roman people, whilst each individual *deditícius* was *nullius certae civitatis civis*,[37] the terms of the ritual nevertheless did not contemplate enslavement. Popilius clearly declined to implement the *deditio* ritual despite the pleading of the Statellates.[38]

In considering the attitude of the Senate, we must remember that the family and friends of Popilius in the senatorial order would have been a minority but one with a powerful voice and substantial influence both in the *Curia* and the assemblies. The majority of the Senate was enraged on receiving Popilius' brazen communication detailing his crushing and brutal victory over the Statellates, no doubt in expectation of a triumph on his return to Rome. The Senate expressed its disquiet in the strongest terms prior to decreeing the reparations required of Popilius:

> "The action seemed outrageous to the Senate, that the Statellates, who alone of the Ligurians had not made war on the Romans, who even on this occasion had been attacked although they had not begun a war, who had entrusted themselves to the good faith of the Roman people, should have been harassed and destroyed with every form of extreme cruelty, that so many thousands of innocent persons calling upon the Roman people for protection should have been sold …a fate which established the worst possible precedent and issued a warning that no one should ever dare in the future to surrender — and, scattered in every direction, should, though at peace, be slaves to those who had once been downright enemies of the Roman people." [39]

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[37] Ulpian *Epit*. 20.14

[38] Popilius' conduct reflected the early concepts of a *provincia* as a military campaign in which it was expected that a commander would slaughter Rome's enemies and devastate and plunder their lands. Success would provide captives and spoils making him a candidate for the splendor of a triumph. Drogula (2015) 273.

But the essential difference, as we have noted, was that Popilius was not, on Livy's authority (42.8.5–7), dealing with an acknowledged enemy, despite his special pleading.

[39] Livy 42.8.5–7.

The Senate was appalled at the treatment Popilius meted out — presumably the torture and butchery of those people who were not enslaved.[40] It is significant that Livy records that the Senate over and over again referred to the Statellates as a surrendered people. This implies a senatorial anxiety that this status necessitated different treatment by the general.[41]

Mature consideration suggests that the underlying concern was not so much humanitarian as diplomatic. Forging or maintaining alliances was what Rome required having regard to the protracted wars in which, as noted above, Rome had become enmeshed. The Senate was now faced with a major threat to its foreign policy, namely, the potential for doughty enemies or peoples who had remained quiescent (as with the Statellates) to decline to surrender to Rome, for fear of maltreatment.

Our sources suggest that Rome's adversaries when subjugated in the field were prepared to surrender unconditionally.[42] The Senate knew that the Statellates had surrendered and was, arguably, outraged because Popilius had declined to apply and observe the *deditio* ritual.

There were distinct advantages in the ritual for Rome, as the Senate knew. There was the prospect of the cessation of hostilities, which released military resources for other theatres. There was the relief for Rome's stretched economic resources resulting from its extended provisioning lines.[43] And there was the advantage of acquiring for citizen and Latin resettlement, without further military effort, all the lands and chattels of the *dediticii* in accordance with the ritual.[44] Polybius and Livy indicate that the result of the ritual was to strip the *dediticii* of all their property and their political rights, but not to endanger their lives.[45] Indeed, were this not so, the other well-known circumstance when recourse was had to *deditio*, namely when a nation sought the protection of Rome against a powerful

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[40] Livy 42.8.5.

[41] Livy 43.8.1–2; 5–6; 8; 21.3; 21.4; 5.

[42] Livy 40.37.8–38.9. Richardson (1986) 109.

[43] This must always have been the case with campaigns relatively distant from Rome. As noted, Rome was dealing with insurgencies to the west in Sardinia, to the north and northwest in Liguria and the Spains and in the East in Illyria, which would involve strains on the security of supplies to armies in outlying posts. These war zones were hardly on Rome's doorstep by the standards prevailing at the time.

[44] Livy 42.4.3–4.

[45] Livy 1.38.2; Polyb. 36.3.9.

neighbour, would have been pointless. For example, the decision of the Coryreans in 229. Therefore, although, those who surrendered might be enemies,[46] the limitation of *deditio* to the terms described by Livy and Polybius might have the potential to turn these *dediticii* into allies of Rome,[47] again an advantage.

Whilst the Senate probably saw *deditio* as a diplomatic tool, the problem was that commanders in the field did not always observe its dictates. As we have seen, *deditio* was not accepted practice. There were other ruthless commanders, like Popilius, who paid scant respect to *deditio* in the savagery they showed to *dediticii*.[48]

The Senate, on the motion of the praetor, A. Atilius Seranus, decreed that Popilius should reinstate the Ligurians to their liberty and should use his best endeavours to recover their property and restore their arms as soon as possible; and that he should not depart from his province before he restored to their country the Ligurians who had surrendered. The decree also warned Popilius that he was not to leave his province until he had restored the Ligurians to their homes.[49] Its conciliatory terms placed the Statellates in a better position than they might have been under the ritual.[50]

However, Popilius defied the decree, thus emphasising the frailty of the Senate. Compliance with its decree depended on respect for its *auctoritas*. Popilius clearly had none. A yawning gap thus developed between the Senate's wish to maintain respect for ill-used *peregrini* and the *deditio* ritual, on the one hand, and Popilius' concern for his own reputation on the other.[51] Popilius returned to Rome,

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[46] Other than those seeking Rome's protection against powerful foes.

[47] The benefits of maintaining strategic alliances with allies. The availability of their cities as havens for Roman armies far from home was an inestimably boon. In 177 Sempronius after a victory over the Sardinians Ilienses and Balari could billet his men in winter quarters among cities of Roman allies. Livy 41.12*: "Victorem exercitum in hiberna sociarum urbium reduxit."* The alternative, in the middle of bleak northern winters away from Rome, would have been to take possession of what remained of enemy cities. Indeed, Popilius availed himself of winter quarters at Pisa for his legions before storming down to Rome. Livy 42.9.2.

[48] Exemplified by the atrocious conduct of C. Lucretius Gallus at Haliartus (Livy 42.63.10), S. Sulpicius Galba with the Lusitanians *(App. Hisp. 59)* and Caius Marius at Capsa in Numidia. *(Sall.t Iug. 91. 6–7.)*

[49] Livy 42.8.8.

[50] The restoration of arms, property and lands, in particular, which they would have lost as *dediticii*.

[51] Popilius epitomised the Roman military aristocrat who regarded it as his right to enhance his personal prestige and add to his personal wealth by exploiting the *peregrini* without conscience,

demanded recognition for his successes against the Statellates and insisted on the repeal of the decree. He sought to justify his conduct on the basis that the Statellates were enemies.[52] This did not impress the Senate. There persisted a strong body of senatorial opinion, which reproached his mistreatment and recognised the importance of maintaining the benefits of *deditio*.[53] These views were made manifest by a senatorial determination to reaffirm the terms of the decree in 172.[54]

Yet, the Senate faced resistance in 172 from Caius Popilius.[55] He threatened to veto any re-presentation of the decree. The Senate reacted as vigorously as it could, bearing in mind its limited powers. It reaffirmed its commitment to the underlying purpose of the decree. It sought to exercise what can be seen as its fundamental administrative powers,[56] which could not so easily be ignored as they affected consular aspirations. A stand-off eventuated with the consuls refusing to proceed to their province.[57] The mood of the Senate remained the same, a determination to secure the passage of the decree.[58]

Then, Marcus attacked the Statellates again and in dispatches to Rome boasted that he had killed 6,000 of their people.[59] The Senate reeled at this assault on a people who had surrendered. Had Popilius enforced the *deditio* ritual in 173 the present problem might never have arisen. Now his latest action had exacerbated relations with the Statellates.[60] In response, the Statellates had taken up arms in retaliation, thereby making the Senate's point about *deditio*. And, as with Popilius' first assault on the Statellates, this attack was illegal having been

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the ultimate prize being a triumph and a comfortable retirement. In Popilius' case his personal dignitas was to be embellished by a censorship in 159.

[52] Livy 42.9.3.

[53] Livy 42.9.3–6.

[54] Livy 42.10.10. The reaffirmation of the decree was required as it could no longer apply to M. Popilius since he was not a consul but proconsul in 172.

[55] The consular brother. He was elected with Aelius Ligus as consul for 172.

[56] Polyb. 6.15.4.

[57] Livy 42.10.11–15.

[58] Livy 42.21.1.

[59] Livy 42.21.2. The Senate could strictly have sheeted home the blame for this outrage to C. Popilius and Aelius for their refusal to go to Liguria. Their presence would have subordinated Marcus Popilius, as proconsul, to their jurisdiction as consuls and properly thereby checked his conduct.

[60] Livy 42.21.2.

instigated without the approval of the Senate or the people.[61] There had been no compliance with its decree and its policy aspirations of building alliances had been further undermined.

The Senate had exhausted its armoury. If it was to inhibit further inroads on its policy position, help was required. The Senate approached the tribunes. At the behest of the Senate, two tribunes moved to implement the senatorial purpose with two initiatives. The tribunes acted because they sensed the harmony of the Senate.[62] They threatened the consuls with a fine if they did not go to their province.[63] Then they submitted to the Senate a *rogatio* for approval whereby the Senate was to decree on oath a magistrate to investigate and punish the person who was responsible for the enslavement of the Statellates, unless they were liberated by a given date.[64] The Senate authorised the *rogatio*, which was passed by the people. Significantly, Popilius was not named as the accused in the *rogatio*.[65] Thereafter the Senate appointed C. Licinius Crassus, the *praetor urbanus*, to undertake the inquisition. The terms of the *rogatio* indicate that the Senate was pivotal to the establishment of this praetorian investigation, which, in reality, was a means of enforcing its decree,[66] and they were specific.[67]

Apprehensive about prosecution under the Marcian law, Popilius delayed his return. The Senate maintained its hostility and was joined by the people.[68] Only when faced with the prospect of a tribunician *rogatio* for his trial *in absentia*, did Popilius reluctantly return. The senatorial contempt was manifest.[69] Pending trial,

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[61] Livy 42.21.3.

[62] Livy 42.21.4: "*Hoc consensu patrum accensi.*"

[63] Livy 42.21.4.

[64] Livy 42.21.5.

[65] Bauman (1983) 201 suggests that this was because the ensuing *lex* would possibly be invalid as a *privilegium* contrary to the Twelve Tables prohibition.

[66] To those who suggest that the Senate could have passed a *senatus consultum* directing the consuls to establish a tribunal the answer would be that the Senate could have no confidence in the consuls complying with any decree. C. Popilius had already shown his colours by refusing to allow the initial *senatus consultum* to be re-adopted and Aelius, the other consul, was in his pocket. The Senate could assume that any effort on its part would be thwarted. Livy 42.10.10–1.

[67] The terms of the enquiry (*quaestio*) under the Marcian law did not adumbrate an offence. They were directed to the issue of enslavement. This was not a general enquiry into Popilius' overall behavior towards Statellates — his provocation of an unlawful war and its completion involving the torture and slaughter of the opposing forces. The unlawful conduct may well have justified a charge of *perduellio*.

[68] Livy 42.22.2: "*adverso senatu, infestiore populo*".

[69] Livy 42.22.4–5: "*Hoc tractus vinculo cum redisset, ingenti cum invidia in senatum venit. Ibi cum laceratus iurgiis multorum esset*."

the Senate passed a decree restoring the liberty of those Ligurians who had not been enemies since 179.[70] By the decree they were also granted land across the Po under C. Popilius.[71] The consul thus ultimately submitted to the Senate's authority, but only in the light of his brother's exposure to punishment in a tribunician tribunal.

The senatorial objective had required the backing of the tribunes. Even then it was not fully achieved. Livy records that in 172 C. Popilius gave an account of his attainments among the Ligurians. However, an unhappy Senate demanded why he had not liberated all the Ligurians crushed by his brother's injustice.[72] The Senate remained concerned to present to *peregrini* a picture of a Rome, which would act decisively to remedy provincial abuses.

M. Popilius was put on trial on two occasions under the Marcian law. On the third occasion Licinius fixed the next hearing for the day on which the new magistrates entered office so that he would not have to adjudicate further. It was the *gratia* of the consul C. Popilius and the powerful entreaties of the *gens* Popilii which overwhelmed the judgement of the praetor[73] and led him, disgracefully, to abandon his duty.[74] Livy acknowledges it: "*ita rogatio de Liguribus arte fallaci elusa est*".[75]

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[70] It has been suggested that Popilius' purpose may have been to secure the supply of agricultural labour for *latifundia* in Gaul and Liguria. Bauman (1983) 202 adverts to the possibility and the arguments of the scholarship. If so, the demands of the Senate for reinstatement of the enslaved must have required their repurchase from the estate owners

[71] Livy 42.22.6–7 remarks that many thousands of persons were thus freed, and after they had been led across the Po, land was allotted to them. It seems curious that Caius Popilius was given this role when he had so strongly resisted the first *senatus consultum*. He may have believed that the land allocations would ameliorate any penalty particularly as the liberations and allotments would do much to reinstate the Ligurians, and that the *fons et origo* for the prosecution would have therefore disappeared.

[72] Livy 42.28.2–3. Livy's account is inconsistent in that initially he states that the *senatus consultum* required the praetors Gaius Licinius and Gnaeus Sicinius to carry out the task of liberating the enslaved Ligurians.

[73] Livy 42.22.7: "*gratia consulis absentis et Popiliae familiae precibus victus*".

[74] A praetor to whom an investigation such as this was entrusted might very well be frustrated at the inroads an enquiry might make into his time in his assigned province from which he looked to gain. This time might be seriously eroded by a lengthy trial and a long period of travel to his province. Thus we perceive a personal and non-political, but hardly meritorious, reason for a praetor to seek to escape his judicial obligation.

[75] Livy 42.22.8.

3.2. C. Cassius Longinus — 171–170[76]

In 170 the Senate received delegations from Alpine Gallic and Histrian tribes[77] complaining of Cassius' behaviour.[78] The first delegation described how Cassius had ravaged the land of Alpine tribes and their allies and had enslaved many thousands of persons.[79] The envoys from the Carnians, Histrians and Iapydes [80] told the Senate that Cassius had demanded guides to show him the way to Macedonia, where he was leading his army.[81] In the middle of the return journey, Cassius had traversed their lands. Slaughter and pillage and burning had occurred everywhere. Livy records the rebuke of the envoys: *"nec se ad id locorum scire, propter quam causam consuli pro hostibus fuerint*".[82] The implication is that these nations, unlike the Statellates, dealt with Rome as existing allies. They made use of diplomatic procedures to vent their fury. They had not retaliated in kind and *deditio* did not arise.

Thwarted in his attempt to reach Macedonia and thereby to enhance his prestige and produce booty for him and his men, Cassius sought to provoke hostilities with these allies in a vain effort to make up for his lack of material success in his province.[83] The Senate was horrified by these accounts of the foolhardy and self-interested conduct of Cassius.[84] He had left his province for that of his fellow consul, he had exposed his army to grave risks in unknown terrain and he had left

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[76] Cassius was consul in 171 with P. Licinius Crassus, the conqueror of Perseus at Phalanna. Cassius had been allotted Gaul as his province and Licinius had the prize of Macedonia and the war.

[77] Livy 43.5.1; 3.

[78] Livy 43.5.1–2. Cassius had succeeded in having himself commissioned as a tribune of the soldiers for 170 under the *consul*, Aulus Hostilius in Macedonia. 43.5.1. He would have been appointed by one of the higher magistrates, most likely, Hostilius, as the *tribuni militum* were, because of the Macedonian war, chosen by the consuls and praetors and not by vote of the people. Livy 42.31.5.

[79] Livy 42.5. 2.Having regard to the similar actions of Popilius, it may be taken that a sale was involved and that Cassius profited.

[80] Livy 43.5.3.

[81] Cassius marched his troops out of his Gallic province, without senatorial approval and tried to make his way to Macedonia, and the war, through Illyricum. Livy 43.1. 4–5. Envoys from the Aquileians told the Senate that Cassius had requisitioned grain from them and mountain guides. The Senate reacted furiously. By *senatus consultum*, the Senate appointed three senatorial envoys to overtake Cassius and warn him to refrain from warlike designs without approval. Livy 43.1. 7–9; 10–11.

[82] Livy 43.5.4.

[83] Livy 43.2.4; 8–11.

[84] "*Enimvero senatus indignari*." Livy 43.1. 9.

open and unprotected the passes into Italy from the northeast and the road to Macedonia.[85]

In 183, the Senate had recognised the need for good relations when it agreed to restore the arms and property of the Transalpine Gauls, who had built a town near Aquileia[86] but who then surrendered in face of the risk of war.[87] The Senate showed sensitivity towards the Gauls indicating a concern to mitigate further threats. Now protection of friendly relations became even more crucial with Cassius' folly. There could be no doubt as to the importance of protecting Rome's northern borders. The Senate had to placate these nations. An insurgency on Italy's northern frontier would have been disastrous.

It was only Cassius' absence on military service and his status as a magistrate that precluded him from being tried for his conduct.[88] The Senate invited the Gauls to bring accusations against Cassius personally on his return from Macedonia. In this event the Senate claimed it would take cognisance of the proceedings and see to it that reparations were made.[89] How could the Senate have effected reparations, bearing in mind that, save in the limited cases described by Polybius,[90] the Senate was never a court? To the extent that the brutalities wrought by Cassius were committed in Italy, then the Senate, in accordance with Polybius' dicta, may have been able to deal with accusations. Again had the Gauls renewed their request on the return of Cassius, the Senate could have decreed that the tribunes follow the procedure adopted with Popilius, in the hope that the praetor would perform his duty, Alternatively, it may have arranged a tribunician prosecution of Cassius before the people for *perduellio*. Cassius' actions in abandoning his province, leaving his country exposed, forcibly exacting provisions for his venture from allies and possibly declaring his own war on the Macedonians would surely have

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[85] Livy 43.1. 9.

[86] Livy 39.22.6; 39.54 passim.

[87] Livy 39.54.9.

[88] Livy 43.5.5. The Senate denied knowledge of the opprobrious conduct and asserted its disapproval. This accords with the Senate being totally oblivious of the earlier foolhardy actions of Cassius in trying to march from Gaul to Macedonia, stung by the successes of his rival consul. Livy 43.1.7–12.

[89] Livy 43.5.6: "*cognita re senatum daturum operam uti satisfiat*".

[90] Polyb. 6.13 lists all crimes committed in Italy requiring a public investigation, such as treason, conspiracy, poisoning, or willful murder as the only jurisdiction controlled by the Senate.

been enough to allow a persuasive argument for *perduellio* to be made.[91] The Senate may nonetheless have been sensitive about exposing the shortcomings in its ability to prosecute errant generals to allied *peregrini* and have been grateful for the enforced delay.[92]

Geographically, these nations stood on the route to Macedonia and their goodwill was paramount. The Senate expeditiously compensated the envoys and their regal principals with gifts pending the return of Cassius.[93] It decreed that distinguished senators be sent to the allies to apprise them of the gifts and the offer to entertain petitions for the prosecution of Cassius. The Senate did not decree that the enslaved be liberated nor was any new land or compensation forthcoming. Yet, it had negotiated terms, which we must assume were satisfactory to the leaders of the complainant nations, with envoys at the highest level and could expect that the leaders would maintain their loyalty.

3.3. Delegations from the two Spains

In 171, the Romans remained locked in conflict with Perseus although they were heartened by the victory of Licinius at Phalanna. The Senate thereafter entertained a delegation from the Spanish provinces.[94] The envoys complained of the greed and arrogance[95] of certain Roman praetors in Spain, who had been administering the provinces over the previous seven years.[96] Importantly, they pleaded their status as allies.[97] A responsive Senate decreed that Lucius Canuleius appoint *recuperatores* to investigate what was due to the Spaniards.[98]

The *senatus consultum*, which succeeded Canuleius' abandonment of his role, indicates the nature of the complaint of the Spaniards. From Livy's account, we

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[91] The ablative absolute *cognita re* does not imply necessarily that it was the Senate, which would take cognisance of these complaints.

[92] It may have hoped that the deferral would dampen the enthusiasm of the distant *peregrini* to journey to Rome to air their grievances.

[93] Livy 43.5.8.

[94] The Spanish provinces, Hispania Ulterior and Hispania Citerior had been recognised from 197. The arrival of the delegation occurred soon after the despatch of the Roman envoys to recall C. Cassius Longinus (cos.171) from his madcap scheme to march his army to Macedonia through Illyria from his province in Gaul. Livy 43.2.1.

[95] Livy 43.2.1: "*avaritia superbiaque conquesti*".

[96] The defendants were the praetors Marcus Titinius (Hither Spain in 178), Furius Philus (Hither Spain in 174) and Marcus Matienus (Further Spain in 173),

[97] Livy 43.2.2.

[98] He was the praetor, to whom Spain had been allotted. Livy 42.31.9.

deduce that the Senate forbade any Roman governor from commuting, at an arbitrary price, grain otherwise supplied for his army. Nor could a governor set a discretionary price for the grain tithe, which the Spaniards were required to supply for feeding Rome.[99] The Senate had readily accepted that money had been extorted — *manifestum autem esset pecunias captas*.[100] Extortion lay in the sharp practices at which the *senatus consultum* struck.[101] For the Senate, the only issue for resolution was an assessment of what the Spaniards had lost.

Again, we note that the petitions struck a chord. Rome had been constantly involved in wars over the previous decade. Initial recognition and acceptance of the complaints of the Spanish allies would have served Rome's interests.[102] These were allies from both of the Spains. Therefore Roman influence and Spanish fealty thereto was obviously widespread, largely due to the actions of Ti. Sempronius Gracchus.

The resort to a *senatus consultum*, and the appointment of senators to assess the claims as *recuperatores*, indicates a concern of the Senate at the highest level to ensure recovery of what the Spaniards had lost. This would have given the allies confidence in Roman justice and helped to assuage unfriendly activity in inhospitable territories. It is possible as well that the Senate had in mind the iron and silver mines of Spain. If praetorian misbehaviour had occurred in areas where ores were minded for Rome, restoration of harmonious conditions, engendered by resolution of Spanish complaints, would be an important reason for the 171 tribunal.[103]

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[99] Livy 43.2.12.

[100] Livy 43.2.3.

[101] The governors probably expropriated all or part of the price for the commuted corn. Further, it is likely that the Senate determined a price for the grain to be supplied to Rome in which event the fixing of a discretionary price above this would allow the governors to pocket the difference.

[102] Richardson (1986) 112–113 argues that the establishment of alliances in the second quarter of the second century was down to the campaigns of Ti. Sempronius Gracchus and L.Postumius Albinus in 180–178 and the resulting pacts with various tribes after cessation of hostilities. He notes inscriptional evidence which indicates that Gracchus established friendly communities not only among the Celtiberians in Hither Spain but also outside his province in Further Spain.

[103] M. Porcius Cato as consul in 195 in Hither Spain restored the province to order — *pacata provincia* — arranged for the collection of revenue from the iron and silver mines and ensured the increasing wealth of the province. Livy 34.21.7.

The recourse to *recuperatores* revived a jurisdiction which had been used to resolve in the past disputes between Roman citizens and foreigners.[104] It is difficult not to conclude that the appointment of recuperatorial adjudicators was intended less as a means of judging praetorian behaviour in the Spains than as a means of assessing the claims of the provincials. The only decision required was to value the amount of the losses as the Senate had accepted that there had been extortion — *pecunias captas*.[105]

The terms of the first *senatus consultum* required Canuleius:

1. to appoint five *recuperatores*, of senatorial rank, for each of the praetors from whom the Spaniards were seeking recovery; and
2. to allow the Spaniards to choose their own advocates (*patroni*), all in the interests of allowing the *socii* to reclaim their losses.

Again, the fact that the Senate ordained by *senatus consultum* that men of senatorial rank be appointed as *patroni* indicates the importance the Senate attributed to the cases.

The Spaniards selected four distinguished *patroni* from the senatorial order, three of whom had had military experience in Spain, namely, M. Porcius Cato, P. Cornelius Scipio, L.Aemilius Paulus [106] and a fourth, G. Sulpicius Gallus

The claim against Marcus Titinius was first taken up. The trial was twice adjourned. On the third hearing Titinius was acquitted.[107] A dispute then arose

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[104] Drogula (2015) 277 argues that this revival was not a new policy intended to improve relations with allies. But the dismal failure of the Licinian *quaestio* would have been an embarrassment to the diplomatic policy of the Senate for which we have argued. It must have driven the Senate to look to other means for meeting the entreaties of the Spaniards and what better for propaganda than the recuperatorial adjudication at senatorial level.

[105] Livy 43.2.3.

[106] Cato enjoyed considerable success as consul in Hither Spain in 195 (n.109). His skilled and courageous military tactics secured victories over the Spanish enemies, eventually resulting in all Spain on the northeastern side of the Ebro being subdued. Livy 34.16.7. Further Spain was allocated to Cornelius as praetor for 193. He fought battles beyond the Ebro and with considerable success culminating in a major victory over the Lusitanians as *propraetor* near the town of Ilipa. Livy 35.1.5–12. Aemilius was allotted Further Spain for 191 as praetor and as *propraetor* in 190. Livy 36.2.6.

[107] Livy 43.2.6. *Bis ampliatus*. The word *amplio* means, in the judicial context, the adjournment of the case to allow the judges to make further enquiries. Lewis & Short (1984) 110. This confirms the inquisitorial function of the *recuperatores*. Briscoe (2012) 392 asserts that the expression refers to the situation where the case is postponed to a fresh hearing because a majority of the adjudicators could not agree with one or more saying *non liquet*.

between the deputations from the two Spains, presumably as to representation before the *recuperatores.*[108] Livy does not mention whether or not this was through disappointment with the representation by the *patroni* in the case of Titinius. Proceedings were next brought by the people of Hither Spain against P. Furius Philus and by the people of Further Spain against Marcus Matienus. Serious charges were made against them — *"gravissimis criminibus accusati ambo ampliatique*".[109]

The cases were adjourned and did not proceed further. By the adjourned day the accused had decided to flee into exile.[110] The nature of the proceedings is obfuscated by Livy's caustic remarks after reporting the flight:

> "There was a rumour that the advocates would not allow accusations against men of rank and influence (*nobiles ac potentes*); this suspicion was increased by Canuleius the praetor, who gave up this investigation (*omissa re*), began to hold a levy, and then suddenly left for his province, so that no more men should be assailed by the Spaniards."[111]

The role of Canuleius is puzzling. It was the *recuperatores* who adjudicated in the trials (*recuperatores sumpserunt*).[112] The praetor must have had some supervisory role. We may divine from this passage the seeds of the administrative rather than judicial role the praetor was to play under the extortion statutes.[113]

A close reading of the passage indicates that it is referring to prevention of any potential new trials of powerful men since the abortive trials of the three praetors had already occurred. The Senate wanted enquiries to be made by *recuperatores*

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[108] Cato and Scipio were preferred as *patroni* by the envoys from Hither Spain, Aemilius and Sulpicius by those of Further Spain.

Cato's successes in Hither Spain would have befitted him to represent these peoples

[109] Livy 43.2.6.

[110] Philus fled to Praeneste and Matienus to Tibur. This decision would not necessarily have protected the assets of the praetors which could still have been garnished under the *aquae et ignis interdictio* procedure and would not therefore be available to them in exile. Kelly (2006) 137. Neither city was far from Rome; life would not be hard and assets might be quickly conveyed there in anticipation of an adverse verdict.

[111] Livy 43.2.11.

[112] Livy 43.2.6.

[113] Essentially the superintendence of the proceedings, the confirmation of the verdict and its enforcement. This was the position under the *lex Acilia* and arguably, based on speculation from this passage, under the 149 law, which was the first extortion law.

into these innominate potentates who had presumably been involved in Spain. Unfortunately, Canuleius' resolve buckled. Powerful interests — *nobiles ac potentes* — "got at him" as they had with Licinius in 172. Both episodes illustrate the weakness of the judicial system as it then stood when the *gratia* of a group of *nobiles* could by devious means defeat the senatorial intent.

3.4. Publius Licinius Crassus and C. Lucretius Gallus in 171–170. Lucius Hortensius in 170.

P. Licinius Crassus was elected as *consul* for 171 along with C. Cassius Longinus. Macedonia, with the impending war against Perseus,[114] fell to Licinius, Italy to Cassius.[115] C. Lucretius Gallus was elected as one of the praetors for 171.[116] He commanded the fleet. Lucius Hortensius was elected as one of the praetors for 170 and succeeded Lucretius to the fleet.

3.4.1. Lucretius and Licinius in Greece

In the winter of 172/1 a Roman embassy, led by Q. Marcius Philippus, attempted to secure the adherence to Rome of various Boeotian cities, Rome not being fully ready for war.[117] Haliartus was steadfast in its commitment to Perseus and remained therefore an enemy.[118]

In 171, Lucretius lay siege to the city.[119] Haliartus having been taken, elders and the youth alike were slain;[120] about 2,500 soldiers who surrendered (*deditione facta*) were sold as slaves.[121] Clearly, Lucretius did not apply the *deditio* ritual Lucretius totally destroyed the city. Livy makes clear that he profited from the sack of Haliartus, which provides a strong motive for his behaviour.[122] Proceeding

[114] A *rogatio* representing an ultimatum to Perseus had been presented to the people by the consuls by order of the Senate and passed by the people. Livy 42.30.11.

[115] Livy 42.32.5. The lot placed Lucretius at the disposal of the Senate. Livy 42.31,9. Later he took command of the fleet. Livy 42.48.5.

[116] Livy 42.28.5.

[117] Livy 42.43–4; 42.46–7.

[118] Thisbe and Koronea also remained loyal to Perseus.

[119] Livy 42.63.3.

[120] Livy 42.63.10.

[121] Livy 42.63.10.

[122] Livy 43.4.6–7.

to Thebes, he then sold the men and families of the party who had supported Perseus into slavery.[123] He offered all their property to the pro-Roman faction.

The conduct of the consul, Licinius, towards unnamed Greek cities was likewise savage. He ransacked and razed the cities and imprisoned and sold the inhabitants into slavery.[124]

In 170 the Senate and the people denounced both Livinius and Lucretius for the ruthless and rapacious manner in which they had conducted the campaigns in Greece in comparison to the conduct of an unnamed praetor who without bloodshed had tamed warlike tribes in Spain.[125]

Zonaras confirms the account of the Epitimator.[126] He explains that that the people were furious and imposed a fine on Lucretius. It can be inferred from Zonaras that Lucretius was prosecuted in before the people at the instance of the bench of tribunes in 170 when he was no longer protected by his *imperium*. It is likely that the Senate was party to the initiation by the tribunes of these proceedings.[127] Together they must have resolved upon the question to be put to the people which, if proven, would expose Lucretius to a fine.[128] Indubitably, from the communications with the Senate over the Marcian r*ogatio*, the people would have been aware of, and have been sympathetic to, the diplomatic intent of the Senate. The people would have understood that a prosecution of Lucretius, at the behest of the Senate here as in the case of the Marcian *rogatio*, would assist the policy of the Senate in which the people were complicit through their involvement with the prosecution of Popilius and Lucretius.

Zonaras also contends that the people effected the liberation of captured cities (presumably Haliartus and Thebes) and bought back from the purchasers the

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[123] A fair reading of Livy's account would suggest that the Thebans also surrendered. Livy 42.63.12.

[124] Livy *Per*. 43.

[125] Livy 43.4.6. Unnamed by Livy, but probably L. Canuleius Dives, who had allowed the Spanish praetors to escape.

[126] Zonaras 9.22.6. Livy *Per*. 43.

[127] The Senate's lack of judicial power is again exemplified. The Senate had aligned itself with the people in expressing mutual disgust at the conduct of Licinius and Lucretius. The Senate would have called upon the tribunes to initiate proceedings as it did with the prosecution of M. Popilius Laenas in 172.

[128] The grounds for the fine must have been the butchery and enslavement of the enemy possibly following the claims made against Popilius. There was no statutory basis for these allegations.

inhabitants who had been sold into slavery and then were in Italy.[129] As the Senate controlled the purse strings for public expenditure, Zonaras' comment is inaccurate. It must be that it was the Senate which bought back the liberty of the enslaved as a part of its function to intervene in diplomatic affairs. The Senate may have resorted to the fine imposed on Lucretius to meet the costs of the liberation of the Haliartans and Thebans. The Senate thus resorted to an executive power, although it lacked judicial power, in an effort to shore up its relationship with *peregrini* which had been so badly damaged by these *imperatores.*[130] Further, it is possible that these enslaved people had been sold for employment on *latifundia* in Italy and were part of a scheme of the generals at the time to enrich themselves. The self-seeking aims of these men to line their pockets was totally at odds with what the Senate was seeking to achieve.

A further reason for volunteering the prosecution may have been plebeian recognition that cessation of hostilities by the implementation of *deditio* and fortification of Roman military endeavours by the maintenance of existing or new foreign relationships would be very much in the plebeian interests. For from among the plebeians came the conscripts for the legions who were exposed to the perils of combat. Anything which eased that burden would thus have been welcome.

The Senate would be concerned to press action with the help of the people in the hope that the reinstatement of the Haliartans and the fining of Lucretius would assuage the feelings of the *peregrini*, and make them better disposed towards Rome, (although they were former enemies) as potential allies.

Notably, the Senate did not adopt the precedent of the Marcian court. There was no *rogatio* for the assignment of the case to a praetor for investigation. The Senate had learnt from the experiences with the absconding praetors in 173 and 171.

3.4.2. Hortensius in Abdera — 170

In 170 the Senate received envoys from Abdera in Crete complaining about the praetor, L. Hortensius.[131] He had succeeded to the command of the fleet from

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[129] Zonaras 9.22.6.

[130] The restoration of the rights and property of the surviving peoples of the captured cities might change their allegiance from Perseus to Rome and in the long run advantage the Roman war effort.

[131] Livy 43.4.7 implies us that his excesses of brutality put those of Lucretius in the shade.

Lucretius. He had demanded 100,000 denarii and 50,000 pecks of wheat to be delivered.[132] The inhabitants of Abdera sought a delay so that they might send envoys to the consul Aulus Hostilius and to Rome. In response to this reaction, Hortensius attacked Abdera, beheaded the leading men and sold the rest of the people into slavery. The Senate, sympathetic to these allies, expressed outrage.[133] It sent two envoys to restore the freedom of the people of Abdera. The envoys were instructed pursuant to a *senatus consultum*, to inform Hostilius, the consul and Hortensius that an improper war had been waged against the people of Abdera and to demand that all who were enslaved should be set free.[134] Presumably the Senate expected that the generals would meet the cost of restoring the enslaved Abderans. However, as with the Haliartans, the Senate may eventually have accepted responsibility for liberating these peregrines in the interests of publicising its policy.

3.4.3. Lucretius in Chalcis — 171 and Hortensius in Chalcis — 170

Again in 170 the Senate received a delegation from the Chalcidians, allies and friends of the Roman people.[135] Micythion, their chieftain, stressed the good offices rendered by the Chalcidians for the Roman armies and generals. He contrasted these with the greed and cruelty[136] perpetrated by Lucretius as praetor (in 171) and continued (in 170) by Hortensius.

Lucretius had plundered the temples of all their finery and transported it to Antium in ships under his command, sold Chalcidians into slavery and despoiled the possessions of the allies of Rome.[137] As for Hortensius, he was using the homes of the *socii* for the accommodation of a rabble of his sailors, in summer as well as winter, thereby exposing the inhabitants to the reckless and dissolute behaviour of these men.[138]

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[132] Livy 43.4.8–10. These provisions were required of the allies for the war against Perseus.

[133] "*Indigna res senatui visa*." Livy 43.4.11.

[134] Livy records the events summarised in this Section 3.4.2 in his account at 43.4.7; 8–10;11;12–13.

[135] Livy 43.7.5–11; 8.6.

[136] Livy 43.7.8: "*C. Lucretius .....praetor Romanus superbe avare crudeliter fecisset.*"

[137] Livy 43.7.10: "*fortunas sociorum populi Romani direptas esse et cotidie diripi*".

[138] Livy 43.7.11.

The plight of the Chalcidians and the people of Abdera must have been particularly galling to the Senate as they were loyal allies.[139] By *senatus consultum*, the Senate demanded that Lucretius present, and explain, himself. Again, the limitations of the senatorial powers were exposed. Verbal attacks from his peers were soon subsumed by action by two tribunes.[140] Livy emphasises the superiority of their powers against those of the Senate.[141] The circumstances were similar to Popilius' case. There the tribunes intervened because they were encouraged to do so by the apparent consensus on the part of the Senate. Here the tribunes intervened because they observed the unrequitable frustration and anger of the Senate over Lucretius' conduct.[142] They were following what they sensed to be the mindset of the Senate, which lacked the armoury possessed by the tribunes. That the Senate allowed the tribunes to upbraid Lucretius in the Senate suggests complicity of design.

Noticeably, the tribunes took the case straight to the people's assembly. They did not tarry, unlike the case of Popilius, with a *rogatio* to set up a praetorian court to try Lucretius. No doubt the fallibility of praetorian judgement still rankled. They indicted Lucretius before the *iudicia populi*.[143] The unanimous decision of the 35 tribes was that Lucretius be fined one million asses, indicating the scale of public opinion against his conduct.[144]

Meanwhile the Senate, lacking coercive power with which to impress the allies, sent a missive to Hortensius demanding that he should act promptly to restore the freedom of those who had been enslaved. The Senate also emphasised that no sailors, other than captains, should be quartered in private houses. Again we may suggest that the Senate may have had recourse to the fine imposed by the tribes on Hortensius to secure the liberation of the Chalcidians, assuming that Hortensius ignored the directive.

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[139] Livy 43.7.5–6.

[140] Livy 43.8.1–2.

[141] Livy 43.8.2: "*graviores potentioresque accessere accusatores*". They had greater weight and authority because they could initiate and prosecute proceedings in the *iudicia populi*, a power which the Senate lacked.

[142] Livy 43.8.2.

[143] Livy 43.8.3.

[144] Livy 43.8. 9–10.

As with Popilius, the Senate relied on Hortensius obeying its decree to restore those sold to freedom. The *senatus consultum* rested solely on the moral authority of the Senate for its enforcement and exposed the limits of its power. The decree contrasted starkly with the coercive power of the people's tribunes, which resulted in a successful condemnation of Lucretius. Despite this, the Senate still remained optimistic and committed to its policy of maintaining its alliances and negotiating new peregrine relationships with all means at its disposal.

Nevertheless, the behaviour of the praetors did awful damage to a loyal ally. It must have created apprehension in the minds of all *socii* who became aware of the misconduct. It ranked as a diplomatic disaster equalled only by the performance of Hortensius in Abdera.

3.5. L. Aemilius Paullus in Epirus

In 167, the army of Aemilius plundered the rebellious cities of Epirus. Remarkably, this assault was ordained not by the *imperator* but by decree of the Senate. In the result, 70 cities were laid waste and some 150,000 Epirotes taken as war captives.[145] This decision at first seems inconsistent with the policy of the Senate for which we have argued. However, it is plausible that the motive for the attacks was economic, namely to replenish a depleted slave population on which Roman society was to become more and more reliant. Indeed, the agricultural system developed in the second century demanded a ready supply of slave labour.[146]

A political rationale for the enslavement justified on the basis of the conduct of the Epirotes faces difficulties. The Epirotes "took practically no part in military operations" and had been forced into war with Rome; the real enemy, the Macedonians and the Illyrians suffered relatively light sanctions.[147]

Livy records that in 174–173 a severe epidemic seized Rome and that the deaths were principally among the slave population, particularly those working in the country, as it was bovine borne.[148] Moreover, as has been noted, the release from

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[145] "The greatest slave-hunting operation in the history of Rome." Ziolkowski (1986) 69 with the sources quoted at 69 note 3.

[146] Ziolkowski (1986) 73.

[147] Ziolkowski (1986) 69.

[148] Ziolkowski (1986) 76. Livy 41.21.5–6.

bondage of those wrongly enslaved by the likes of Popilius, Cassius and Lucretius also reduced the slave population. Many of the liberated may have been working in the great estates of the wealthy senators and *equites* in Italy. These affluent landowners would have particularly felt the pinch with a reduction in available slaves to tend their *latifundia*. So, after Aemilius' victory at Pydna, the Senate possibly reasoned that this depleted population could be restocked from war captives.[149] The inhabitants of the cities of Epirus were preferred for reasons of convenience.[150]

Consistent with our position that the Senate was concerned to build alliances against pending or ongoing hostilities, a scholar argues that the Senate's main policy in 173 was to "settle the Macedonian question once and for all".[151] The ruthless aggression of M. Popilius and Lucretius, which we have discussed, and the foolhardy expedition of C. Cassius threatened this policy. The Senate, in procuring the enfranchisement of the allies and enemies enslaved by its generals, serviced this policy but it was at the expense of depleting the labour forces on the *latifundia*.[152]

The decision of the Senate, which condemned the Epirotes, is not to be seen as being in derogation of the foreign policy for which we have argued but rather as driven by an overweening necessity.

3.6. L. Lentulus in 154 and the praetors in 153

In 155 and 154 wars resurfaced between Rome and the Lusitanian tribes of Further Spain and the Celtiberian tribes of Hither Spain.[153] Our sources provide little information as to any acts of extortion by Roman generals. However, we know that legal action or investigation for provincial malfeasance continued in the ensuing years. Valerius Maximus records the condemnation of L. Lentulus Lupus on a charge of extortion under a *lex Caecilia*.[154] Lentulus was consul in 156. On

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[149] Slave traffic did not become an additional major source until the establishment in 167 of a market in Delos. Ziolkowski (1986) 75.

[150] The proximity of Tarentum and Brindisium facilitated organization and transportation of war captives to various destinations. Ziolkowski (1986) 78.

[151] Ziolkowski (1986) 77.

[152] Ziolkowski (1986) 77.

[153] App. *Iber*.10.56–58 — Further Spain. App. *Iber*. 9.44–45; 46–47;48–50 — Hither Spain.

[154] Val. Max 6.9.10.

the basis that he held a proconsular command in 155, his trial probably occurred in 154 after the law had been passed.[155] Therefore, a *lex Caecilia* dealing with *repetundae* was in place before 149, but it could not have established a permanent court. It must have set up an *ad hoc* tribunal or special commission, similar to the court set under the Marcian law in 172,[156] or a recuperatorial tribunal akin to the 171 body. The Epitimator tells us that in 153 several praetors, accused of extortion by different provinces, were condemned and punished.[157] It is reasonable to assume that the praetors as well were tried under the *lex Caecilia*.

The brief evidence we have of these trials implies that despoiled *peregrini* were aware of the court and of the chance to recover their stolen property. If for example, we consider the rugged and inhospitable terrain of the Spains, so distant from Rome, the availability of reliable allies was imperative. Thus the existence of a remedy for recovery of property evinced intent to support allied interests, which had been abused. The allies could, in return, provide important benefits — safe winter quarters,[158] reinforcements and provisioning — each a necessity.

The fact that the *lex Calpurnia* was introduced indicates that instances of provincial extortion were becoming more frequent as the Senate, in particular, would be painfully aware. Continuing the awkward practice of convening *ad hoc* tribunals as more cases arose was an unpalatable option because it was unsystematic. More cases would place pressure on the Senate as to what form of tribunals should be considered. The possibility of disparate outcomes depending on the tribunal used would hardly serve the diplomatic policy. The Senate now had a vested interest in remedying the situation presented by the increase in cases

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[155] Broughton MRR 450 suggests that Q. Caecilius Metellus (Macedonicus) was a tribune for 154. In this event he probably promulgated the *lex*.

[156] The issue is of some debate among scholars. The better view would seem to be that the court was a special tribunal and that the proceedings took place soon after the consulship possibly in 154. Gruen (1968) 11; Strachan-Davidson (1912) 2.13; and Bauman (1983) 205. To the contrary Cloud (1994) 508, note 79.

[157] "*Aliquot praetores a provinciis avaritiae nomine accusati damnati sunt*." Livy *Per*. 47. The expansion of the number of praetors in 197 to six when there were only two places for consuls must have increased the pressure on the praetors to take advantage of their "moment in the sun". Drogula (2015) 273.

[158] Nobilor and his soldiers suffered extreme hardship through having inadequate winter quarters (App. *Iber*. 9.47), but in 151 Lucullus went into winter quarters among the Turditani. App. *Iber*. 9.55; Galba wintered with his army at Conistorgis. App. *Iber*. 9.58.

because of its diplomatic policy and because the defendants were essentially members of its own order.[159]

3.7. L. Licinius Lucullus and the Vaccaei in 151

In this year, Lucullus invaded the territory of the Vaccaei in Further Spain and attacked the town of Cauca.[160] The Senate had made no declaration of war against the Vaccaei nor had the Vaccaei, like the Statellates, done any harm to Roman interests. After the inhabitants of Cauca had satisfied the demands of Lucullus,[161] they ingenuously allowed a Roman garrison of 2,000 troops to be admitted to the city. Lucullus, after introducing the rest of his army ordered the soldiers at the sound of the trumpet to kill all the adult males. Some 20,000 Caucaei, cursing the perfidy of the Romans, were cruelly slain. Lucullus then sacked the city.

Appian records that Lucullus obtained none of the gold and silver he was after (this being why he had waged this war, thinking that all Spain abounded with gold and silver).[162] Although the war with the Vaccaei, was waged by Lucullus without the authority of the Roman people, Appian records that Lucullus was never called to account.[163] Why did neither the Senate nor the people who had been so incensed by the similar case of Popilius in 172[164] not propose action? The answer may well be that the Vaccaei were not as "lily-white" as Appian implies[165] and that there may have been some force in Lucullus' claim[166].

3.8. S. Sulpcius Galba

In the very year in which Calpurnius presented his *rogatio* to the *consilium plebis*, his colleague, L. Scribonius Libo sought unsuccessfully to bring to account

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[159] Gruen (1968) 11–12.

[160] The Vaccaei asked the reason for his hostility. Lucullus answered that it was because the Vaccaei had wronged the Carpetani who were well disposed to Rome. App. *Iber*. 51.

[161] He had asked for hostages and 100 talents of silver, and a contingent of horse for the Roman army as a condition of granting a truce.

[162] App. *Iber*. 51–52.

[163] App. *Iber*. 55.

[164] Significantly, the atrocities of Galba in the following year were to enrage them still more. See Section 4.8.

[165] App. *Iber*. 51–52.

[166] Richardson (1986) 150–151 notes that M. Aemilius Lepidus when campaigning in 136 in Hither Spain accused the Vaccaei of provisioning the Numantines and that again in 134 Aemilianus attacked two cities of the Vaccaei, reasoning that again they were supplying the Numantines. He suggests that both Lucullus and Aemilianus would have acted against the wishes of the Senate.

S. Sulpicius Galba.[167] In 150, Galba had presided over the slaughter of a massed group of the Lusitanian peoples, whom he had treacherously induced to surrender to him by false promises of land settlements, in breach of good faith,[168] and had sold the rest of the people into slavery.[169]

Galba's conduct mirrored that of Popilius in 172.[170] Each had presided over a massacre of a people who had surrendered, and then sold the survivors for gain. However, it is a possible reading of the sources that Galba invited the *peregrini* to participate in the *deditio* ritual and then despicably betrayed their trust. His perfidy was the worse for, arguably, Popilius had not offered *deditio*. The Senate had experienced considerable apprehension about the possible consequences of Popilius' actions in 173 and 172. Galba presented the Senate, a quarter of a century later, with an acute reminder, stemming from his cruel duplicity, of a major concern for the Senate, namely that foreign nations would be hesitant to surrender to Rome. The position was acerbated by the fact that the number of foreign peoples who were now within Rome's sphere of influence would have increased over this period.

In protest against Galba's betrayal, Sempronius stirred up the people and presented a *rogatio* to them for a law to set up a *quaestio* to investigate Galba's conduct.[171] It is readily arguable, in light of the apprehension mentioned above, that a worried Senate had called in aid the support of Scribonius. M. Porcius Cato spoke harshly at the trial against his inveterate enemy.[172] However, the Senate was again not uniform in its opinion as we observed in discussing the case of Popilius in 173. Galba had his supporters. Q. Fulvius Nobilor, "the distinguished consular"[173] spoke strongly for Galba against the acerbic harangue of Cato.[174] In

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[167] He was praetor for Further Spain in 151 and *propraetor* in 150.

[168] Cic. *Brut* 89. Livy *Per*. 49. Val. Max. 8.1.2.

[169] App. *Iber*. 60.

[170] Popilius had sold a nation which surrendered after being worsted. Galba tricked the Lusitanians into surrender by mendacious inducements then slew or sold the unfortunate peoples.

[171] Cic. *Brut*.89. Cic. *De Or*. 227.

[172] Cic. *De Or*. 1.227. It is possible that Cato was lobbied by the Lusitanians to speak for them because of Cato's understanding of Spain resulting from his campaigns as consul in 195 where he showed firmness but restraint, and his advocacy before the recuperatorial tribunal in 171.

[173] Gruen (1968) 12.

[174] He was consul in 153. App. *Iber*. 45–47 shows that Fulvius had a disastrous campaign against the Celtiberians. His humiliating experiences would have made him an advocate for any defence that suggested bad faith or treachery on the part of the Lusitanians.

his defence Galba, like Popilius and Lucullus, pleaded as justification that he had responded to a potential threat.[175]

Notably, although Galba was, according to Cicero, the subject of public loathing and ill will,[176] Sempronius did not simply prosecute Galba before the people in the judicial assembly. For this Cato was the catalyst. In 187 he had failed in an attempt to prosecute his bitter enemy P. Scipio Africanus before the people.[177] Africanus eluded prosecution before the judicial assembly through his *gratia*.[178] Cato had more success with a *rogatio*, passed by the people after Africanus' death.[179] This required the Senate to indicate which of the praetors the Senate would appoint to hold an enquiry as to what had happened to property captured or taken from King Antiochus,[180] and resulted in the conviction of Lucius Scipio.[181]

In view of his success with the special praetorian court in 187, Cato probably counselled Scribonius Libo, 40 years later, to submit a *rogatio* for the establishment of a court again presided over by a praetor. The advantage would be that the terms of the allegations against Galba could be laid down with some precision. The possible problem of whether Galba's conduct would be regarded by the communal throng in the assembly as deserving of punishment would be avoided. There would be greater certainty in a decision by the praetor about accountability as had occurred in 187. Cato was an advocate of war with Carthage[182] and therefore could be seen as a grey eminence who would appreciate the significance of maintaining good relations with foreign allies.

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[175] Livy *Per*. 49. App. *Iber*. 58–59.

[176] Cic. *De Or*. 1.228: "*et invidia et odio populi tum Galba premetur*".

[177] Livy 38.50.4: "*Scipioni Africano…duo Q. Petillii diem dixerunt*". Lintott (1971) 696 notes that the phrase *diem dicere* is invariably used by Cicero to describe a prosecution before the people before the era of the standing courts. Prosecution in a *quaestio* would entail the use "*accusavit"*, "*postulavit"* or "*nomen detulit"*.

[178] The two Petillii arraigned Africanus in the *iudicium populi* for *pecuniae captae*. Livy 38.51.1; 50.5. By force of his many achievements for the *res publica*, which he adumbrated to his admiring acolytes, his ostentatious display of religious devotion and his *gratia* emerging therefrom, Africanus confounded any proceedings before the people. Livy 38.51.7–14; 50.10–12.

[179] Livy 38.54.1.

[180] Livy 38.54.3–4.

[181] Livy 38.55.5.

[182] Cato had been a member of a delegation which went to Africa to settle a territorial dispute between the Carthaginians and Massinissa. On observing how well Carthage was prospering and that it was increasing in wealth and population, Cato returned to Rome and pronounced his notorious words — "*Ceterum autem censeo Carthaginem esse delendam*" — which instigated the resumption of hostilities. App. *Pun*. 69.

Galba was most apprehensive about condemnation. Nevertheless, a dramatic performance by Galba stirred the people's sympathy. With tearful entreaties he brought his children to the assembly and commended them to the safety of the people along with the orphan son of Gaius Gallus.[183] As a result of these histrionics the *rogatio* was abandoned.[184] It is likely that Galba feared a capital penalty, which would explain his melodramatic reaction. We find support for this suggestion in the *De Oratore*. Here Cicero cites the trenchant criticism by P. Rutilius Rufus of Galba's lachrymose lamentations: "These methods Rutilius used roundly to condemn, affirming that banishment or death itself was better than such abjectness."[185] Valerius Maximus also implies that the guilt and potential punishment for Galba was very serious.[186]

Indeed, Galba's conduct and demeanour mirrored that of Popilius in 172. As Popilius was most reluctant to return to Rome, following the passing of the Marcian law, it is tempting to conclude that he too was facing a capital trial. Nevertheless, the inconsistent treatment meted out to the generals in the other cases we have discussed militates against any suggestion that there was a consistent policy that provincial mistreatment earned the capital penalty. Popilius' conduct was similar to that of Galba. Both assailed nations who had not openly declared war on Rome. The reactions of both men suggest a real apprehension about the repercussions of a conviction.

As *gratia* had saved Popilius, so an outstanding ability to orate [187] and possibly the support of his soldiers as voters saved Galba. As a military tribune under Aemilius Paulus, Galba had encouraged Paulus' soldiers to oppose a triumph for their general for his victory over Perseus because of Paulus' parsimonious distribution of booty from the war against Perseus.[188] Significantly, Livy records Galba's exhortation to the soldiers that the city plebs would follow the soldiers on the voting. As a wealthy man, and one further enriched by the spoils emanating from his brutality, Galba would have been able to gain the gratitude of his soldiers

[183] Cic. *Brut*. 89–90. Cic. *De Or.* 1.227.
[184] Livy *Per.* 49.
[185] Cic. *De Or.* 1.228.
[186] Val. Max. 8. 1.2.
[187] Cic. *Brut*. 333. Gruen (1968) 12.
[188] Livy 45.35–39.

by appropriate distribution of largesse. Appian, a biased source,[189] remarks that Galba was mean in the plunder he gave to his soldiers. Yet, faced with the backlash against his conduct, it is surely more plausible that Galba learnt from Paulus and was more generous to his men. The soldiers would have favoured him and his rhetoric. The city folk, if we can rely on Livy's remark, would have followed suit, swayed as well by the Galban histrionics. A further reason for Galba's acquittal may be found in a self-serving letter of Galba recorded by the Epitimator.[190] Galba claimed he had found out that the Lusitanians had sacrificed a man and a horse, and that this, according to their custom, meant that they were preparing an attack.

As to other cases, Lucullus went unpunished for similar conduct. The praetors from the two Spains faced serious innominate charges yet were dealt with in a tribunal which was civil in nature. Lucretius viciously attacked friend and foe alike and was only heavily fined for his inhumanity. Hortensius received a written rebuke from the Senate with orders to restore the enslaved to their freedom. The Senate was thus still disinclined, and was to remain disinclined for some time, to punish barbarism on the part of its generals.

4. Significance of the foregoing cases

In the course of its dismayed reaction to the brutal treatment of the Statellates, the Roman Senate[191] made clear, as this study has stressed, what it then regarded as a major feature of its foreign policy. This was the encouragement of those vanquished by its generals to surrender to the Roman people. However, knowledge that defeat would inevitably result in ruthless abuse would necessarily deter any consideration of surrender. It is implicit therefore, that the Senate would have been more than happy were the victorious *imperatores* to have applied the *deditio* ritual, which had considerable advantages.

In the presence of enduring hostilities, and in the face of an emerging new enemy in Perseus, the shortcomings of the Roman Senate in advancing the diplomatic

[189] Gruen (1968) 13 note 11.

[190] Livy Per. 50.

[191] As already noted, the references to the Senate must take account of the fact that there were influential groups within the Senate whose interests did not accord with the majority such as the *Popilii* and the *nobiles et potentes* who stymied the recuperatorial enquiry in 171.

interests of the Roman state were manifest. The Senate was concerned to strengthen existing and establish new alliances throughout the far-flung empire as it then stood. The breadth of the empire and the ever-present threats from marauding nations provided the reasons. Allies on whom Rome might rely were vital to the military and civilian governance of the provinces within the empire.

Yet, senatorial policy could founder on the selfish, ruthless and often foolhardy conduct of generals. This was regularly at odds with the goals of the majority in the Senate.[192] In their own interests, generals were even prepared to seriously maltreat, those who were allies. There could be clear conflicts. For a Roman aristocrat and member of the senatorial order the holding of a provincial command promised many things. It represented the chance to earn prestige and add to one's *gratia* by undertaking wars first approved by the Senate and the people. It might also provide the opportunity to recover the substantial costs of electoral campaigning from the booty of wars, or by the imposition of exactions on the local inhabitants. The problem for the Senate arose when members of its order abused their gubernatorial authority by behaving in a manner, which undermined senatorial policy.

In the 170s, the Senate was faced with several cases involving both allies and foes where its generals exhibited extremes of cruelty to enhance their personal interest without regard to its effect on the policies of the Senate. In order to reinforce or to establish new alliances where the arrogance and ruthlessness of members of its order threatened to undermine its aspirations, action was required to negate the consequences of this conduct. The Senate had to convince *peregrini* that it was serious in inhibiting the predations of its generals. That it was not always entirely successful could be ascribed to conflicts of interest within the order. The failure of the cases against M. Popilius and the Spanish praetors illustrate this.[193]

What we deduce first from these cases is just how powerless the Senate was judicially in the face of contumelious opposition. It did possess limited powers to deal with crimes, but these were those committed in Italy.[194] However, we

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[192] As we continue to maintain, generals and governors as senators themselves with their aristocratic *gratia* would have had their friends and probable family connections in the Curia who supported their viewpoint. The Senate could surely never be absolutely uniform in its opinions.

[193] Sections 3.1 and 3.3 above.

[194] Polyb. 6.13.

musdistinguish between these limited powers of the Senate, on the one hand and its *auctoritas,* on the other. The most important sources for the expression of the will of the Senate were the *senatus consulta* and their force derived solely from the authority of the members of the Senate — their *auctoritas* and nothing more. They did not have the force of law. These decrees were directed to magistrates.[195]

M. Popilius Laenas shattered the illusions of the Senate when he ignored the decree demanding the reinstatement of the Ligurian Statellates whom he had sold into slavery. He would not let senatorial *auctoritas* stand in the way of securing the proceeds derived from the sale of the unfortunate Ligurians or the potential enhancement of his reputation derived from a bloody victory, deliberately provoked. The Senate was thus compelled to forage for other means of enforcing its will as expressed in its decrees.[196] It called upon the bench of tribunes for assistance. The consequence was a *rogatio* submitted by the people to the Senate for the establishment of an enquiry to be conducted by a praetorian nominee of the Senate.[197] The proconsul only relented when the tribunes assisted with a further *rogatio* threatening a trial *in absentia* which forced his return. But the objectives of the Senate and this form of tribunal were spiked by the abject submission of the praetor to the influence of the Popilii *gens*. The experiment with this court must inevitably have made any potential *dediticii* think twice about surrender, all to the detriment of Roman foreign policy.

To the northern allies, whom Cassius had seriously maltreated in 171, the Senate offered the prospect of reparations. But how the Senate might have effected these is highly conjectural, as we have seen. It is unlikely that the Senate would have risked a repetition of the praetorian court. A referral of Cassius to the people for *perduellio* would intimate to *peregrini* that the Senate was willing to effect a prosecution of a Roman general for breaches of military discipline. Yet this, even if successful, could do nothing to recover allied property or losses as it was not a restitutionary procedure.

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[195] Although not legally binding the decrees emanating from the august body had considerable weight as expressing its will and were usually followed by magistrates.

[196] Before grasping for judicial solutions, the Senate attempted a political manoeuvre. It tried to weaken the resolve of the consular brother, C. Popilius and his colleague by appointing them to Liguria rather than to Macedonia. Both still refused to allow the decree to be represented for ratification.

[197] The precedent for this praetorian court was probably the Petilliian tribunal of 187 in which Lucius Scipio was condemned and fined.

In response to the complaints of the envoys from the two Spains the Senate tried another tack. It called in aid the system of *recuperatores*. Possibly the determination of the Senate that extortion — *pecuniae captae* — had certainly occurred was an inducement to adopt a system which would require assessment of loss, rather than investigation of liability. Moreover, it was a useful propaganda tool for the Senate's flagging judicial fortunes with the bench comprising senators and the Spaniards having the opportunity to select as their *patroni* the *optimi* from among the senators.

The experiment was a consummate failure. There was apparent disquiet on the part of the Spaniards with the adjudicators themselves; the accused were either acquitted or allowed to slip into exile after the praetor offered them an adjournment. Moreover, other powerful aristocrats who may have been participants in extortion were not brought to book because of the suspected machinations of the *patroni*. And the praetor deliberately recused himself from the further enquiry and took himself off to his province. As with the Popilii, the influence of powerful and influential aristocrats operated to scotch the objectives of the Senate.

Scholars see the 171 tribunal as the procedural forerunner of the 149 court.[198] But it had a number of deficiencies in its framework of which Calpurnius would have had to take stock.

The Senate had at the time also to deal with the pitiful account of the wrongs done by Lucretius in 171 to the city of Haliartus, an enemy. Those who had been sold by Lucretius were liberated. The fact that Lucretius was fined indicates that the people in the *concilium plebis* were involved and, by analogy with the earlier cases, it is likely that the Senate encouraged the people in this endeavour. We have evidence again of the judicial powerlessness of the Senate itself. Despite the vicious slaughter inflicted, the Senate and people did not seek further to punish Lucretius for his barbarities. Perhaps his position was, on this occasion, distinguished by the fact that his victims were enemies. It was possibly a

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[198] Sherwin-White (1952) 44. Henderson (1951) 80. Sherwin-White (1949) 6.

> "About the Calpurnian Law of 149 B.C. the established view seems to be sound, that this law did little more than regularize and improve the procedure which had been improvised in 171 B.C. when the first complaints of extortion from, a province were brought to the notice of the Senate."

balancing act for the Senate. Its foreign policy objectives were clashing with the ruthless self-interest of its generals.

Hortensius worked further savagery in 170 on the people of Abdera, an ally of Rome.[199] Envoys brought the news of unspeakable brutality. Immediate legal action of some kind was prevented as both Hortensius and the consul Hostilius[200] still possessed *imperium*. The Senate turned to an administrative procedure dependent on its *auctoritas*.[201] It decreed that *legati* be sent to Abdera with instructions to restore the enslaved people to their freedom and to inform the generals that their involvement was required for this task.

Envoys from Chalcis, another ally, were received in the same year complaining about ruthless treatment at the hands of Lucretius and Hortensius. The Senate issued its decree requiring Lucretius to explain himself. But it was finally a tribunician action which succeeded in bringing Lucretius into the tribal assembly to be fined by unanimous tribal consent.

As for Hortensius, he was ordered by the Senate to restore the enslaved Chalcidians to their liberty and to refrain from quartering undesirable seamen in the homes of the allies. No action was threatened.

In 150, Galba as *propraetor* in Further Spain, endangered the policy whereby conquered nations were encouraged to surrender to Rome by his murderous conduct towards the Lusitanians. The tribune Scribonius was unsuccessful with a *quaestio* under the aegis of a praetor based possibly on the court instigated by Cato in 187. Galba's conduct had sickened all the people.[202] It is reasonable to assume that the Senate backed Scribonius' initiative, bearing in mind the potential effect of Galba's conduct. This study has already speculated on the reasons for the defeat of the bill.

Our examination indicates that the Senate had not by 150 found a satisfactory means of inhibiting misbehaviour by its generals in the interests of advancing its foreign policy objectives. The idea of permanent courts had not taken root in the

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[199] Section 3.4.2 supra.

[200] Livy implies that he was complicit in Hortensius' gross misconduct.

[201] The withholding of Macedonia for allocation as a province in 172 was an earlier example of administrative action.

[202] Cic. *De Or.* 1.228.

period even though the misconduct of the praetors Licinius in 172 and Canuleius in 171 disclosed how justice might be thwarted. The attempts of the Senate to find a suitable court procedure, which could not be easily eluded, must surely indicate recognition that something more established was required in order to protect provincials. Want of effective powers to deal with provincial maladministration was an obvious stimulant for the creation of the 149 court. Senatorial control of the court was an added impetus.

5 Rationale for the *lex Calpurnia* and the *quaestio de pecuniis repetundis*

The rationale for the passing of the *lex Calpurnia* was a diplomatic one, namely to reinforce and enhance existing, or foster new, alliances or relationships with foreign nations. This was at a time when Rome had was embarking on a serious conflict with the old enemy, Carthage [203] and had been engaged in continuing warfare on a number of fronts, including the debilitating wars in Spain.[204]

We have seen that in the previous 40 or so years, the Senate received reports both from the front (relating to enemies) and from allied legations about imperatorial atrocities. The Senate invariably showed concern about this ill treatment of *peregrin*i by *imperatores* and, where possible, offered adjudication or caused legal proceedings to be brought in order to provide some remedy to *peregrini*. Whilst our sources indicate sympathy for the wronged *peregrini* this was often proffered for diplomatic reasons. The real concern was to counter the prospect of *peregrini* who were enemies declining to surrender when bested in war. It was also to provide comfort to allies whose friendship with Rome had been savagely abused by avaricious *imperatores* for whom self-interest trumped Rome's interests. The brutality of these *imperatores*, when matched against the inability of the Senate to light upon an impervious court procedure, did much to thwart its diplomatic purpose. Further, murder or enslavement would obviously provide the opportunity for the looting or misappropriation of the property of the victims.[205]

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[203] Rome's intent is illustrated by both consuls for 149 being assigned to Africa. Broughton MRR 1.458.

[204] Polyb. 3.5.5.

[205] This was the attraction of the provincial command or of the conduct of a war, even if not approved by the Senate or people. Senators vied for these positions for reasons of prestige and

Some scholars see the events arising from the trial of Galba as being the inevitable catalyst for the 149 court.[206] Others have discounted the suggestion on the basis that none of the sources make this connection.[207] The first mentioned position is the more persuasive. The atrocious brutality of Galba must have been seen as the nadir of magisterial conduct. It is reasonable to assume that in this atmosphere the Senate, bearing in mind its diplomatic objectives, did turn to the tribunes' bench once again in an effort to stem the repercussion of Galba's genocide. The unfortunate fate of Sempronius' prosecution was also a spur.

It is plausible that the issues of brutality and enslavement, as well as extortion of property, were included in the original bill. However, what emerged after debate in the *contiones* and the final vote of the people in the *concilium plebis* was a bill which was a shadow of what was originally proposed — a simple restitutionary provision. It cannot have been the case that this final form was the same as the provisions originally proposed. There was so little therein to which the Roman people could object.

We should therefore see the *lex Calpurnia* of 149 as a compromise position, shaped by vigorous debate in the *contiones*, which preceded its presentation to the tribes.[208] In line with its policy of sustaining alliances, a majority of the Senate would surely have wanted a statute which provided machinery whereby generals who had maltreated *peregrini* could have been brought to book. However, the *lex Calpurnia* was not to offer a remedy in respect of outrages wreaked by *imperatores*.

Apart from the *senatus consultum*, the Senate also lacked legislative authority. As we have seen in the case of Popilius in 172, if an unscrupulous magistrate or an *imperator* saw fit to ignore a *senatus consultum*, the fragility of senatorial legislative and judicial power was exposed. Absent obedience to advisory decrees and administrative powers, legislative and judicial limitations made it difficult for the Senate to deal effectively with Roman provincial mismanagement. Threats to its authority meant that the Senate had to look to the principal law making

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wealth enhancement, as we have discussed. Thus, Lucretius carried off paintings, statues and other artwork from Haliartus for his own estates.

[206] Gruen (1968) 13. Brennan (2000) 235.

[207] Richardson (1986) 139. Weinrib (1969) 318–319.

[208] See Section 6 below.

assembly of Rome, the *concilium plebis*, comprising the 35 tribes, in implementing action in furtherance of its policies.[209]

6 The procedure with the *Concilium Plebis* and the *Contiones*

It is important to touch upon these institutions as all of the *rogationes* for the creation of the permanent courts had to pass muster before the *contiones* and then the *concilium plebis*. The passage of the *rogatio* against Galba, proposed by Scribonius, did face opposition from some *nobiles*, as discussed above. Yet our sources record no opposition to the *lex Calpurnia*. This absence of objection implies that all interested groups had been exposed to the legislative process and that the statute, albeit with its limited scope, was acceptable to the majority. The statute as passed represented the middle course. The limitation of the relief to restitution was an accommodation. It indicated the best "deal" those supporting the Senate's avowed purpose could secure.

If the policy of the Senate was to promulgate widely the concerns of the Senate about maltreatment of *peregrini* in order to maintain the loyalty and respect of allies, existing and potential, this was the opportunity. Clearly, the optimum course would have been to have enshrined in the new law a statutory definition which extended to proscribe brutality and to provide penalties therefore and for the theft of peregrine property, over and above a mere right of civil restitution.

Whilst the ultimate decision on whether to pass a bill into law rested with the plebeian voters in the *concilium plebis*,[210] there could be no discussion there on its merits.[211] It was not the forum for debate or compromise. It was in the *contiones*

[209] The *lex Hortensia* of 287 had conferred on the plebeians the right to pass in the *concilium plebis* (from whose meetings the patricians were banned) laws (*plebiscita*) which bound all of the Roman people, patricians and plebeians alike.

[210] It is a mistake to assume that the plebeian citizens were drawn for the most part from the poor. Certainly by the middle of the second century, possibly due to the carnage of the Punic Wars, there had been a diminution in the number of men from the old patrician families. Yet there were plebeians who were wealthy and plebeians who were *nobiles* (men whose ancestors had held the consulship) and members of old families, like Calpurnius.

[211] Mouritsen (2001) 42; 46.

preceding the voting assembly that the terms of the *rogatio* to be presented were resolved.[212]

Despite some reservations on their decision-making powers expressed by Gellius,[213] scholars accept that the *contiones* were a means of presenting new legislation to the people.[214] The procedure was that the proposed *rogatio* had to be put before the people over a period of three market days before it could be presented to the voting assembly. At a special *contio,* held immediately before the assembly vote, the arguments for or against the bill (*suasio/dissuasio*) were made.[215] It was the final opportunity for the supporters or opponents of the *rogatio* to make their views known to the plebeians assembled for the voting.[216] The proximity of these meetings tends to overcome the concern expressed that the crowd turning up for the voting assembly might be completely different from that which listened to the immediately preceding *contio* or *contiones*.[217] Here compromises or changes to a *rogatio* might be negotiated or argued before an agreed version was put to the *concilium plebis* for a formal vote, or defeated.

A magistrate, for the most part, a tribune of the plebs, would summon and control procedure in a *contio*.[218] As the presiding magistrate in the *contio* and the *concilium plebis*, which followed, he would usually speak in favour of his bill; then he could, at his discretion, allow other magistrates, senators and "members of the political elite drawn from the higher echelons of society"[219] to address the *contio*.[220]

The commons were rarely given the opportunity to express an opinion [221] but those present in the forum or other public space would assuredly have listened from the "side lines" and made clear their opinions by expressions of derision —

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[212] *Contiones* were non-decision making assemblies convened by a magistrate with *ius contionandi*. Mouritsen (2001) 38.

[213] Aulus Gellius *Attic Nights* 13.16.3.

[214] Mouritsen (2001) 38.

[215] Mouritsen (2001) 38; (2017) 83.

[216] Mouritsen (2017) 83.

[217] Mouritsen (2001) 46.

[218] Morstein-Marx (2004) 38; Mouritsen (2001) 46.

[219] Morstein-Marx (2004) 16.

[220] Mouritsen (2001) 46.

[221] Rarely, people of lesser status might be allowed to speak where it was necessary to substantiate an allegation. Morstein-Marx (2004) 40.

shouts, hissing, sibillation, catcalls or harassing — or by expressions of encouragement or silence. This conduct was not limited to the "lower classes".[222] Members of the senatorial class could sway those who could only listen.[223] The commons could hear and observe policy questions ventilated as well as opposing arguments adumbrated and be educated on the differing points of view about a law. The ability of the elite of Roman society to dominate contional debate and thereby fashion the discourse and the opinion of the voters, who were restricted from speaking by custom, must have been highly significant. It would follow that any *rogatio*, which threatened perceived aristocratic privilege, would face difficulties in being accepted.

Accordingly, provisions in Calpurnius' *rogatio* seeking to proscribe enslavement or slaughter of *peregrini* would surely have drawn the ire of some senatorial forces in the *contiones* and as voters in their tribes. Limitations, which might interfere with the prospects of booty and prestige from a provincial command, would be anathema and subject to opposition. Moreover, in light of the pyramid structure of Roman political progression, there would be those among the senatorial order who would be desperate not to lose what might be a last opportunity to secure their material and social advancement. Bribery and intimidation of the plebeians, who would be determining whether the *rogatio* should pass into law, and *gratia*, would all have been brought into play in the contiones and the *consilium plebis*.[224] Bearing in mind Galba's savage attacks, it remains a possibility that provision was made in the initial *rogatio* for the imposition of a capital penalty for proven acts of brutality, discussed above. This would have engendered even more strenuous opposition to the bill. There were those in the senatorial order who would then have had a real concern to hobble the

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[222] Cic. *Att*. 2.19.2: "*Populares isti iam modestos homines sibilare docuerunt*." And of the *boni*, Cic. *Att*.18.1: "*clamoribus et conviciis et sibilis consecantur*". Mouritsen (2001) 47 and note 26.

[223]Senators could only speak if invited by a magistrate (Page 48). "The presiding magistrate who convened the *contio* might bring forth or summon (*producere, vocare in contionem*) or invite members of the elite to address the people in the *contio* (*contionem dare*) which they could not do if they were not holding a magistracy." Morstein–Marx (2004) 164; 38.

[224] The voting procedure in the *concilium plebis* meant that the proponent of a *rogatio* for a law had to secure the approval of a majority of the 35 tribes into which the voters, meaning the plebeian citizens, were divided. Each tribe had one vote, the decision of the majority of citizens within that tribe constituting the vote of that tribe.

rogatio in the *contiones* "as their whole life and dignity might have been at stake".[225]

For these reasons, what emerged as the *lex Calpurnia* was arguably a watered down version of the original *rogatio*. The remedy presented by the law was the best the Senate could offer to *peregrini*. It gave no remedy against the repetition of brutality.

Whilst there is some doubt as to whether by 149 the prior approval of the Senate was always required to legislation to go before the people, it is likely that the senators would have been concerned to see the proposed bill before it went to the assembly, in view of its obvious importance for foreign affairs.[226] The *rogatio* for the149 law would have been well ventilated first in the Senate and then in the *contiones* and have had the approval of the majority of the Roman people, both patrician and plebeian.

Our examination of the various contretemps between Roman *imperatores* and the Senate prior to 149 has shown that the Senate often utilised the powers of the tribunes to achieve that which the Senate itself could not do because of its lack of legislative or judicial authority. It is quite feasible that the Senate selected Calpurnius to promulgate the *rogatio* before the *concilium plebis* because of the background he possessed. Calpurnius was a scion of the distinguished plebeian family, the Calpurnii. That Calpurnius was *nobilis* is apparent from his ancestry. The presentation of the law to the people by this tribune would surely have also carried great weight particularly because of his connections with Spain.[227]

7. The existing tribunals as against a permanent court

7.1. Existing tribunals

Calpurnius, and those supporting the proposal for a law to provide succour of some kind to *peregrini*, but more significantly support for Roman diplomatic strategy, no doubt gave consideration to the other forms of tribunal which were in existence or had been tried in the recent past.

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[225] Lintott (1993) 106.

[226] The Marcian *rogatio* of 172 was subject to a prior senatorial approval to its format.

[227] He was ennobled by his uncle, C. Calpurnius Piso, who was elected praetor for 186 and consul in 184. Livy 39.31.

Clearly the special courts established by the Senate to deal with national emergencies or conduct, which seriously undermined the welfare of the state, would have hardly been suitable. They were only constituted if it was determined that a trigger event of sufficient magnitude had occurred, which would justify the intervention of the consuls. We may question whether even the worst of the massacres of foreign peoples by *imperatores* fell into that category. In any event it was an *ad hoc* procedure, which would necessitate the convening of the Senate and a protracted enquiry before appropriate remedial action could be taken. This requirement surely rendered the procedure unsuitable. The whole purpose of the Senate was to publicise the existence of a court which would be available as and when incidents which might attract its jurisdiction arose.

The procedure employed against M. Popilius Laenas involved the tribunes submitting a *rogatio* to the *concilium plebis* for a law, the terms of which described the conduct to be examined. It required the Senate to decree on oath which person would investigate and punish the individual found responsible for the enslavement of the Statellates.[228] As a consequence of the passing of the *plebiscitum* a court presided over by a praetor was established.[229]

The praetor dealt with the accusation personally. The people were not likely to have been involved in its decisions.[230] However, the tribunal was hardly in good odour. The abrupt abrogation by Licinius in 172 of his responsibilities as presiding magistrate did not make the structure of this court sound or immediately acceptable. Licinius, as we have seen, was overwhelmed by the *gratia* of the Popilii and also failed to proceed with investigations into other *nobiles ac potentes*. Again this too was an *ad hoc* tribunal. Other candidates were the *iudicia populi*, the people sitting as judicial assemblies and the recuperatorial tribunal set up to try the Spanish praetors in 171.

The judicial assemblies comprised the *concilium plebis* where a fine was sought or the *comitia centuriata* where the *caput* of the accused was at stake and they

[228] Perhaps the law was so drafted to avoid any suggestion that it was a *privilegium* directed at Popilius alone.

[229] Livy 42.21.8.

[230] Feig Vishnia (1996) 134.

were convened by the tribunes of the plebs.[231] The assemblies dealt with conduct, which "endangered the state" [232] or was "against the public good". Whether conduct met these criteria was a matter for the decision of the community represented by the jurors. There was no statutory provision defining the wrongdoing.[233] In the *iudicia populi* what was punishable was, in the absence of statutory definition, very much a matter for the people to determine. The *iudicia populi* focused on cases which concerned wrongdoing against the state, in particular, *perduellio*. However, Calpurnius was seeking to proscribe conduct directed at the provincial victims of gubernatorial excesses. This did not directly affect the security of the state.

The proponents of the *rogatio* would not have been comfortable with a tribunal in which the people assessed whether conduct was actionable. This study argues that the terms of the conduct, which gave rise to restitutionary rights, were probably spelt out in the 149 law.[234] There was a recognition on the part of the lawgivers that the proscribed conduct needed a statutory, not a discretionary base. A degree of precision as to what constituted this conduct would have been necessary so that *peregrini* would not be left guessing as to its effects. Leaving it to the discretion of the people to deliberate on whether provincials had a claim would have been inimical to the senatorial purpose of strengthening relations with friends and allies, as we have argued. The senatorial proponents of the law would hardly have been enamoured of this prospect. Moreover, it would have been a bitter pill to the senators for the people generally to sit in judgement on the peculations or otherwise of their members.

In the *iudicia populi* an arbitrary element prevailed. Even where there were recognised offences, such as *perduellio* and *peculatus*, the ambit and scope of these offences was very much a matter for the judgement of the people in the *contiones* and the final assembly as to whether a case had been made out against an accused party.

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[231] A good illustration is the proceedings against Claudius Pulcher, consul in 249. Cic. *ND*.2.7; Cic. *De Div*. 71; *Schol. Bob*. 90.

[232] Greenidge (1901) 229.

[233] Harries (2007) 15.

[234] The proposition is that the provisions appearing in the lex Acilia in this respect were tralatitious and reflected what had been legislated in the *lex Calpurnia*.

Calpurnius would have understood that the jurisdiction of the *iudicia populi* did not depend on a statutory definition of offences. Again, *contiones* preceded the final decision so that the conduct in question could be subject to unrestrained and vigorous enquiry and argument. For Calpurnius the absence of certainty in the procedures in the *iudicia populi* did not make these tribunals a suitable forum in which *peregrini* could pursue their remedy under the 149 law with some expectation of certainty of result. The likelihood of success on the part of the *peregrini* was important in that a failure in the judicial system could undermine peregrine confidence and the willingness to side with Rome.

The recuperatorial tribunal pursuant to which the Spanish praetors were investigated in 171 was probably a precursor to the 149 law. The circumstances of this tribunal have been discussed above (see Section 3.3). It had the appeal of senatorial adjudicators and *patroni* from that order. However, its downfall had been the failure of the presiding praetor to perform his ordained duties in the face of aristocratic *gratia* and the apparent bias of the adjudicators and the advocates. Calpurnius would, as we have discussed, have not wanted to relent on the issue of senatorial judges but he would have to have taken steps to ensure that the praetor as the administrative office complied with his obligations. It is possible that some of the provisions of the *lex Acilia* intended to secure the position of the praetor were also tralatitious.[235]

Finally, what of Scribonius' *rogatio* for a court to try Galba. We suggest that this *rogatio* preceded the *lex Calpurnia*. If so, it must have played some role in Calpurnius' thinking, particularly as Galba's actions also involved plunder and *repetundae*. The attempt to establish the court had been an abject failure with the major wrongdoer being able to elude his pursuers. To consider recourse to such a structure within months or even weeks of its collapse would hardly suggest confidence in achieving the ultimate senatorial purpose.

It is possible that the *rogatio* of Scribonius may also have been defeated on the basis that it was a *privilegium.*[236] This trap would not have concerned Calpurnius

[235] This is discussed in Section 8 below.

[236] Cic. *Brut*. 89. As already stated above, Popilius was not named in the tribunician *rogatio* for what became the Marcian law. Bauman (1983) 207.

since his concern was to have passed a blanket provision directed at provincial despoliation. His was not an *in personam* law.

7 .2. A permanent court

At the beginning of this dissertation we noted the emphasis placed by our sources on the *quaestio de pecuniis repetundis* being the first permanent court. The creation of the court as permanent can be seen as a propaganda exercise designed to convince *peregrini* that they had a means of obtaining some relief against the depredations of their governors. There was now a jurisdiction which could be invoked. Uncertainties as to whether an appropriate *ad hoc* tribunal could be established in which *peregrini* could ventilate their grievances should now have dissipated. *Peregrini* could be a little more confident in contemplating the long and hazardous journey to Rome. Their position was more secure than, for example, the Spanish, whose envoys in 171 petitioned for relief. Then the Senate had resorted to a temporary and ill-adjusted tribunal [237] to deal with their complaints.

Permanence, however, meant more than just a court structure. It demanded stability. *Peregrini* needed the assurance that their forensic journey would not be blighted by magisterial chicanery during proceedings. Repetition of the behaviour of the praetors in 172 and 171 who improperly abandoned their investigations because of undue influence and the suspected bias of the *patroni* had to be forestalled.

If we look ahead to the *lex Acilia*, we can observe that a praetor was the presiding authority in the *quaestio de pecuniis repetundis* with specific administrative functions.[238] On the argument we will present about tralatitious provisions, the same situation may well have obtained in the 149 court, namely, a praetor, perhaps the *praetor peregrinus*, would have been the first presiding official for the court. Thereafter there would have been an annual appointment of a praetor to the court. The concept of continuity would have required such an ongoing administrative functionary.

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[237] There was a lack of harmony among the *patroni* and the suspicion of bias there and with the *recuperatores*. See Section 3.3.

[238] *Lex Acilia* II. 12–15. Then in each following year, whichever praetor was appointed was required, within ten days of the commencement of his term, to proceed to the jury selection. *Lex Acilia* II. 16–19.

Let us consider the system of the *legis actio sacramento*, which Calpurnius selected for the new court. There were two steps to this procedure. With the first step (*in iure*) the applicant for relief was required to state his claim according to a strict form of words (*verba certa*). The praetor decided whether the claim was proper to go to the *iudex* for determination.[239] If so, the claim then proceeded *apud iudicem*. This procedure dictated the ongoing presence of a praetor to rule on the appropriateness of a proceeding. In this there is the suggestion of the durability of the court and we can identify the element of permanence in the praetor being available at all times to convene the court.

The establishment of the 149 court as a permanent court, albeit with the limited jurisdiction was surely an indicium of the senate's desire to maintain the strategic approach to existing and potential allies. The court was a means for the *peregrini* to recover payment of that which they had improperly lost "thus satisfying their complaints and rehabilitating Rome's reputation abroad".[240]

8. *Locus standi*

Scholars acknowledge that Roman laws were tralatitious,[241] that substantial portions of a law were carried over into subsequent laws, which dealt with the same or similar subjects.[242] Certain remarks of Cicero, in his *Oratio Pro Rab. Postumio*,[243] are regarded as the *sine qua non* for this view, at least in the sphere of public wrongdoing.[244] The doubts expressed by a scholar as to whether the

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[239] Richardson (1987) 4.

[240] Lintott (1993) 106.

[241] "Roman laws are heavily tralatitious, that is big chunks of text dealing with particular provisions were simply repeated in successive laws on the same subject: note Cic. *Rab. Post.* 8–9 for a clear example of the practice."

"In fact Roman draftsmen copied and pasted all the time and there was a great deal of overlap."

The above quotations are from the comments of the anonymous referees on the paper *The lex Calpurnia of 149* (Marshall and Betts (2013) 39–60). See also Alexander (2002) 56.

[242] This view and what follows differs from what was expressed in the paper *The Lex Calpurnia of 149* (Marshall and Betts (2013) 39–60). I am grateful to the anonymous referees who first raised this issue in their critique of the paper for publication. It will be apparent that since writing my section of the paper, I have had an opportunity to reconsider and revise the approach, which I had previously adopted: see Marshall and Betts (2013) 50.

[243] Cic. *Rab. Post.* 9.

[244] Cicero's client, Postumius, was alleged to have received money from the disgraced proconsul, Aulus Gabinius. He absconded, having been found guilty of corruption during his proconsulship in Syria in 57–54. Gabinius was unable to meet the damages assessed against him of 10,000 talents in the *litis aestimatio* proceedings. Siani-Davies (2001) 70. Gabinius had provided no securities. A claim was made for recovery under the "*Qvo ea pecvnia pervenisset*" ("what has become of the

passage is authority that laws were tralatitious are not persuasive.[245] Cicero provides a sound base for our argument that some provisions of the *lex Acilia* were imported from the *lex Calpurnia* and the *lex Iunia*.[246]

It would follow that an examination of the provisions of the *lex Acilia* could provide information about the possible content of the *lex Calpurnia*, always accepting that other clauses originated with the *lex Acilia*.[247]

Further support can be found in the "double jeopardy" provisions[248] of the *lex Acilia*. These, as we have discussed, draw in as tralatitious provisions taken from the 149 law, those dealing with *locus standi*, the potential defendants and the grounds for relief. Further, it is possible that more provisions of the *lex Acilia* were subsumed. Indeed, it has been argued that "the only major innovation of Gracchus was to change the constitution of the juries. There was no need to alter much if anything else about the law on repetundae." [249] Machinery provisions of the *lex Acilia* dealing with the appointment of a representative, the hearing of the case, the awarding of the verdict and how it was enforced may have formed part of the *lex Calpurnia* and have allayed the apprehensions of *peregrini*.

Let us consider the wording of some important provisions of the *lex Acilia*:

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money") provisions of the Julian law *de pecuniis repetundis*. In the course of the defence, Cicero argued that these provisions had been transferred verbatim not only from the Cornelian law but also from the Servilian law.

[245] Siani-Davies (2001) 136, relying on the use by Cicero of the word *sin* in the passage from the *Pro Rabirio Post*. 9, argues that it introduces uncertainty so that the clause may not have been transferred word by word from the previous laws. To the contrary, Cicero is conceding that the provision is tralatitious and that in seeking to obtain a conviction, when Postumius was not named in the main proceedings against Gabinius, Postumius' accusers are asking for a "new spin" or interpretation to be placed on the tralatitious provision or the procedure associated with it. The word *sin* could happily be rendered as "given" which would make the point.

[246] "Several tralatician statutes (that is, statutes that borrowed substantial sections from previous laws relating to the same subject) were passed in later decades, and one of them, probably from the Gracchan era and usually identified with the *lex Acilia*, has survived, albeit with major lacunae". Alexander (2002) 56.

[247] *Lex Acilia* II. 13 and 16. Chief among the latter would have been the clauses which excluded senators or their relatives from being jurors (iudices) in the *quaestio de pecuniis repetundis* and which therefore implies that senators were the iudices in the *quaestio* established under the *lex Calpurnia*. Other sources make clear that Gracchus eliminated senatorial participation as *iudices* under the *lex Acilia*, Vell.Pat.2.32; Diod. 35.25.

[248] *Lex Acilia* ll.73–74; 80–81.

[249] Comments of one of the anonymous referees referred to in note 241. Significantly, Gracchus did introduce a financial penalty thereby moving the proscribed conduct nearer to the concept of a crime.

1. *Locus Standi*(a) "...any man from among the allies, either of the Roman name or of foreign nations, or within the sovereignty, dominion, power, or friendship of the Roman people, who needs to seek the return of what is his…]." [250]

(b) "if anyone satisfies the praetor that he has been deputed by a king, a community or fellow-citizen of his to sue, he shall have the right to sue and denounce in that matter; investigation shall belong to the praetor."[251]

2. Grounds for relief

> "If he sues a man who has been dictator, consul, praetor, magister equitum, censor, aedile, tribune of the plebs, triumvir capitalis, triumvir for the allocation of lands, tribune of the soldiers for any of the first four legions, or the son of any of these, whose father is a senator, for a sum of money more than…sestertii in any single year…in respect of property which has been stolen, seized, extorted, procured, or diverted from himself, his parent, his son, or from a man to whom he himself, his parent or his son is heir, the investigation shall belong to the praetor." [252]

Firstly, based on our arguments that they are tralatitious, sections 1(a) and (b) above cast doubt on the argument that the *lex Calpurnia* was not intended to be for the benefit of *peregrini*. This argument is based on the point that the procedure applying under the *lex Calpurnia*, the *legis actio sacramento*, was unavailable to *peregrini* as it required an oath that the applicant sued as a Roman citizen. This excluded from its ambit all but Roman citizens.

However, applying our reasoning, the words in sections 1(a) and (b) above indicate the classes for whose benefit the 149 law was introduced. The first

[250] *Lex Acilia* ll.
[251] *Lex Acilia* ll. 4.
[252] *Lex Acilia* ll. 2 and 3.

applicants recorded are the citizens of the allied and Latin states of Italy; then the citizens of external peoples,[253] presumably allies.

Then, *locus standi* is extended to all under the influence and power or in the friendship of the Roman people — "*qui in arbitratu dicione potestate amicitiave populi Romani sunt*". Sherwin-White notes that here there are two categories. The words "*in arbitratu dicione potestate*" indicate peoples who have been defeated and have surrendered to Roman generals by an act of formal surrender — "*deditio in fidem*" — or by unmediated submission.[254] Indeed, our sources confirm that these words are associated with *deditio*,[255] the act of unconditional surrender to the Roman people. This right of action reflects the policy of the Senate not to deter peoples involved in warfare with Rome from surrendering to the good faith of Rome. It is a good question as to why, if in accordance with the *deditio* ritual as recorded by Polybius and Livy, all of the property of the *dediticii* escheated to Rome, there was any point in their having *locus standi*. Still, the inclusion in the statute of a right to sue for an identifiable group in such specific terms suggests that the draftsman contemplated that there were circumstances in which *dediticii* should be able to recover their property.

The second category he argues is very different. "*Qui in amicitia sunt*" [256] indicates the "free states and independent kings of the Roman world outside the territorial provinces who were formally called *socii et amici populi Romani*…".[257] Significantly, Sherwin-White concludes that the *locus standi* sections of the *lex Acilia* applied "to all the inhabitants of the Roman world, whatever their status, even recently conquered peoples, and it picks out the kings and free states as a

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[253] Sherwin-White (1982) 19.

[254] Sherwin-White (1982) 20:

> "The first category — those in dicione, etc. — covered not only provincials but the great barbarian peoples in various degrees of submission or revolt beyond the frontiers of the European provinces of Spain, Cisalpine Gaul and Macedonia, even also of Transalpine Gaul."

[255] Thus Livy 26.33.13 speaks of the Capuans and other peoples: "*qui se dediderunt in arbitrium dicionemque populi Romani*".

[256] It will be seen that Sherwin-White's reading of the text here (*lex Acilia* ll.1) differs slightly from Lintott but this does not detract from his point.

[257] Sherwin-White (1982) 20. He further states:

> "The law refers to this group elsewhere by the phrase 'qui ... regis populive ... sui nomine ... (sc. petit)', 'whoever acts in the name of a state or king.' At this period it was a major category covering half the Roman world: the kingdoms of Asia Minor, Syria, Numidia and Egypt."

special group."[258] Accordingly, all of these peoples would have had *locus standi* under the *lex Calpurnia*. The breadth of the classes of potential applicants was significant. The wider the classes the greater the opportunities for winning the goodwill and support of applicants as allies in the Senate's foreign policy cause.

Indeed, the focus in the quarter century before the *lex Calpurnia* is on wrongs done to subject peoples and rarely on Roman citizens.[259] The references in paragraph 1(b)[260] suggest that the promoters of the *lex Calpurnia* had in mind the various persons who petitioned the Senate for relief on a representational basis, on behalf of regal personages (such as Cincibilus, the king of the Gauls [261]) or as envoys for their nations, these being the most frequently recorded supplicants. Again this would have been an important right for *peregrini* and an important feature of diplomatic policy, that even foes possibly could petition for relief against depredations.

The width of the terminology used in the passage from the *lex Acilia* set out in paragraph 2[262] — "*ablatum captum coactum conciliatum aversumve*" — may imply that the proscribed taking went beyond *res repetundae*.[263] For, Livy sometimes indiscriminately uses (*pecunias*) *capere* to mean the taking or the acceptance of bribes [264] or *peculatus*.[265]

On the basis of the tralatitious nature of the *lex Acilia* for which we have argued, *peregrini* would certainly have had the right to sue under the *lex Calpurnia* for extortion and the applicants were not restricted to Roman citizens, as Richardson suggests.[266] Indeed, the statute may possibly have extended to the taking of bribes but not *peculatus*.[267]

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[258] Sherwin-White (1982) 20.

[259] Bauman (1996) 168 note 5.

[260] *Lex Acilia* ll. 4.

[261] Livy 43.5.1.

[262] *Lex Acilia* ll. 2 and 3.

[263] "stolen, seized, extorted, procured, or diverted". Lintott (1992) 89.

[264] In187 the Petillii, who were tribunes of the plebs charged that Publius Scipio Africanus took bribes from Antiochus the Great. The words Livy uses are *pecuniae captae*. Livy 38.51.1–2.

[265] Livy 38.54.3 uses words to describe the misconduct alleged against L. Scipio in 187 — "*pecunia capta ablata coacta ab Antiocho rege…quod eius in publicum relatum non est*". Livy 38.55.5 makes it clear that Lucius Scipio was put on trial with his legates for peculatus, ultimately convicted and fined.

[266] Richardson (1987) 5. His views are by way of suggestion rather than definite conclusion and he cites the opposing arguments of other scholars. Crawford (2008) 3 contends that a reading of the

It will have been observed, nevertheless, that there still arises a significant point of contention. The argument that the 149 law was intended to provide a remedy only for Roman citizens because of the *legis actio sacramento* procedure, cannot stand against the breadth of these tralatitious provisions which grant *locus standi* to "all of the inhabitants of the Roman world".[268] There must have been a way for *peregrini* around the restrictions of the *legis actio sacramento* procedure (see Section 10).

9. The remedy under the *lex Calpurnia*

The form of the *lex Calpurnia* represented a compromise resulting from a debate in the *contiones*, in which the terms of the proposed law were hammered out prior to its submission to the *consilium plebis*. This explains the reason for the absence of opposition to the passing of the bill. The terms of the *rogatio* having been argued, the final form emerged as an acceptable compromise.

There was significant opposition to the *rogatio* of Scribonius in the same year, so clearly some senators must have initially been at odds with the concept of a wider role for the court. Senators opposing the Calpurnian bill could obviously regard it as a possible intrusion on their traditional practices. Ruthless exploitation of the persons and property of *peregrini* whatever their attitude to Rome was seen as a virtual privilege of command.

It is also possible that a tradition was followed with the *rogatio* for the 149 law being first submitted to the Senate by Calpurnius, allowing for changes or concessions. However, by this time there was a dilution of the force of the tradition. The referral was not a legal requirement and, where a decision was clearly within the gift of the people, failure to obtain senatorial consent could not invalidate the popular will.[269]

In the end, the law surely entailed a balancing act. The Senate, wearing its foreign policy hat, at least secured definite legislation which lent some support to its

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Ciceronian evidence shows that Cicero believed that the extortion legislation applied to provincials "right from the outset".

[267] It seems doubtful as to whether *peculatus* was covered. It continued to be justiceable before the people and a separate *quaestio de peculatu* was created around 103.

[268] Bauman (1996) 168 note 5 makes this point against Richardson (1972).

[269] Livy 38.36.8.

policy of seeking to maintain alliances, or create new connections, in foreign parts by offering a remedy but one fettered by its obvious shortcomings. The senatorial opponents secured significant protection in that their miscreants would be adjudged by their peers.[270]

The *lex Acilia* makes clear that the *lex Calpurnia* and the later *lex Iunia* would have provided only for simple restitution.[271] No compensation or damages, fines or other indicia of penal sanctions was or were provided for in these statutes. Whilst the terms of the *lex Calpurnia* applied to a wide range of *peregrini* and not simply to those who were Roman citizens, the promoters of the law were unable to legislate to combat cruelty. Restitution was the only remedy available to distressed *peregrini* whatever the treatment to which they or their property had been subjected.

> "One cannot say that the object of this law was to expose ambitious and refractory officials to a strict and general control. The law only touches the avaricious. It entirely neglects the principal offences against the state and atrocious crimes against provincial subjects. It in no way tries to prevent proconsuls from massacring provincials or Italian subjects individually or by the score." [272]

This comment was made not in respect of the 149 law but in respect of the *lex Acilia* whose provisions were, in providing for damages at twice the value of the property misappropriated, more rigorous than those of the 149 law. But still there was no relief offered against brutality .

10. The *legis actio sacramento*

A final sticking point for our conclusion that the *lex Calpurnia* allowed a remedy to *peregrini*, is the fact that Calpurnius employed as the procedure for

[270] Forsythe (1988) 114 contends that there would have been "broad" senatorial support for the law. If Forsyth means before it was presented to the contiones, his proposition is questionable The support given by Q. Fulvius Nobilior to Galba in the proceedings earlier in 149 would shows that there were senators who would not have favoured the 149 law, certainly in relation to any provisions which sought to proscribe ruthless imposition of command. The aborted prosecution of Popilius and the Spanish praetors suggests the existence of a strong senatorial rump opposed to any inroads on perceived prerogatives.

[271] *Lex Acilia* ll 58–59.

[272] Sherwin-White (1982) 28.

adjudication the archaic, *legis actio sacramento*.[273] Calpurnius and other the promulgators of the law were presumably satisfied with this procedural form as they must either have selected it or accepted, it during the debate in the *contiones*. The formalities of the *legis actio sacramento* did present problems for the view that the 149 law was of value to the *peregrini*, because, at first blush, they appear to rule out actions for relief by *peregrini*.[274] For example, the parties to the proceedings claimed under Roman law (*ex iure Quiritium*),[275] — "by Quiritary right", that is to say, by right of being Roman citizens.[276]

It might appear, then, that the procedure under the *legis actio sacramento* as adopted by Calpurnius for adjudication by Roman senators did not apply to persons who were not Roman citizens.[277] However, the suggestion that the *peregrini* had no rights under the 149 law is wholly at odds with what we have argued were the reasons for, and the policy of the Senate behind, the law. A statute, which was limited to Roman citizens, would have been an abject failure in strategy for the Roman Senate.

We must seek for means inherent in the legal system whereby *peregrini* could claim relief under the *lex Calpurnia*. Now, the praetor under the *lex Acilia* could, if asked by an applicant, appoint a *patronus* for him. It is possible that such appointment might have been available under the *lex Calpurnia* if the provision in the *lex Acilia* was tralatitious. In order to be represented effectively, it would have been desirable for *peregrini* to call upon Roman citizens to represent them as advocates (*patroni*) before the *quaestio*,[278] as their knowledge of Latin legalese

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[273] The *lex Acilia* ll. 24 indicates this.

[274] The *legis actio sacramento* (the action on the law on oath) was one of the five old actions at law. Gaius *Inst.* 4.11. The *actiones* were described as such because they were set out in a statute (since the edicts of the praetor, which introduced numerous actions — the formulae — were not yet in use) or were precisely adjusted to the words of statute; accordingly they were observed as immutably as if they had been statutes. Gaius *Inst.* 4.11.

[275] Richardson (1987) 5.

[276] Gaius *Inst.* 4.15.

[277] Richardson (1987) 5:

> "but in either case (and explicitly in the formal phrases used for the *actio in rem*) the two parties were asserting their rights (or, for the defendant in an *actio in personam*, denying that he had violated a right) under Roman law (*ex iure Quiritium*, in the *actio in rem*). In the normal form of the action, therefore, this remedy was not accessible to non-citizens, any more than any other part of the *ius civile*."

[278] Lintott (1976) 208–209.

and court procedure would have been deficient. *Patroni* would, however, have been there as advocates and not as the *alter ego* of the peregrine applicants.

Seemingly, difficulties still abound. Lintott has argued that the *patronus* might have performed a *sacramentum* in aid of the material allegation such as *aio te clientibus meis dare oportere* or as *aio te quadragintiens sestertium ex Sicilia contra legem abstulisse*.[279] Again, Valerius Probus explains certain abbreviations, which probably related to the *sacramentum in personam*. The applicant began the proceedings with the averment: *aio te mihi dare oportere*.[280] But, this averment could not have been made by a *patronus*. It involved the assertion of an entitlement to the proceeds of the claim, which a *patronus* could not make as the right was that of his *cliens* and not his.[281] Such special pleadings by a *patronus* would surely have offended the requirement emphasised by Gaius to adhere to the *verba certa*.

In addition, the averment would have transgressed the rule to which Gaius adverts as being operative when the *legis actiones* were applicable. This rule restricted the institution of proceedings in another's name (*alieno nomine agere non liceret*) though there were exceptions (*praeterquam ex certis causis*).[282]

The existence of possible exceptions allows speculation as to other means whereby non-citizens might achieve *locus standi* under the 149 law. Richardson has noted that under the formulary system[283] the presiding praetor could have made a formula, based on *concepta verba*,[284] apply to a non-citizen by interposing a *fictio civitatis*.[285] *Peregrini* would then presumably be able to plead or would

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[279] Lintott (1976) 209. Richardson (1987) 6 advances a number of criticisms: chiefly that the averment says nothing about the recovery of money.

[280] Valerius Probus 4.1. (ch. 35). Roby (1902) 179 note 26.

[281] Lintott (1976) 209. Richardson (1987) 5.

[282] Gaius *Inst*. 4.82. In the *Digest* from Ulpian *Dig*. 50.17.123 the rule is simply stated:

> "*nemo alieno nomine lege agere potest. Justinian Inst. 4.10 also notes that there were exceptions: Cum olim in usu fuisset alterius nomine agere non posse, nisi pro populo, pro libertate, pro tutela*."

[283] We know from Gaius that a formulary system began to replace the *legis actiones*, probably from the middle of the second century. Jolowicz (1972) 219. It was the catastrophic consequences of any slip up in pleading the *verba certa* that precipitated the change. Gaius Inst. 37.

[284] The essential difference between the formulary system and the *legis actiones* was that under the former the action was based on the use of *concepta verba*, by phrases designed to cover the substance of the issue between the parties to the dispute, in contrast to the *certa verba*, the strict and unalterable phrases of which were a feature of the *legis actiones*, as we have observed.

[285] Richardson (1987) 6.

not be required to plead "Quiritary" right. The *iudex* trying the merits would proceed to judgement on the basis that the *peregrinus* was a Roman citizen.[286] However, Richardson acknowledges that there are difficulties in understanding how a *fictio civitatis* could have been embodied in the actual wording of the *legis actio sacramento* ritual. His solution is that the *fictio* may have been included in the statute itself though he admits that there is no mention of such embodiment in the sources.[287]

Crawford's resolution is more appealing.[288] He argues that the areas where it was possible to sue in the name of another (*pro populo, pro libertate, pro tutela*) created an authoritative basis for the view that the civil procedure of the *legis actio sacramento* was intended to protect those who could not protect themselves.

Accordingly, the answer to the conundrum may simply be that wronged provincials who fell within the *locus standi* provisions of the *lex Calpurnia* subsumed by the *lex Acilia* could prosecute their case through a Roman *patronus* who sued by a probable exception to the *alieno nomine non agere liceret* rule or by asserting a *fictio civitatis* enshrined in the statute.

11. Summation

Our argument has been that the Senate, faced with the trauma of ongoing wars waged in the quarter-century before the *lex Calpurnia*, was concerned as a matter of foreign policy to establish new or maintain existing alliances in the Roman provinces.[289] Occasionally a pressing competing interest might produce a reaction inconsistent with this policy but the policy was largely respected.[290] However, in this quarter-century the Senate had to grapple with the ambition of ruthless governors and *imperatores* to whom provincial appointments were seen, in

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[286] Gaius 4.37 in providing us with an example of the formula makes clear that it was available to a peregrine who was either raising or defending an action.

[287] Richardson (1987) 6. By this Richardson must mean the inability to alter the *verba certa*. The praetor did not possess the same flexibility in drafting the wording as he did with the formula.

[288] Crawford (2008) 3

[289] The point is reiterated here that there must have consistently been a body of senators opposed to this policy or at least the steps taken in support The influence of the Popilii clan in 172, the pressure on Canuleius in 171 and the defence of Galba in 149 by Nobilor all suggest a resistance to the action desired by the majority.

[290] The assault on the Epirotes at the direction of the Senate for what we have accepted were economic reasons provides an example. See Section 3.5 above.

accordance with old Roman custom,[291] to be the means for political advancement and personal and family enrichment. In their pursuit of personal interests, generals could actively seek to undermine a comrade in order to gain or debilitate his command. And what were a few thousand barbarians to the prospects of a triumph? Against this the Senate, with no civil service to speak of, could enlist only conventions, such as *deditio*, and its decrees and administrative powers as a means of protecting *peregrini* so as to win their support in administering the burgeoning empire.

In deference to its policy the Senate sought means of combatting the brutalities of its governors. Its efforts served only to highlight the deficiencies in its powers to arrest these excesses against *peregrini*.

Arrogant generals could sneer at senatorial *auctoritas* and ignore senatorial decrees, as did M. Popilius in 173–172. The Senate was made aware that it had no legal means of enforcing them. Concerns that the ritual of *deditio* had not been observed by Popilius when the Statellates had surrendered and the effect this might have on the willingness of nations to submit to Rome with consequent benefits for both sides had no impact.

Recourse was then had to administrative powers, but these were resisted.[292] The Senate appealed next to the tribunes' bench. Plebiscites resulted directed against generals including M. Popilius in 172 and for the prosecution at the instance of tribunes of Lucretius in 170 before the people. The fact that in 171 the Senate had recourse to another stratagem, namely, a tribunal of *recuperatores*, suggests dissatisfaction with the systems previously tried. Lucretius heaped his brutalities on Chalcis, an ally (with Hortensius) as well as on Haliartus. Hortensius attacked Abdera. An embarrassed Senate had to receive angry envoys from each nation.

Again, we have seen how senatorial aspirations had been dashed by the abysmal judicial performance of the praetors in 172 and 171 who had been overborne by the influence of powerful nobiles.

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[291] Drogula (2015) 273.

[292] Attempts to use the power of appointing consuls to provinces and authorizing levies to overcome consular recalcitrance were treated with disdain in 172 by Popilius' brother, C. Popilius, and his colleague.

The final straw came with the atrocity wrought by Galba in 150 following the ruthless campaign of Lucullus in 151 against the Celtibarians. The legal process of a *rogatio* to set up a court to try Galba was defeated. This time it was histrionics, oratory and possible the critical votes of Galba's soldiers which defeated the process.

The tribunals to which the Senate had resorted were all temporary in their operation and experience had shown how readily they could be evaded or disrupted to the detriment of senatorial intent. Having exhausted the available courts, it was therefore an inventive step for the Senate, learning from their weaknesses, to come up with the permanent concept.

The permanent court did not address all of the allied complaints. The suppression of butchery and enslavement were not encompassed in its terms. Restittion alone was available and no fine or sanction was provided. The statute was a compromise forged in the heat of the *contiones*. We may reason that there were initially ambit claims directed at the proscription of heinous conduct, which were withdrawn in the face of vigorous opposition from vested interests.[293]

Importantly, because of the tralatitious nature of the *lex Acilia* as we have argued, the classes of *peregrini* who had *locus standi* were broad and evidence a concern on the part of the Senate to see that the remedy available under the 149 law was made available from *deditícii* to monarchs alike.

[293] The fact that the jurors were to be senators must have been of some comfort to the more belligerent opponents of the law.

Chapter 3. The *Quaestio de Sicariis et Quaestio de Veneficiis*

1. Introduction

In the second chapter we argued that the *lex Calpurnia* of 149 established a court, the *quaestio de pecuniis repetundis*, which provided a remedy to *peregrini* whose property had been misappropriated by provincial governors. The remedy was limited to restitution. The classes of *peregrini* who had *locus standi* thereunder were not limited to those who were Roman citizens. This was because of the effect of:

1. the clauses of the *lex Acilia* prohibiting "double jeopardy;"[1] and
2. the tralatitious *locus standi* provisions of the *lex Acilia*, subsumed from the *lex Calpurnia*, which by the breadth of their language extended to "all the inhabitants of the Roman world".[2]

The *legis actio sacramento*, the antiquated procedure stipulated for the resolution of disputes under the *1ex Calpurnia* appeared, at first sight, to require as a necessary step the making of a Quiritial oath. However, the problem this presented for non-Roman *peregrini* who wished to sue, was overcome by the use of a *fictio*, (possibly incorporated in the statute itself),[3] whereby they were deemed to be Roman citizens.

The *1ex Calpurnia* exhibited none of the trappings of a criminal statute, at least by the norms of modern common law countries. It imposed no punishment and its hoary procedure was a creature of the civil law. The *lex Calpurnia* was directed at a form of wrongdoing, which was associated essentially with members of the senatorial order.[4]

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[1] *Lex Acilia*. ll. 73–74; 80–81.
[2] Sherwin-White (1982) 20.
[3] Richardson (1987) 6.
[4] Cloud *CAH*. 1994. Vol. 9. Ch.13. p. 520.

In this study we shall argue that a significant development occurred after 149, with the establishment in 142, of the first permanent court entertaining a criminal jurisdiction, the *quaestio de sicariis*.[5]

Sometime later, but before 123, came a second court concerned with crime, namely the *quaestio de veneficiis*.[6] With the establishment of these two courts the Romans initiated a shift from a standing court with procedures, which were essentially civil, to new standing courts with criminal procedures. This shift also involved an extension of those who might be prosecuted from the senatorial order to the general Roman community. The decision to establish criminal courts, which because of their subject matter concerned the conduct of the whole of society and not just senators, was visionary. It represented the beginning of a Roman criminal justice system with offences defined by the enabling law in place of the discretionary adjudication of events *apud populum*. In short, the Romans, soon after the establishment of the 149 civil court, were creating new courts, which were not only permanent but exercised criminal jurisdiction. Moreover, their reach extended to all classes of Roman society.

2. Criminality

The concept of criminality is at the outset troublesome. We do not understand how certain behaviour, which would be regarded as criminal by legal norms applicable in modern common law countries, would have been viewed by the Romans.[7] Gaughan claims that:

> "Before the middle of the second century B.C.E, there were no crimes…what is known is that the government did not legislate regarding criminal acts until the middle of the second century B.C.E when the legislation was tied to the

[5] See Section 4 below for the scholarship on this issue.

[6] The dictator L. Cornelius Sulla was to combine the jurisdictions of two existing courts, the *quaestio de veneficiis* and the *quaestio de sicariis* into the one permanent court. Riggsby (1999) 50.

[7] Gaughan counsels against the use of the words "crime" or criminal" to describe acts that constituted a danger to the state. She points out that were no words in Latin that can be translated as these English expressions. Gaughan (2010) 2.

> creation of standing criminal courts, the *quaestiones perpetuae*." [8]

The implication of this passage is that:

1. conduct prosecuted in other forms of tribunals, *before* 149 or, perhaps, more accurately the passing of the enabling statute of the *quaestio de sicariis*, was not criminal; and
2. the scope of what was criminal was to be found in the words of the enabling statute of the permanent courts.

We do not, therefore, do any offence to the scholarship by using the word "crime" and its derivatives from 149 onwards in relation to the enabling laws for our permanent courts. As to the nomenclature before 149, Harries presents an alternative analysis to Gaughan. She argues that:

> "an offence defined by law as subject to 'public' legal process was a crime…the existence of law is a precondition for the existence of crime. No law means no crime because crime could exist only in the context of the legal process set up to deal with it."[9]

It can be inferred from Harries' remarks that Gaughan presses too far her point that, until the coming of the *quaestio de sicariis*, there was no concept of crime since, Harries notes, there was, in the *iudicia populi*, a public process to deal with the trial of crime. Accordingly, it is acceptable to refer to crime and criminality in the context of the Roman legal system and not just in the context of the standing courts.

Prior to the creation of the *quaestio de sicariis*, the Romans had recourse to *ad hoc* tribunals in which conduct, which threatened to harm or undermine the security of the state,[10] "or was seen as damaging to society as a whole"[11] was prosecuted. In the early Republic a relatively rudimentary public procedure *apud*

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[8] Gaughan (2010) 67.

[9] Harries (2007) 3.

[10] Gaughan (2010) 68–72 argues that this was the criterion for prosecution before the establishment of permanent courts when the particulars of the offence were set out in the enabling law.

[11] Harries (2007) 14.

populum prevailed.[12] Later and by our period proceedings, instigated by tribunes involving magisterial investigation (in open *contiones*) and adjudication, which was subject to appeal to the people, overtook the earlier process.[13] In addition, special courts, ordained by the Senate with the backing of a tribunician *rogatio* in which a praetor presided, were utilised.[14]

Cicero reports that prosecutions in the people's judicial assemblies continued after the establishment of the permanent courts. This followed from the fact that skilled counsel, like Caius Carbo, was much in demand, particularly after the introduction of the secret ballot for the judicial assemblies.[15] This was effected by the *lex Cassia* of 139. There was therefore a dual court system operating for crimes committed in Rome in the second half of the second century.[16]

3. The judicial assemblies of the people

It is noteworthy that plebeians in the *consilium plebis* were prepared to pass enabling acts whereby the two new permanent courts were established. These courts were manned by senatorial jurors, since the privilege of serving as the exclusive jurors was taken from the senators by Caius Gracchus,[17] and the two courts were created before Caius' reforms in 123. If the *quaestio de sicariis* was

[12] Harries (2007) 14.

[13] The cases were heard before a magistrate. There were three investigative hearings with periods between them. The hearings were before a *contio* which could make no decision, but which was open to all. After a further period, the magistrate made his decision in a formal . If the decision went against him, the accused had a right of appeal (*provocatio*) to the people, which could set aside or amend the magistrate's decision. If the penalty sought was a fine the people in the *concilium plebis* decided the appeal. If a capital case was involved the people in the *comitia centuriata* ruled on the fate of the appellant. Harries and other scholars accept this analysis, which is largely that of Mommsen: Harries (2007) 14.

[14] Exemplified by the praetorian tribunal set up by the Marcian law to investigate who was responsible for the maltreatment of the Statellates. The trial by a praetor of the Roman noble matrons Publilia and Licinia in 150 for poisoning their husbands may have been a further example, though the sources do not indicate how the tribunal was set up. Livy. *Per*.48.

[15] Cic. *Brut*.106.

[16] There were also occasional special courts established by the Senate to deal with offences committed in Italy. Polybius 6.13.4. Examples include the Silva Siva tribunal in 137 and the praetorian investigations into poisonings authorised by the Senate in the late 180s.

[1717] Vell. Pat.2.32; Diod.35.25.

established around 142 [18] the stigma of senatorial corruption, [19] which later attached to the 149 court would not yet have materialised.[20]

What reason would the Roman plebs have for passing *plebiscita* to establish these permanent courts?

It is possible that the plebs saw merit in permitting the adoption of the new court system as a better means than their judicial assemblies for controlling the unsettled conditions prevailing in Rome after the fall of Carthage. The move may well have come as welcome relief. Many responsible plebeians probably regarded their assemblies, which were temporary in nature, with judgements dictated by impetuosity in an often unruly and turbulent atmosphere, to be inimical to securing punishment of the serious offenders emerging in this period.[21]

A trade-off may have been involved in the negotiations in the *contiones*. The plebeians lost the capacity to adjudge murderers, dagger wielders and poisoners in return for stability. However, the movement towards the establishment of permanent criminal courts did not progress, at this time, to the creation of such courts for the crimes of *perduellio* and *peculatus*, where the accused were usually members of the senatorial order. These crimes formed much of the work in the *iudicia populi*.[22] With senators as the judges in the first permanent courts it might be expected that it would have been in the interests of the Senate to press for a shift to establishing standing courts for these offences as well.

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[18] See Section 4 below.

[19] App. *BC*.1.22.

[20] As far as our evidence allows, it was almost ten years before there was any incident of a *repetundae* case: Gruen (1968) 31.

[21] The events which took place with the prosecution of Galba in 150 on a possible capital charge for his brutality (CH.2. Paragraph 3.8) well evidence how trials could go awry and lead to verdicts or judgements which were disquieting or unacceptable. See passage from Brennan cited at footnote 179 page 155.

[22] Good illustrations include:

- the prosecution before the people of P. Claudius Pulcher for *perduellio* in 249, either for his contemptuous disregard for the unfavourable omens stemming from the failure of the sacred chickens to eat or for the loss of his fleet Cic. *ND*.2.7; Cic. *De Div*.71; *Schol. Bob*. 90; and
- the successful charge of *peculatus* in 187, albeit in a specially convened court of the people, against Lucius Scipio and his legates, for taking or capturing property from King Antiochus and not accounting for this to the *aerarium*. Livy 38.54.3;5;8.

Instead, the Senate apparently rested content with the continued operation of the *iudicia populi* well after 149. Their function, although often lacking procedural formality and predictability, was tolerated. The reason was possibly a wariness, on the part of the Senate, about advancing too quickly in depriving the people of jurisdiction for the offences in their own courts. The Senate may also have been concerned as to whether the people would pass laws establishing further permanent courts without substantiation for their existence.

Moreover, senators were aware that where a moving tribune sought the death penalty for an accused the case would be tried not in the *concilium plebis* but before the *comitia centuriata*, where the first class and the senatorial order could dominate through their centuries. The *former assembly* could impose only fines. The Senate might therefore have decided that on balance leaving the plebeians with the more limited penalty prerogative was an appropriate compromise in order to secure the passing of the enabling laws for the two new courts.

Again, it is likely that the Senate was better able to secure the passing of these enabling laws rather than laws to establish courts for *peculatus* or *perduellio* because the very seriousness of the proscribed offences — murder, the carrying abroad of a deadly weapon and poisoning — affected all Romans. The plebeians might well have seen the achievement of the former as apolitical. In contrast, any attempt to accomplish the latter —the deprivation of plebeians of jurisdiction over the two offences — might be regarded by suspicious plebeians as intended to insulate senators (who would have constituted most of the accused) from popular prosecution as well as an affront and threat to plebeian judicial prerogatives.

Moreover, in the judicial assemblies it was for the people to determine whether conduct fell within these categories of *perduellio* or *peculatus* or was punishable for another reason.[23] Statutory intervention, providing a test for proscribed conduct, was not necessary to outlaw wrongdoing. It was up to the community to decide in their assemblies both on what was "criminal" and on guilt.[24] The people also voted and decided on the penalty to be imposed.[25]

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[23] The slaughter and enslavement by Lucretius of *peregrini* at Haliartus in 171; for example, Livy 43.63.3–10.

[24] Harries (2007) 15.

[25] Bauman (1996) 5: "the salient fact is that there is no fixed penalty. It depends on the magistrate's discretion and the endorsement of the people."

It is likely that this factor, the capricious and discretionary nature of decision making without the advantage of statutory guidance, invited the possibility of graft. We may reasonably speculate therefore that, in cases where prominent members of its order were the accused, the Senate would have been quite conscious of the opportunity to secure a favourable decision by the distribution of largesse to the people in the tribes or in the *comitia centuriata*.

Overall, movement towards creation of standing criminal courts was unhurried and politically astute, in that the people were not wholly deprived of jurisdiction. They continued to exercise their powers over senators in cases of *perduellio* and *peculatus* in the judicial assemblies

We have discussed the promulgation procedure in Chapter 2, Section 6. The analysis there allows for the possibility that the enabling statutes for these two courts represented compromise legislation.[26] As against what we have already argued, it may be possible that the promotion of a law for a court to deal with crimes additional to the *de sicariis* law, for example *peculatus* and *perduellio*, was contemplated as an ambit claim, but was defeated in the *contiones*.

Before the passing of the enabling laws for these two *quaestiones* under discussion, the Romans had established in the 149 court a permanent court with civil procedure and a civil remedy. The defendants who might fall within its jurisdiction were within a narrow senatorial range. The achievement of the Romans was to accomplish the creation, within a short time, of two standing criminal courts equipped to punish breaches of their enabling laws which, because of the nature of the crimes, applied to all Romans. There was a recognition of the need to expand the Roman criminal justice system to provide courts which might deal with the threats posed to the state and society by the wrongdoing.

However, the Senate did not pursue the creation of permanent senatorially manned courts, which might assume jurisdiction over the other crimes which specifically affected them alone as senators. We will now review what impelled the Romans to embark upon this important shift to establish the two new standing

[26] As plebiscites, it would have been necessary for them to have been passed by a majority of the tribes, inevitably after vigorous debate in the *contiones*.

courts,[27] whilst allowing criminal proceedings in other areas to continue before the people.

4. The date of the *quaestio de sicariis*

Cicero's remarks in the *Brutus* permit the conclusion that there was more than one standing court created between 149 and 123.[28]

We know that in 142,[29] L. Hostilius Tubulus, as praetor, presided over a court described by Cicero as a *quaestio inter sicarios*.[30] Pivotal to our enquiry is whether this court is to be regarded as a permanent court or a *quaestio extraordinaria*. The scholarship is firmly divided on this issue.[31] The competing points of view are best represented by the arguments of Brunt,[32]Bauman [33] and Gaughan[34] on the one hand and Gruen[35] and Cloud[36] on the other. The weight of

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[27] Cic. *Pro Cluent*. 148 makes it clear that special statutory provisions set up the permanent courts.

[28] Cic. *Brut*. 106: "*Nam et quaestiones perpetuae hoc adulescente constitutae sunt quae antea nullae fuerunt*." Gruen (1968) 87 note 44 argues that Cicero's remark means that the institution of *quaestiones perpetuae* is to be dated from 149. , Brunt (1988) 219 strongly disagrees. He argues that the use of the plural suggests there was more than one court created in Carbo's youth . He refers to "the plain sense of the text" which makes this position the more plausible:

[29] Cic. *Att*. 12.5.B.

[30] Cic. *Fin*. 2.54.

[31] Cloud (1994) 520 argues that: "There is no decisive criterion for determining whether Cicero was referring to a permanent or special court."

[32] Brunt (1988) 221.

[33] There are attractive arguments to support the view that the court of Tubulus was a permanent court. See Bauman (1983) 234–236 and 236 note 78.

[34] Gaughan (2010) 69; 161 note 4 and 161 note 11 regards the *quaestio de sicariis* as already in existence in 142. She accepts that it was a permanent court: Gaughan (2010) 161 note 11. Gaughan refers first to Greenidge (1901) 420 who contends that: "there was a strong probability that this court was of a permanent character": Then she cites with approval Bauman, whose argument she finds the clearest and most persuasive in support of the court being a standing court.

[35] Gruen (1968) 29, doubts whether Tubulus' court was a standing court. His main ground is the consular investigation in 138 of the Silva Sila killings. He asks why an enquiry by the consuls, directed by a *senatus consultum*, would have been undertaken if there was a permanent court at hand:

The answer may lie in Gaughan's analysis of the killings. Gaughan (2010) 70–71. The Senate was concerned not with the murders but rather with any threat to the fabric of the state. This arose from the high status of the victims, the fact that the accused included lowly slaves of the company which operated a pine pitch factory, and that the company leased the factory from the censors: Another plausible response is that the crime may have been regarded as a "high crime" committed in Italy for which the Senate, according to Polybius, would have exercised jurisdiction.

[36] Cloud (1994) 521 argues that Cicero does not use, of a judge in a standing court, the words *ob rem iudicandum*, because in the standing courts it was the *iudices*, not the single judge, who determined the verdict: However, his argument is somewhat diminished by the fact that, in writing the seminal chapter in the Cambridge Ancient History, Cloud does not cite or counter Bauman's analysis.

the scholarship supports the view that Tubulus' court was a permanent court, and that accordingly the *quaestio de sicariis* was in place by 142.

It is likely that the adjudicators in the *quaestio de sicariis* were members of the senatorial order. This emerges from the oft-cited passage from Asconius about the court of L. Cassius Longinus Ravilla, the strict *quaesitor*:

> "L. Cassius was a thoroughly stern figure. Whenever he was presiding in court over a case of homicide (*Is quotiens quaesitor iudicii alicuius esset in quo quaerebatur de homine occiso*), he used to give the advice, indeed the instruction to the jurors (*iudicibus*) applied here by Cicero: the jury should ask in whose interest was the death of the man in question."[37]

Gaughan argues that there was never a standing "murder" court, a court *de homine occiso* as such at the time, as distinct from a *quaestio de sicariis*.[38] However, Asconius' language imparts the idea of a continuity of administration of the court[39] by Cassius and therefore, as Bauman suggests, a permanent tribunal.[40]

Again, a trial *de homine occiso* could easily encompass a trial *de sicariis*, involving a killing. Cassius was probably a praetor in 130.[41] If so, it is likely that his presidency of this court occurred in a period before 130.[42] We therefore proceed on the basis that the *quaestio de sicariis* was formed as a permanent court by the passage of an enabling law in the period between 149 and 142.

Notably, Asconius refers to *iudices*, that is a body of jurors, not simply the people gathered in their assembly, to whom Cassius was wont to pose his celebrated question. If a standing court was in existence by 142, it is likely that its *iudices* were drawn from the senatorial order, since this was the position with the first court.

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[37] Asc. Cic. *In Mil*. 45. Translation of Squires (1990) 71.

[38] Gaughan (2010) 69.

[39] Particularly in the use of the adverb, *quotiens*, and the imperfect tense, *quaerebatur*.

[40] Bauman (1983) 234–236.

[41] He was consul in 127 and probably praetor in 130. MRR 1.507.

[42] Cloud notes that the regular (permanent) criminal courts, unlike special tribunals, never had presidents of higher rank than praetors and the *quaestio. de sicariis*, at least after 130 , regularly had presiding magistrates of lower rank: Cloud (1994). p. 522. Therefore, as Cassius was praetor in 130 he must have presided before 130 in the *quaestio de sicariis*.

It is somewhat disappointing that the scholars who argue for the existence of the permanent *quaestio de sicariis* as early as 142 do not appear to pursue, in detail, the effect of this conclusion for the system of the permanent courts. The interpolation of this court gives rise to matters of some moment. Interesting questions as to the procedure applicable in the two new standing courts, the number of the jurors and the penalties, and as to the validity of some assumptions, based on the alternate view that there were no permanent courts other than the 149 court, arise. This study seeks to deal with some of these matters.

5. The reasons

5.1. The *quaestio de sicariis*

Before the creation of the *quaestio de sicariis* it was only those killings, which threatened the security of the *res publica*, which came before the people.[43] They, in their assemblies and in the absence of statutory guidance, ruled on guilt.

The dangerous conditions prevailing in Rome after the destruction of Carthage must have induced much disquiet as to whether the people's judicial assemblies were capable of reining in the potential for violence. Something more than the kinds of temporary tribunals to which the Romans had had recourse in the past was required to deal with the potential for ongoing problems.

The court as originally established, was concerned with the acts of the *sicarius*. The meaning of *sicarius*, therefore, defines the jurisdiction of the court. The expression connotes a murderer or assassin. However, Gaughan, who is concerned to establish that there was no murder court, as such, in our period, cites a passage from the *De Inventione*.[44] Cicero postulates a hypothetical case in which a defendant, who maimed but did not kill, an *eques* in dismembering his arm, should have his *praeiudicium* determined not before *recuperatores* but rather in the *quaestio de sicariis***.**[45] Gaughan takes this as an indication that the *quaestio de sicariis* was not *wholly* concerned with homicide.

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[43] See Gaughan (2010) 68. Gaughan notes that these included *veneficium* and *parricidium*, which had their own particular effect on the citizenry as well as killings which were brought within the scope of *perduellio* because of the number of victims.

[44] Gaughan (2010) 74.

[45] Cic. *de Inv*. 2.59.

Importantly, because we argue that the *quaestio de sicariis* and its enabling statute should be dated to 142, we must treat such evidence as is available on the basis that it relates back to, and is confirmatory of, the circumstances prevailing in 142, unless to do so, in respect of any material, would be unsupportable. Our position, therefore, is that the provisions of the *lex Cornelia de sicariis et veneficiis* of Sulla, as recorded by the jurists and referred to in the following paragraphs were tralatitious and were embodied in Sulla's law but derived their content from the 142 enabling law. Accordingly, we contend that the jurisdiction of the142 *quaestio* was concerned with the matters listed by the jurists or at least part thereof.

Let us turn to this evidence. Cloud, refers to passages from Ulpian and Marcian in seeking to justify his conclusion that murder was not the primary objective of Sulla's law.[46] However, these passages from the jurists juxtapose the crimes. Marcian asserts, in descending order, that anyone is liable under the law who shall have killed a person or who shall maliciously have created a fire, or who shall have ventured abroad with a weapon for the purpose of killing someone or of committing a theft.[47] On the other hand, Ulpian claims to cite the text of the first chapter of the *lex Cornelia*. This puts first, as proscribed conduct, any man who shall have ventured abroad with a weapon for the sake of killing or for committing a theft or shall have killed a person.

Cloud concludes that Sulla's law was directed at "gangsters" (men who went abroad with deadly weapons) and not necessarily killers and the effects on public order of their conduct.[48] *Sicarius* was therefore a gangster rather than a killer. However, his examination of the jurists seems to rest very much on the order in which each of the learned authorities refers to the going abroad with a deadly weapon or actually murdering another man. As each of the jurists refers in fact to the killing outright of a fellow man this should be enough to allow us to conclude

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[46] Cloud (1994) 522. The passage from Ulpian 1.3.1 reads:

> *cavetur ... praetor .. .uti quaerat ... de capite eius, qui cum telo ambulaverit hominis necandi furtive faciendi causa, hominemve occiderit, cuiusve id dolo malo factum erit.*

The passage from Marcian is found at *Dig. 48.8.1. p r . (= Marc.)*:

> *lege ... tenetur, qui hominem occideret: cuiusve dolo malo incendium factum erit: quive hominis occidendi furtive faciendi causa cum telo ambu- laverit . . .*

[47] *Dig*. 48.1.1 (Marc.).

[48] Cloud (1969) 274; 280.

that *sicarius* can be rendered as "murderer" and the court as a court concerned with murder. In any case Cloud's construction of the statute does not exclude prosecution of assassins.

If, as we have suggested, these passages from the law of Sulla cited by the jurists were tralatitious, then they would have formed part of the 142 law as well, and the law of 142 would have been concerned with murder.

Cicero associates *sicarii* in his speech on behalf of Sextus Roscius in 80 with those who murder, or are contracted to murder, for the purpose of acquiring the property of the victim but not with political objectives.[49] Again, recent scholarship has suggested that the Cornelian Law was concerned not only with urban gangsters but also those killing other men, those wearing weapons and those committing arson.[50] Parallels are thus likely between the urban conditions after the fall of Carthage and those prevailing prior to Sulla assuming his dictatorship.

What emerges is that the enabling law for the 142 court would have extended not just to murder but also to the carrying of a deadly weapon with a view to murder or theft. The law was directed at the assassin who killed, or the footpad or armed robber who threatened society or property for his own particular reasons with a deadly weapon.

Nonetheless, we should not be induced into believing that the meaning of *sicarius* and therefore the jurisdiction of the court was restricted to the gangster who went abroad with a deadly weapon. The references from the jurists, albeit in the context of the Cornelian law, argued to be tralatitious, indicate, that the law also extended to the murderer himself. Moreover, it is surely illogical that, if the times were so unstable as to justify a law against "gangsterism," the proponents of the enabling law for the 142 court would not have addressed the crime, which would inexorably have flowed from it — namely murder. We conclude that the subject of the court's jurisdiction was not limited to the "gangster" but extended equally to murderers.

The proponents, of the 142 law, were content to allow the judicial assemblies to continue to adjudicate on conduct, which threatened the state, but not on that of

[49] Cic. *Rosc. Amer*. 93. Cloud (1994). p. 522.

[50] Ellart (2012) 3.

the *sicarii*. The submission of the behaviour of the *sicarii* to the adjudication of a jury composed of senators in a permanent court implies that there was seen to be a need in Rome to tackle this conduct and that the existing machinery was inadequate. Indeed, it was conduct which threatened the Roman people overall and not just the senatorial class. The Roman community had a vested interest in combating the conduct of the *sicarius*. Despite the continued sitting of judicial assemblies for other crimes, it is plausible that they were failing to keep pace with the number of cases involving unlawful killings or marauding dagger wielders, because of their clumsy and protracted forensic procedures.

Accepting circa 142 as the possible period for its enactment, some significant events about this time must have triggered the decision to pass the enabling law for this court.

We must surely pinpoint the ramifications of the destruction in 146 of Carthage. The sources are uniform in their view that the removal of this threat, the *metus hostilis*,[51] lead to a decline in Roman society occasioned by the pursuit of *ambitio*[52] and then of *avaritia* and *luxuria*.[53] The end result was changes in the social order,[54] the spread of civil discord, the disturbance of the state[55] and the potential for mob rule.[56] Arguably, given such a climate arising from the unrestrained ambition of all classes to achieve their desires, the opportunities for the *sicarii* to provide their services would have escalated. For the purposes of this study, it is not significant as to whether the *sicarius* at whom the enabling law was directed was the assassin who killed, or the footpad who threatened society for his own particular reasons with a deadly weapon. In the conditions which we have postulated as prevailing in Rome armed robbers would have proliferated as much as murderers and repression of their "enterprise" would have been equally as important for the security of the state.

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[51] Sall. *Iug*. 41.2.

[52] From Sallust's account it was *ambitio*, which dominated Rome after the fall of Carthage: Conley (1981) 380.

[53] Sall. *Iug*. 41.9–10.

[54] Sall.*Cat.*10.6:"the community was changed, and governmental authority, instead of being the most just and best, became cruel and intolerable." Sall. *Iug*. 41.5: "For the nobles began to abuse their standing and the people their liberty, and every man took, pillaged, and plundered for himself."

[55] Sall. *Iug.* 41.10.

[56] Polyb. 6.57.9.

At the same time the annihilation of Carthage was to make Rome the most powerful trading economic and military power in Italy and in the Mediterranean, and inherently more prosperous. Rome would thus have been a magnet for all men seeking opportunities for self-advancement, particularly those who had been dispossessed or whose lives had been disrupted by war. In the mid-second century, Rome was at war on several fronts — in the Spains, in Greece and Macedonia, as well as with the Carthaginians. Rome would have attracted not only those who sought to better themselves by honest toil but also, more to the point, the unscrupulous and those prepared to resort to violence to attain their ends.

In addition, the ingress into the urban environment of large numbers of the rural poor must have placed pressure on available resources of food and housing. These immigrants represented agricultural peasant workers dispossessed by the growth of the great plantations, known as *latifundia*, owned by the wealthy senators and *equites* and worked by slaves with whom the small farms could not compete. The devastation of large agricultural areas of Italy by the opposing sides in the Punic Wars and their long absences on active service in these wars meant that men found their holdings unviable on returning home following their demobilisation. This made them captive to the acquisitive avarice of the large landowners and bought out they drifted to the city. Rome with its promise of subsidised corn doles as well as the excitement of the entertainment in its amphitheatres and the circus was an enticement which smaller local cities could hardly have matched.

There was also the opportunity to gain from the largesse of the *nobilitas* seeking office.

The influx of these immigrants into the urban environment must substantially have increased the population and have led to overcrowding and to shortages of food and housing. It must also have added to the prospects of serious anti-social behavior and finally to conflict and violence.

The *sicarii* could not realistically have been kept in check because the Romans lacked anything akin to an effective police force. The only possible candidates for

this work were the *tresviri capitales* and their duties, as far as we know them, fell well short of what was required.[57]

In short, conditions in the city from the fall of Carthage necessitated the presence of a tribunal, which could deal effectively with the *sicarii* and could be expeditiously convened with a minimum of procedural fuss. The Romans found this with their creation of a standing court with procedures which were concerned with criminality, and which applied to society as a whole and not just with senatorial miscreants.

As to penalties, the punishment of the Bacchanalian conspirators in 186 and in the years following, and the execution in 150 of the noblewomen, Publilia and Licinia, by their blood relations, for the poisoning of their husbands, provides evidence that poisoning was regarded as meriting capital punishment. It is reasonable to assume that the penalty, therefor, for *damnati* in the first *quaestio* de *veneficiis* would have been capital. As poisoning was a category of murder, the same penalty should have applied in the first *quaestio de sicariis*.

On the other hand, the jurists suggest that condemnation under the combined *lex Cornelia de sicariis et veneficiis* of Sulla involved the sentence of *aquae et ignis interdictio* and by Ulpian's time there were changes in the penalty.[58] However, Kelly also remarks that the conclusions of the jurists are "highly problematical" because their works were continually modified and updated by later scholars.[59] It is possible as well that the penalties changed in the years after Sulla's law was passed. As the offences seem to have been no graver at the time when the statute of Sulla was passed, it is plausible to reiterate that the capital penalty applied in the two new courts. In reality the capital charge could be mitigated by the accepted practice of flight into exile, which would trigger an interdiction from fire and water ruling from the court.

A question arises as to whether the law of Caius Gracchus, preventing the execution on a citizen without a judgement of the Roman people (*lex Sempronia*

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[57] Their functions were mainly the prevention of nocturnal conflagrations, the supervision of executions and possibly patrolling the streets for evidence of wrongdoing. There is considerable doubt as to the ambit of their duties. Gaughan (2010) 96.

[58] This was replaced by Ulpian's day with deportation to an island (presumably exile as an alternative to execution) and confiscation of property for those of high social status. As to the inferior classes it was the practice to hurl them to the wild beasts: *Dig*. 48.8.5.

[59] Kelly (2006) 40–41.

ne de capite civium iniussu populi iudicaretur),[60] would, after its passage in 123, have precluded the jurors in these two courts pronouncing the death penalty. However, the permanent courts were established by statutes which were passed by the vote of the *concilium plebis*. It follows that the plebeians in their assembly had thereby approved the enabling laws and their statutory penalties and all sentences represented their will.[61] Caius' statute would not therefore have precluded the imposition of the capital penalty.

The likely adjudication procedure is controversial. It could not have been the ancient form of action, the *legis actio sacramento*, which applied under the *lex Calpurnia*. The action under the 149 law was essentially of a civil nature with no provision for criminal sanctions.[62] It is inconceivable that the 142 enabling law under which the worst of malefactors were to be prosecuted and punished could have employed the machinery of this form of action. A procedure, other than the *legis actio sacramento* must therefore have been set down in the enabling law. Speculation as to the nature of the procedure strains the imagination.

With the *legis actio sacramento*, it was still necessary for the jurors to decide which of the parties' version of the facts was the more plausible. This must have been done by a majority decision of the senatorial jurors. Perhaps the procedure in 171 before the *recuperatores* provided the precedent with senators as advocates.

There is also the possibility that the Senate assigned to a praetor, as its delegate, the duty of presiding in the permanent court, particularly in view of the likelihood that there would have been no shortage of cases before the court. The enabling statutes must also have addressed the numbers of jurors required since the complement of the Senate was around 300 at this time. With many of its members engaged in other administrative duties or infirm there could not have been a large pool to draw upon. In addition, the nature of the crimes was such that it may have been necessary for more than one division of the courts to be sitting and there was also the extortion court.

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[60] Cic. *Rab. Post.* 12.

[61] Kelly (2006) 40–42. He makes the point in relation to Sulla's courts but the same analysis would apply to the two criminal courts under discussion.

[62] Gaius *Inst.* 4.3.

Therefore, within the indicated period the Romans developed their criminal justice system to a new and heightened level. The conduct of the *sicarius* in Rome was now to be dealt with by a permanent court, manned by senators, and where members of the whole community rather than the senatorial order were exposed to prosecution. The facilities for permanent prosecution for criminality of the lower social orders had now materialised.[63]

The upshot is that, with their first permanent criminal court, the Romans sought to deal with the problem of violent crime, which was likely to have been perpetrated in the prevailing conditions by members of the lower orders. No doubt the Senate may have liked to have had a court created which took over from the judicial assemblies the offences where senators especially were at risk but the Senate resiled from this for fear of a plebeian backlash against the two enabling laws.

It is plausible to suggest that with some seven years only separating the *quaestio de pecuniis repetundis* from the *quaestio de sicariis* court, the plebeians senators who would be voting in the *consilium plebis* on the enabling law for the latter court would have had in mind what advantages, if any, might be derived by peregrines from the powers conferred on this new court. Whilst the interests of foreign nations may not have been the primary purpose for the creation of the new court, senators may well have supported its passage for the reason that it stood to create a safer Rome. The purpose of the *lex Calpurnia* had been to provide a forensic remedy, but only in Rome, for *peregrini* to seek restitution. The fact that the Romans had introduced a court which sought to deter the most life-threatening crimes, would have been of some comfort to *peregrini* who contemplated the hazardous journey to the city to vindicate their rights. The prospect of a more secure city would surely have been regarded as a step forward and have made *peregrini* better disposed to litigating in Rome.

Would *peregrini* or their relations, who were injuriously affected by conduct proscribed by the enabling law, have had *locus standi* in the *quaestio de sicariis* if they were adversely affected by conduct covered by this court when present in Rome? We do not know the procedural requirements for a trial under this *quaestio* and therefore whether *peregrini* would have had a right of action. Under the *lex*

[63] The *sicarius* is more likely to have been found within the ranks of the Roman urban mobs although his services would probably have been employed by members of the higher order possibly at the risk of prosecution if discovered.

Calpurnia, it was the procedure of the *legis actio sacramento* which introduced the requirement for Roman citizenship, as discussed in Chapter 2, Sections 8 and 9. It has been suggested that the *legis actio sacramento* procedure would have been unsuitable for the *de sicariis* court. Therefore, it is possible that the peregrines could have sued in person but the assistance of a Roman citizen would surely have been necessary for comprehension of the proceedings. To suggest that the court would have required the assertion of Roman citizenship would have blocked prosecutions by the peregrines and been detrimental to the Roman diplomatic purpose of securing peregrine goodwill, as was discussed in Chapter 2.

5.2. *Quaestio de veneficiis*

Paucity of evidence means the date of the creation of this court is uncertain. Scholars have suggested any date between 149 and 98[64] for the permanent court.[65] As we have noted, Cicero intimates that there were a number of permanent courts created in the period between 149 and 120.[66] A date between 142 and 123 seems feasible, with the court following on the creation of the *quaestio de sicariis*. The fact that the jurisdiction of the *de veneficiis* court included the actions of poisoners carried out with intent to kill indicates a relationship between this court and the de *sicariis* court, which supports the possibility of a close chronological nexus. [67]

Postulating the existence of a permanent court for poisoning before Sulla raises the same issue about the details of the offence as we have discussed with the *de sicariis* court. The main evidence is provided by the jurists and by Cicero; they purport to speak in the context of the *lex Cornelia de sicariis et veneficiis*. Our position again must be that the Cornelian law was tralatitious and its provisions as recorded by the sources reflected those of the pre-Sullan law for which we argue.

Thus, the jurists record a number of activities relating to *venenum* as being proscribed by Sulla's statute, the *lex Cornelia de sicariis et veneficiis*. These included the formulation of poison (*venenum*) and its administration for the purpose of killing a person [68] and the making sale, or the possession of poison, for

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[64] Inscriptional evidence shows C. Claudius Pulcher as president in 98 of a permanent court *de veneficiis*. *CIL*.6.1283.

[65] Robinson (2007) 34. Cloud (1994) p. 521.

[66] Cic. *Brut*. 108.

[67] It is noticeable that in the description of the Sullan combined court *veneficiis* follows *sicariis.*

[68] *Dig*. 48.8.1 (Marcian).

the purpose of killing people.[69] The sale of harmful medicines (drugs) (*mala medicamenta*) or their possession for the purpose of homicide rendered the perpetrator liable to the penalty fixed by the *lex Cornelia*.[70]

The emphasis on the intention to kill going to the root of these offences supports our view that this common purpose made it likely that the *de veneficiis* court followed relatively soon after the *de sicariis* court and probably well before the *lex Acilia*.

Cicero in his defence of Cluentius indicates that cases of poisoning under the *lex Cornelia de sicariis et veneficiis* involved a man who made poison, sold poison, bought it, had it in his possession or administered it. He intimates that it was the toxicity of the poison which made the act of manufacture (and by extension, we may surmise, the other acts) criminal.[71] Men and women,[72] freedmen and slaves, were all are liable to prosecution.[73]

Our position, to recapitulate, is that these remarks of Cicero and the jurists as to the contents (or part thereof) of the *lex Cornelia de sicariis et veneficiis* were tralatitious and derived their content from the enabling law for the first permanent court *de veneficiis*. Accordingly, this *quaestio* was concerned in dealing with the matters listed by Cicero and the jurists or at least part thereof. So why did the Romans somewhere in the period between 149 and the passing of the *lex Acilia* decide to create standing court for poisoning? They had already created a court to make criminal the conduct of the *sicarius.*

Gaughan argues that *veneficium* had an extensive history "as an actionable offence".[74] But then, somewhat surprisingly, she suggests that "no law prohibited the act" [75] before the creation of the permanent court. By law, Gaughan must mean a statute. For, alleged *veneficii* were prosecuted before different tribunals in which judgement followed a forensic investigation. These included special

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[69] *Dig*. 48.8.3. (Marcian).

[70] *Dig*. 48.8.3. (Marcian).

[71] Cic. *Clu*. 148.

[72] Many of the more notorious examples of poisoning before 149 were carried out by women.

[73] Cic. *Clu*. 148.

[74] Gaughan (2010) 77. This reference shows up the difficulty represented by the argument that there were no "crimes" in Rome before the passing of the enabling statutes for the two standing courts.

[75] Gaughan (2010) 77.

courts,[76] praetorian enquiries and the judicial assemblies where the people were called upon to determine the culpability of certain conduct.

Prosecutions had previously been instituted because of the threat to the security of the state presented by the poisoners, of the importance of the persons involved — there were both poisoners and victims of high social status — and of the large number of people implicated. These were all causes of consternation to the superstitious Roman mind.

Polybius remarks that the Senate dealt with poisonings and murders, among other crimes, which were committed in Italy.[77] If this is so, then, the *quaestio de veneficiis* was established to deal with cases of poisoning which occurred in Rome.

We have no evidence after 150 of widespread poisonings or the benefit of any Livian type annalist for the period which would provide grounds for the creation of the court.

However, it is conceivable that the burgeoning population in Rome after 146 would have led to increasingly squalid housing with the poor living in multi-storey tenements and unsanitary conditions, which in turn would have exposed the city to continual plagues. There would have been an increase rather than a diminution in disease with the influx of more and more of the dispossessed, of fortune seekers and of other refugees. To the superstitious and the suspicious, poisoning could yet again have been seen as the cause and origin of the pestilences.[78] The sheer number of potential victims of poisoners might well have aroused the apprehensions of conspiracy to which the Romans were captive and the consequent danger to the state.[79]

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[76] The Bacchanalian tribunal of 186 set up by the Senate with the consuls presiding is the archetypal example.

[77] Polyb. 6.13.4.

[78] Livy 8.18 3–11 records the first example in 331 of a nexus between pestilence and poisoning. A pestilence had broken out. Informants alleged it was due to female deceit (*muliebri fraude civitatem premi*) in that matrons were brewing poisons. The number condemned in trials before the people, more than 170, was significant, as was the fact that they came from the upper echelons of society. These factors would have shaken confidence in light of Roman anxieties about clandestine activities, particularly the possibility of conspiracy. Gaughan (2010) 78–79.

[79] The existence of the threat to the stability of the state and the uppermost society was illustrated by a high profile case, the poisoning in 180 of the consul, Calpurnius, by his wife, Quartia Hostilia: Livy 40.37.5–7.

There had been in and before 150 cases of poisonings of spouses by Roman matrons of aristocratic standing for political or personal ends.[80] We know that some of the condemned women were executed by their families rather than by the state so the penalty was surely capital in the permanent court.[81]

From Livy's account it appears that the outbreaks of pestilence and their repercussions in the form of prosecution of poisoners were sporadic rather than frequent occurrences. Accordingly, the need for an ongoing tribunal to deal with the activities of poisoners did not present itself.[82].

It is plausible that circumstances changed with the growth in the inhabitants in Rome after the fall of Carthage and that the Senate would have, as a result, found it a desirable step to follow the precedent of the first criminal court recently established and pass an enabling law for the *quaestio de veneficiis*. As cases involving poisoning and its attendant, conspiracy, had traditionally attracted a frisson of superstition and awe among Romans, the creation of a permanent court, especially to deal with *venenum,* could be seen as a policy decision by the Senate to restore some stability in Rome.

In summary, our position, is that the Romans created the court to deal with the offences which the jurists and Cicero record as being the subject of the Cornelian Law. This is based on the argument that the Cornelian Law, like many Roman laws, was tralatitious and took its content from the enabling law of the first *quaestio de veneficiis*.

6. Summation

In the light of conflicting scholarship and sources, we have argued that each of these permanent courts preceded the *lex Acilia*.

The decision soon after the creation of the 149 court to establish a criminal court concerned with the conduct of the whole of society and not just senators was a momentous one. It represented the beginning of a Roman criminal justice system

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[80]. Livy *Per*. 48 records that in 150 Publilia and Licinia, women of high rank, were accused of poisoning their husbands and were tried before the praetor.

[81] *Val. Max*.6.3.8.

[82] Cloud (1994). p. 521.

with offences defined by the enabling law in place of the previous discretionary adjudication of events *apud populum* and other tribunals.

Possible reasons for the establishment of the *quaestio de sicariis* may be found in the fractious conditions, which are likely to have existed after the decimation of Carthage and from the constant wars in which Rome was engaged during the period. Rome was the centre of the world and a magnet for immigrants, including disgruntled farmers dispossessed by the *latifundia*, discharged soldiers and men of fortune. Inevitably overcrowding and other privations would have portended violent crime. The plebeians would have supported the passing of the enabling law for this court because the judicial assemblies could not cope with the offences emerging from these conditions. The permanent court system was but recently established and there is no record of any blemish at least around the time of the creation of the *de sicariis* court.

It is more difficult to find a justification for the *quaestio de veneficiis* because the sources do not record any repetition in the 130s to the 120s of the widespread poisonings, which dogged the early second century. Nonetheless this study has argued that insalubrious and unhealthy conditions in Rome after the destruction of Carthage would have led to plague and disease for which poisoners might have been blamed. Another reason may have been the desire to proscribe the dealing in poisons described by the jurists and Cicero, as distinct from their use with a view to *homicide.*

In summary, the establishment of these courts provided the Romans with the opportunity to replace the previous civil procedure with a permanent criminal justice system which provided for the most serious of penalties and which was not restricted to a particular class of society as the potential objects of the two jurisdictions. It was a bold initiative and reflects the practicalities of the Roman mind in being able to address a pressing urban social problem emerging from its successful overseas ventures. It also possible that the Senate would have seen advantages for the diplomatic policy it was seeking to engender with peregrines by the creation of a more stable and secure Rome in which peregrines would be more confident in the prosecution of their rights under the 149 law.

Chapter 4. The *Lex Acilia* of 123 and the *Quaestio de Pecuniis Repetundis*

1. Introduction

In Chapter 3 we argued that the Romans, in the period between 149 and 123, engineered a monumental shift in their jurisprudence. Having established a permanent court for extortion, the *quaestio de pecuniis repetundis*, the jurisdiction of which was essentially civil in nature, the Romans then elected to create two new courts. Not only were they permanent but each was concerned with subject matter which was criminal in its nature in the sense that it threatened the security of the *res publica*.[1] Moreover, not just the senatorial order but all members of the Roman community were exposed to prosecution there.

We come next to the *lex Acilia*,[2] the enabling law for the standing court of Caius Gracchus. The enabling statute was the epigraphic law, recorded on the Urbino bronze fragments. This is now generally accepted as a statute of Caius [3] passed in 123 or 122.[4] It is the same epigraphic law as the *lex Acilia* noted by Cicero in the first Verrine oration.[5]

The *lex Calpurnia* of 149 was intended to improve the legal position of *peregrini* whose property had been misappropriated by Roman administrators (see Chapter 2). They now had a standing *quaestio*, manned by senators, available to them. The 149 statute was a compromise provision. The Romans promulgated it in order to convince the provincials of their concern for peregrine welfare and thereby as a means of cementing diplomatic relations.

The inscriptional data bears out that there *had been* successful prosecutions under the earlier extortion laws ("earlier laws"), namely, the *lex Calpurnia* and the *lex*

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[1] The conduct of a *sicarius* and the act of poisoning (*venenum*) prosecutable respectively in the *quaestio de sicariis* and in the *quaestio de veneficiis*.

[2] *Lex Acilia* CIL I^2 583.

[3] Lintott (1992) 17; Sherwin-White (1982) 18; Gruen (1968) 88.

[4] Lintott (1992) 166–169.

[5] Cic. *Ver.*1.1.51: "Remember the Acilian Law, your father's work—the law whereby the nation gained efficient courts and strictly honourable judges to deal with extortion claims." Lintott (1992) 17.

Iunia.[6] In contrast, the indications in literary sources suggest that the main reason for the introduction of the *lex Acilia* was to overcome the venality of the senatorial judges in the 149 court or the propensity to acquit members of the senatorial order on other spurious grounds. This conflict requires reconsideration. Clearly, the earlier laws were working to inhibit extortion because the *lex Acilia* recognises the existence and the continuation of prosecutions thereunder.[7] Thus, insufficient attention has previously been given to the effect of the reservation of actions under the earlier laws in the *lex Acilia* and epigraphic evidence is to be given precedence as primary evidence.

2. Economic purpose

Caius was an economic as well as a judicial reformer. The reasons for the promulgation of the *lex Acilia* should be read in that context. Current scholarship holds that most of his statutory reforms including the *lex Acilia* belong to 123.[8]

Like his murdered brother, Tiberius, Caius made use of the principal legislative body in Rome, the *consilium plebis*, to secure the passage of his reforms, many of which challenged the traditional areas of authority of the Senate. Tiberius had previously introduced a law seeking to appropriate the estates bequeathed to Rome by Attalus of Pergamum, for use as seed capital for the allotees of land under Tiberius' own agrarian law. He also challenged the Senate's right to determine the status of the towns and cities in Attalus' kingdom.[9] Tiberius thus incurred the odium of the Senate still more by threatening by the use of *plebiscita* to interfere in spheres of influence traditionally the sole domain of the Senate.

Like Tiberius with his agrarian law,[10] Caius needed monies to fund the ambitious economic programmes encapsulated in his statutes. These may be summarised as follows:

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[6] *Lex Acilia* ll.73–74; 80–81. See Chapter 2, Section 2.

[7] See Section 9 below.

[8] Kay (2014) 69 following Brunt (1971) 84. However, our sources indicate that the colonisation programme and that for the granting of equal voting rights to the Italians belong to 122. Livy *Per*. 60; Plut. *C.Gracch*. 8; 10; 11.

[9] Plut. *T.Gracch*.14.

[10] Under his agrarian law Tiberius renewed the provision of the "famous" (1 MRR 108) Licinio-Sextian Rogation, which limited individual possession of the *ager publicus* to 500 *iugera*. The law allowed the sons of current occupants to retain 250 *iugera* of land. It proposed that any public lands in excess of these holdings should be made available for distribution to the poor and that an

- Soon after his election as tribune he brought in a *lex frumentaria* designed to ease grain shortages. Distributions of corn were made to the urban poor at a fixed price per modus subsidised by the state.[11] The urban poor had inadequate knowledge of husbandry and were not candidates for land settlements. Accordingly, many would have looked to the great senatorial houses for help with foodstuffs, rent and other living expenses. The law was intended to loosen the dependence of the poor on Caius' opponents and to relieve the wretchedness of the indigent to his political benefit.[12]
- The building of the *Horreia Sempronia* for the storage of the subsidised corn.[13] These silos permitted the continued flow of the cheap corn in times of short supply.
- The renewal of the agrarian law of Tiberius.[14] The legal complexities and disputes associated with the implementation of Tiberius' land allocations left the commission defunct.[15] The preferable construction of events, having regard to the inconsistency in Velleius' accounts,[16] is that Caius' measure breathed new life into the fraternal law rather than that he created his own new law. In accordance with Roman practice Caius' law may simply have been tralatitious.
- The prohibition on youths under 18 being enlisted in the army and the provision of free clothing for the soldiers.[17]

Agricultural Commission of three comprising Tiberius, Caius and Appius Claudius, father in law of Tiberius, be established for the purpose of determining and implementing the public lands allocations (App. BC. 1.9-13; Plut. Tib. Gracchus 9; Vell. Pat. 2.6.3).

[11] Six and one third asses. Livy *Per*. 60. App. *BC.* 1.3.21 states that the distribution to each citizen was at the public expense and that this was unprecedented. **Other sources for the law: App. *BC.* 1.21-23; Plut. *C. Gracchus* 5; Vell.Pat. 2.6; *Cic. Pro Sest.*48.103; *Cic. Tusc. Disp.* 3.48; *Cic.Off.* 2.21.72; Oros.5.12; Diod. 35.25; Schol. Bob p.135; 96.St.**

[12] Brunt (1971) 86.

[13] Fest. 3701. Plut. *C.Gracch*. 6.3.

[14] Plut. *C.Gracchus* 5; 9; Livy Per. 60.

[15] App. *BC*.1.18–19.

[16] Velleius Paterculus' account of this law is confusing 2.2.3. He attributes the agrarian law to Tiberius. But he later attributes the statute to Caius. Vell. Pat. 2.6.3.

[17] Plut. *C.Gracchus* 5; Diod.34/35.25.

This would have helped the peasant farmers from whom the troops were drawn, again to Caius' advantage.

- The building of major roads throughout Italy, which may have been to facilitate access to the land allotments and colonies.[18]
- The important *lex Sempronia de provincia Asia* which stipulated that the auctioning of the tithes for tax farming in Asia should take place in Rome under the control of the censors and not in the provinces where there existed the possibility of connivance by the governor.[19]
- The introduction of a law for new customs duties.[20]
- The creation of settlements for colonists in Capua and Tarentum and Solacium Minervam.[21]
- The founding of a new colony on the site of Carthage authorised by a *plebiscitum* passed by a colleague, C.Rubrius.[22] The colony was to be called Iunonia and the allotments were up to one hundred *iugera*.

3. Financial control of the Senate

According to Polybius, the Senate controlled the treasury and regulated all revenue and expenditure.[23] The heaviest and most important expenditure, namely the outlay authorised every five years by the censors on public works, whether for new constructions or repairs, was subject to the Senate making a grant to the censors of the necessary funds. The censors of 125 could not then have been privy to Caius' proposals made three or four years later. Caius' ability to obtain the

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[18] Plut. *C.Gracch*. 6.3;7.1-2; App. *BC*. 1.23.Appian explains that this gave work to many contractors and labourers.

[19] *Cic*.*Verr*.6.12; App. *BC*. 5.4; *Cic*. *Leg. Man* 19;14; *Cic*. Ad Att.1.17.9; Schol.Bob on *Cic. Planc*. p.157; Diod. 35.25.

[20] Vell. Pat. 2.6.3.

[21] *De Vir*.*Ill.* 65.3; Vell. Pat. 1.15.4; 2.6.4; Plut. *C. Gracchus*.6.3; 9.2; *Cic*. *Leg. Ag*. 2.81.

[22] Plut. *C. Gracchus* 10.2; Vell. Pat.1.15.4; 2.6.4; Oros.5.12; Eutrop.4.12.

[23] Polyb. 6.13; 14.

funds necessary for his reforms was therefore fettered unless the Senate was willing to loosen the purse strings. There had recently been considerable outlays on public works.[24] For the Senate to contemplate any financial assistance for Caius' major public works would thus have been contrary to Roman procedure. The wide range of projects he proposed in his first tribunate in 123 would inevitably have imposed a strain on the treasury.[25] For these reasons alone, a conservative Senate would hardly have been eager to fund them.

Caius' reforms represented the most comprehensive legislative programme undertaken by a tribune.[26] The volume of his legislation suggests that he had a vision of Rome wherein the people were a significant source of power. His objectives were, for the most part, such that they affected, adversely, the privileges of the senatorial order. In proposing change his legislative recourse was to the people and as a tribune he was in a unique position to propose legislation in the *consilium plebis*. Caius used the legislative power of the people to challenge time-honoured areas of senatorial pre-potence. Indubitably, in his oratory before the *contiones* when his bills were debated, he emphasised the benefits of his reforms. Significantly, the laws concerning the grain dole and the tax collections for Asia challenged the Senate's authority in both state finances and in foreign affairs.[27]

Caius was able to recognise the inevitable result of his manipulations and saw that he would need to harness the legislative potency of the plebs in order to circumvent custom, senatorial intransigence and its monopoly over the treasury. He had to employ the people' power in the form of *plebiscita* to prise open the *aerarium* and to fund his agenda.[28] It thus seems unlikely that, in his intent to

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[24] The construction of Rome's fourth aqueduct, the *Aqua Tepula* in 125 and a number of roads had preceded Caius' reforms.

Kay (2014) 220 notes that in 145 the "hugely expensive" Aqua Marcia was built and probably financed from the booty recovered from Carthage and Corinth (citing Frank (1933) 226). This is a pointer to where Caius would have to look for his funds — to Roman provinces and ceded or conquered territories.

[25] The majority of the economic reforms noted on this and the previous page would have been proposed by Caius in his first tribunate. MRR.1.515.

[26] Dillon and Garland (2013) 405: "It could even be described as a 'presidential' tribunate'." Kay (2014) 259: "a massive programme of public expenditure".

[27] As did the *lex Acilia*.

[28] Plut. *C.Gracch*.10.2 records that the senatorial stalking horse, M. Livius Drusus, took no part in the management of funds for the implementation of his rival programmes but that Caius personally

promote the people as the real constitutional force, he bothered bringing his proposals before the Senate first, thereby ignoring customary practice. It is a mark of his success, albeit in the year of his first tribunate, that he was able to carry his programme untrammelled by the intercession of any colleague suborned by the Senate. Even when the Senate was emboldened in 122 to adopt a device to meet his influence, enlisting M. Livius Drusus to undermine Caius' influence with the fickle populace by proposing even more popular reforms, this merely indicates that the Senate was not displeased with Caius' programmes as much as with the man.[29]

Caius must surely have had some confidence in the prospects of his economic laws being passed by the tribes. The people would gain immediately with the grain dole and the resuscitation of the agrarian law; the *equites* with their appointment as sole arbiters in the standing courts. These men would thus be unlikely to oppose Caius' legislation.

4. Caius and public moneys

The evidence indicates that Caius believed that the funds of the Roman state were a perquisite of the Roman people and should be available for its purposes. Caius would have held this opinion in respect of all monies, described later, which came or should have come into the treasury. Particularly, it would have applied to the price paid by *publicani* under contracts with the censors for the right to collect taxes under the Asian law receipts.

In this belief, he mirrored his brother's reasoning over the legacy of Attalus which Tiberius sought to attach by *plebiscitum* for the benefit of those allocated the *ager publicus*.[30] In 124 Caius returned to Rome from Sardinia as *proquaestor* to stand for the tribuneship. In a speech he gave at the time, which Gellius records, Caius indicated his belief that senators were involved in extortion in the provinces:

> "I so conducted myself in my province that no one could truly say that I received a penny, or more than that, by way of

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involved himself in the most important work. This obviously involved the financing of his projects.

[29] Plut. *C.Gracch*. 9.1.

[30] Section 2 supra.

> present, or that anyone was put to expense on my account. …Accordingly, fellow citizens, when I left for Rome, I brought back empty from the province the purses, which I took there full of money. Others have brought home overflowing with money the jars which they took to their province filled with wine."[31]

His conviction was that the wealth of the provinces belonged to the Roman people, but that it was being diverted to their own use by greedy Roman governors. Caius expressed similar views in another speech to the people referred to as the *dissuasio legis Aufeiae* also recorded by Gellius.[32] Millar concludes that the important point emerging from this speech was the right of the people to the profits of empire, and the suspicion that senators were lining their pockets by not pursuing the public interests of Rome rather than those of allied kings.[33]

If these were his convictions, then Caius obviously needed to secure these revenues so that they were available for his programmes.

5. The *Aerarium*

How stood the treasury on which Caius was to draw to fund his reforms? [34]

Prior to Caius' initiatives, and thereafter, Rome's revenue stream flowed to the *aerarium* from multiple sources. Income emanated from the contracts let by censors,[35] harbour dues,[36] provincial taxation[37] and the exploitation of minerals,[38]

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[31] Gell. *AN* 15.12.4.

[32] Gell. *AN* 11.10. The *lex Aufeia* was apparently intended to reapportion kingdoms in Asia Minor at some point after the settlement of the province by Aquillius.

[33] Millar (1986) 8–9.

[34] The implementation of the reforms which related to the corn dole, the agrarian law, the construction of grain silos, the provision of military attire for the military, the construction of public works and the proposed colonies would have imposed significant financial demands.

[35] Polybius 6.17.2, writing of events around 146, speaks of the income the Senate derived from the letting of numerous contracts by the censors and the revenue collected "from many rivers, harbours, gardens, mines, and land—everything, in a word, that comes under the control of the Roman government".

[36] Polyb. 6.17.2.

[37] Cic. 2 *Verr.* 3.12 explains the differences between the taxation systems throughout the empire. In Spain, a fixed tax or *stipendium* was imposed as a consequence of defeat. There was also a corn tithe. In Asia the tax was regulated by censorial contracts. However, in Sicily the Romans retained the tithe system, the collection of which was auctioned, based on the pre-existing structure of Hiero. Richardson (1976) 139 suggests that in Sardinia the Romans adopted a system essentially similar to the Sicilian one.

on which Caius might draw for his purposes.[39] It is possible that the expenditure the censors of 125 authorised to be outlaid for the ensuing five years provided capital funds as distinct from revenue although expenditure was under the control of the Senate.[40] It is likely that Caius also had recourse to the *sanctius aerarium*, the reserve fund,[41] into which the five percent tax on the manumission of slaves [42] was paid.[43] So too *praeda* from a successful campaign, although public receipt of the latter was at the discretion of the triumphant *imperator*.[44] It is clear that Caius did have recourse to the *aerarium* for Cicero stresses on a number of occasions that Caius virtually emptied the treasury with his grain legislation.[45] *Senatus consulta* would normally be required to free funds from the *aerarium*[46] but if Caius could access these funds then senatorial misgivings had to yield to the power of the *consilium plebis* and Caius' laws.

Rome's finances were not in a parlous state at this time. Pliny states that after receiving the booty of 300 million sesterces brought back from Macedonia by L. Aemilius Paulus in 167 and paid into the *aerarium*, Rome ceased to tax its citizens.[47] Depletion by the fiscal demands of Caius' grain dole surely meant that

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[38] The Romans actively mined for silver and lead in Spain from the beginning of the second until the end of the first century. Nicolet (1994) 624; 625–626. Strabo 3.10 reports Polybius' assertions that the silver mines of New Carthage (in his time) brought into the Roman exchequer a daily revenue of 25,000 drachmae. Richardson (1976) 142–147 argues that the operation of the Spanish mines was undertaken by small-scale contractors since mining by *societates publicanorum* would have involved payment of a one-time auction price which would be inconsistent with Polybius. In contrast, Brunt (1988) 150 and note 18 argues that *societates publicanorum* would have operated the mines.

[39] The demand for funding would have been particularly acute for the implementation of the reforms which related to the corn dole, the agrarian law, the construction of grain silos, the provision of military attire for the military, the construction of public works and the proposed colonies.

[40] Polyb. 6.13.3.

[41] Barlow (1997) 290.

[42] In 357 the consul C. Marcius Rutilius carried a bill to establish this tax. Cic. *Att*. 2.16.1 notes that it was still being levied in 59.

[43] Barlow (1997) 298–299 suggests that the reserve fund was drawn upon to fund the subsidised grain laws of Saturninus in 103 or 100. It is reasonable therefore to accept that Caius' corn law also enjoyed a similar subvention, which provided a precedent for Saturninus.

[44] Kay (2014) 31–33; 41. Kay notes that substantial amounts were paid by Carthage, Macedonia and Syria as war indemnities. He suggests a figure of 27, 280 talents. This source of revenue was derived in the period between 201 and 152 and was therefore not a contributor in our period. Kay (2014) 39; 42

[45] Cic. *Sest*. 103. *Off*. 2.72. *Tusc*.3.48. In his hostile account Diodorus Siculus 35.25 asserts that Caius exhausted the public treasury on base and unsuitable expenditures. However, this is an unfair assessment.

[46] Polyb. 6.13; 14.

[47] Plin. *HN*. 33.56.

the coffers were only temporarily exhausted until further monies flowed from the sources listed above. Cicero's remarks must therefore be understood in this context. Yet, implementing not only the grain legislation but also the other reforms occupied a very short period — merely that of the first, and part of the second, tribunate. Pressure to secure the necessary funds in so a short time precluded delay. If the expenditure demanded by Caius' other legislation is also taken into account, it appears that Caius had to quickly locate additional sources of income to support his "massive programme of public expenditure".[48] When the treasury coffers proved inadequate, Caius hit upon "a new and robust method of provincial exploitation through his *lex Sempronia de provincia Asia*". [49] He now looked to the provinces and, particularly, the cash cow of Asia,[50] and also to customs duty.[51] Some 60 years later Cicero could refer to the richness and fertility of Asia as surpassing all other provinces and to its taxes as being the mainstays of the *res publica*.[52]

6. Asia and the *lex Sempronia de provincia Asia*

Between them the Gracchi can be said to have contributed substantially to the organisation of the new province bequeathed in 133 to Rome by King Attalus III of Pergamum. In particular, Caius' contribution was to establish a new system for tax collection under his Asian law, which Cicero considered unique.[53] From a speech of Marcus Antonius in 41, which Appian records,[54] it appears that before the Asian law of Caius there was no system of tax collection by *publicani* in

[48] Kay (2014) 59.

[49] Kay (2014) 59.

[50] The attempt by Tiberius to seize the Attalid treasures would have made Caius aware of the opportunities beckoning from the east. Asia comprised the western shore of Asia Minor: Hellespontine Phrygia, Mysia, Lydia, southwestern Phrygia and Caria excluding the Rhodian offshore dependencies. Kay (2014) 65.

[51] Serrati (2016) 102 points to the inscriptional *Monumentum Ephesenum*, which outlines the *portorium* (customs duty) from Ephesus. He contends that it is clear from the text that the law dates back probably to the time of Attalus III (138–133) and that on the annexation of the province in 129 the Romans adopted the Attalid customs structure. Scholars have argued that Caius may have set up a system for taxing trade from the Bosporus to Pamphylia and that the law formed part of his legislative programme. Kay (2014) 74–75 cites a number of scholars on the point.

[52] Cic. *De Imp.Cn.Pomp*.14; 17.

[53] Cic. *Verr*. 2.3.12.

[54] App. *BC*. 5.4.

Asia.[55] Caius needed an effective system to ensure that he had a reliable revenue flow under his statute of public monies. In the absence of any Roman civil service, he therefore had to call upon the tax farming procedures, which the *publicani* with their experience and financial resources could provide. This know-how had been honed over a period of some 60 years, beginning with Rome's exploitation of the iron and silver mines of Nearer Spain initiated in 195 by the consul, M. Porcius Cato.[56] Scholarly opinion is that the *publicani* had responsibility for the collection of the revenue from the mines from this time.[57]

Caius' innovation was to introduce the principle of *censoria locatio*. All bidding for the right to collect the taxes provided for in his law and the consequent conclusion of contracts was to take place before the censors in Rome.[58] As it was the censors who contracted with the *publicani*, the bids must have been for the rights to farm the provincial taxes for the ensuing five year.

The collections from the five-year contracts farmed for Asia may have been worth as much as 15 million *denarii* when the total revenues from the empire were about 50 million *denarii*.[59]

Substantial resources were needed to win such contracts. In reality, it was the *societas publicanorum*, the large tax-farming companies, comprising wealthy *publicani*, who would have been the successful bidders rather than small contractors. Exposure to the liability of a five-year term and the need to travel to Rome for the auctions would have discouraged the modest provincial entrepreneur.

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[55] The reference in the *Senatus Consultum de Agro Pergameno* to a land dispute between *publicani* and Pergamenes has been taken by some scholars as indicating that taxes were imposed in Asia by 129 before Caius' reforms. However, later scholarship has effectively established that the decree is more properly to be dated to 101 and that the dispute refers to "events precisely at the time of the introduction of the new system of taxation under C.Gracchus." Kay (2014) 69.

[56] Livy 34.21.7.

[57] See Kay (2014) 51–54. There was also additional revenue from the Spains in the *stipendiarium* imposed on the provinces as a penalty of defeat (*poena belli*): Cic. 2 *Verr*. 3.12.

[58] Millar (1986) 8: "That must give a possible clue to the real point of another law of Gracchus, that about the censoria locatio of the revenues of Asia. It should be seen not just as a political scheme to benefit the equites or publicani, but as aimed, firstly, at securing the revenues due to the people; and, secondly, at ensuring the allocation of the contracts by the censors, in Rome, before the people."

[59] See McLeister (2016) 77–78 for scholarship in support of these claims.

Before the censors in Rome auction terms would be exposed to full public scrutiny. Caius could thus not allow room for underhand or comfortable deals, which might be negotiated between avaricious governors and *publicani* in Asia.

The account of Antonius' speech given by Appian does however muddy the waters somewhat. Appian records that whilst the *publicani* with their societies collected the tithe it was one based on a proportion of the annual harvest and that Caius did not seek a certain sum by imposing a fixed valuation on the harvest.[60] Yet, the Asian law auction procedure meant that the right to collect the tithe was in consideration for a definite sum. Appian can therefore be interpreted as meaning that Caius was not seeking a specific amount from the *peregrini*. Instead, they were to pay a variable tithe to the *publicani* dependent on the harvest. The *publicani* were bidding for the right to collect a stream of variable revenues. [61] This bidding under the Asian law would eventually materialise into fixed contracts[62] and Caius would derive his certain sum from them. Nevertheless, canny *publicani* in their *societates* would have been aware that harvests could fluctuate and therefore could pitch their bids to accommodate this risk. Irrespective of what they collected from *peregrini* (and lawfully this should have been limited to the percentage of the harvest) they were still committed to pay the contract price to the censors.[63] There was also the possibility that *publicani* might seek some relief from their contracts if receipts from the variable tithe were less than their bid price. Caius would thus have lived with this potential menace to the budgeted income for his reforms.

Caius was pragmatic. He sought to establish under his law a stable fixed price system, which would provide a reliable flow into the *aerarium*. At the same time, he showed his sympathy for the uncertainties of husbandry by conceding a variable base on which tithes were to be computed.

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[60] App. *BC*. 5.4.

[61] App. *BC*. 5.4

[62] *Schol.Bob.* page 157 St. on Cic. *Planc* 31 indicates that the bids must have been at fixed prices.

[63] We may deduce this from a late source. It is an occurrence in or about 61 to which the Scholiast on Cicero's speech *Pro Plancio* 31, delivered in 61, adverts. A tax farming company which had bid for the Asian tax farming rights sought an equitable reduction in the account, which it owed under the *lex Sempronia*, because of a loss in the collection of tithes. This shows that the company had offered a specific price which had been accepted by the censors to farm the anticipated revenue stream and that a downturn had resulted in the company receiving less than it had contracted to pay to Rome.

7. The *lex Acilia*

Caius sought, by the *lex Sempronia de provincia Asia,* to ensure that the auction bidding by the *societates publicanorum* for the right to farm the taxes in Asia would be held before the censors in Rome — the *censoria locatio.* We have discussed the cogent reasons above.

He realised that the restitution procedures under the *lex Calpurnia* were inadequate.[64] He also needed to protect the revenue flowing from the *peregrini* so that it was available for his programmes. A governor would make enemies of the *publicani,*[65] who were investors in the *societates publicanorum*, if, during his short period of office, he sought to maximise his profit by exploiting the *peregrini*.[66] Depredations by governors[67] could affect the ability of *peregrini* to pay their tithes to *publicani*. Payment of the contract price fixed at the auction in Rome for the right to collect tithes may have been required at, or soon after, the auction. Alternatively, the arrangement may have been that the payments on account of the contract price would be made regularly by the *publicani* from the variable peregrine tithes. In either case, *publicani*, faced with reductions in peregrine collections, would surely have been forced to seek some adjustment or financial accommodation from the censors to compensate for the shortfall between, on the one hand, collections to date and anticipated receipts and, on the other, the contract price. Depleted collections resulting from governmental despoliation of provincials would inevitably have taken its toll on Roman revenues.

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[64] Kay (2014) 78: "at the time when C. Gracchus was first elected tribune, there was no legislation that was effective in securing the conviction of (and therefore acting as a deterrent to) such magistrates".

[65] The *publicani* who ran the *societas publicanorum* represented the economic elite. They were a mixture of *equites* and other wealthy men, including probably those of the senatorial order. Kleinman (2016) 64.

[66] The imposition of additional taxes on *peregrini* and the use of strong arm men to collect them was a ploy adopted by Verres and may have reflected the behavior of others. Blosel (2016) 77 notes examples.

[67] The wealth of the new province and its but recently established administration could only have acted as an enticement to the avaricious. Indeed, the founder and organiser of Asia, M. Aquillius was prosecuted in 126 after his return to Rome. Appian *BC*. 1.22 intimates that the charge was *res repetundae* and that he was acquitted corruptly and that this was a reason for the *lex Acilia* being passed. Appian *Mith*. 57 also suggests that the offence may have been connected with bribes received from the king of Pontus to persuade him to hand over Phrygia, in the course of the settlement of Asia.

The *lex Acilia* was therefore designed to ensure that the Roman people received the income from Asia, which was their due, by introducing a more stringent and systematic procedure with significant restraints[68] on gubernatorial exploitation. Caius in appointing as jurors the *equites*, many of whose order were *publicani*, was thus announcing to the governors that the prospects of any despoliation being treated with "kid gloves" by jurors, who were their peers, was over. Importantly, it is likely that the law was directed at proscribing conduct which misappropriated provincial resources which *peregrini* otherwise needed in order to pay tithes to *publicani*. Caius was dependent on the *publicani* companies to pay the contract price for the right to collect tithes. He was committed to ensuring that the system he set up under his Asian law would work and the *lex Acilia* was his response.[69]

In both the Asian statute and the *lex Acilia*, Caius milked the advantages of notoriety. The benefit of the *censoria locatio* was the publicity of the proceedings, which took place in the public forum before the eyes of the people and away from the corrupt supervision and manipulation of a provincial governor.

Similarly the ability of non-citizens to sue in Rome in the new extortion court was made more effective. The embarrassment to the Roman aristocrat from the promulgation of his grubby financial dealings would cause great discomfort when he was no longer to be tried by his peers but rather in Rome by a jury of *equites*.

In improving the rights of *peregrini* to sue governors, Caius was also strengthening the diplomatic policy which lay behind the 149 law (see Chapter 2). Rome was engaged in continuous protracted warfare and the Senate was concerned to maintain existing peregrine relationships and establish new ones. The creation of the 149 court in which *peregrini* could recover the value of despoiled property was intended to establish this rapport. In creating the 123 court, which did much to rectify deficiencies in the procedure in the earlier court, Caius can be seen to be conscious of the need to reinforce this policy.

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[68] That is, when compared to the *lex Calpurnia*.

[69] Caius had not guarded against some obvious means of defrauding the revenue, *The lex Acilia* did not extend to members of the equestrian class. *Publicani*, frustrated by seasonal fluctuations in their collections might seek to extract from subject peregrines more than the percentage tithe fixed by Rome. Their actions might be driven by apprehension that they would have to underwrite, from their own resources, any shortfall between their collections and the fixed price they were contracted to pay to the censors. On the other hand, they might be induced by sheer greed to exploit the peregrines in this way. Appian *BC.* 5.4 records in the speech of Marcus Antonius to the Greeks the following: "When the publicans, who farmed these collections by the authority of the Senate, wronged you by demanding more than was due…"

8. Literary sources

Our literary sources, however, offer more mundane reasons for the *lex Acilia* and they pay scant regard to the actual text of the *lex Acilia*.[70] Instead, they allude to the venality of the senatorial judges or to the unwillingness of the senators to convict where an accuser (necessarily the *patronus* of a peregrine) was a man of power and influence. These were factors, they claim, which persuaded Caius to create his new court and replace the existing order with *equites*.

Appian asserts that Caius transferred the courts of justice from the senators to the knights[71] because, so he asserts, the courts had fallen into disrepute because of bribery.[72] Appian cites as notorious examples, the cases of L. Aurelius Cotta, Salinator, and Manius Aquillius (the subduer of Asia). He refers to these men as flagrant bribe takers (*σαφῶς δεδωροδοκηκότες*) which implies that they were mere recipients.[73] If they were such, and were not actually active coercers or canvassers for lucre, their conduct would not seem to constitute *res repetundae*. However, the wording of the *lex Calpurnia* may well have caught mere receipt of bribes as *res repetundae.*[74] This suggestion accommodates the Greek of Appian. It may therefore not have been necessary for any of these men to have been actively pressing for monies but perhaps receiving rewards for services rendered.

The question is whether, even if these men were accused of extortion on either the usual basis or the extended one mentioned above, they were acquitted because they bribed the senatorial jurors. Appian complains that these blatant bribe takers were each acquitted by the judges.[75] Aurelius Cotta was prosecuted in 138 for *res*

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[70] See the appendix to this chapter for arguments that these sources would have been aware of the provisions of the *lex Acilia*.

[71] This is an example of the scant regard of the secondary ancient sources for the primary inscriptional source. It has already been argued that they would have been aware of the relevant epigraphy (see appendix). Instead, we observe from the *lex Acilia* that there was no transfer but rather a directive to the presiding praetor to exclude certain defined classes of men from being selected as jurors in an existing court structure. *Lex Acilia* II 13; 16.

Noticeably, it was not only the senators who were to be excluded from the *album*. Tribunes of the plebs, *quaestors*, *triumviri capitales*, tribunes of the soldiers for any of the first four legions and *triumviri* for the distribution of lands were also left out. Perhaps they too had sat as jurors under the earlier courts.

[72] App. *BC.* 1.22: τὰ δικαστήρια, ἀδοξοῦντα ἐπὶ δωροδοκίαις.

[73] App. *BC.* 1.22.

[74] Chapter 2, Section 8.

[75] App. *BC.* 1.22.

repetundae by Scipio Africanus.[76] The charges against him were serious.[77] However, the decision was premised on the basis of the jurors not wishing to appear swayed by the rhetoric of a renowned accuser.[78] The evidence is not sufficient to establish, as against Appian, that bribery of the jurors was involved. The decision was probably a *quid pro quo* for the acquittal, on the same basis, of a protégé of the Scipios, Q. Pompeius, prosecuted by consular members of the Metelli faction.[79] These tit for tat proceedings, which resulted in the senatorial jurors resorting to a device to avoid the responsibility of decision making, may be also seen as a move by members of the aristocracy to utilise the 149 court to harm a political enemy. This would be another reason for Caius to reshape the structure of the court to suit his purpose. One can only imagine the perplexity and frustration of a peregrine plaintiff who might have selected high calibre *patroni* to present his case successfully only to find that the fruits of victory were snatched away because of the status of his representation.

We know nothing about the case involving Salinator. However, we do know that Manius Aquillius was accused by the *princeps senatus*, P. Cornelius Lentulus, probably in 124.[80] Asconius specifies that the charge was extortion.[81] Cicero records that although Manius had been convicted on charges of greed (*avaritia*) (he does not use the words *res repetundae*), the Senate acquitted him because he had so gallantly carried on the war against fugitive slaves.[82] The evidence does not indicate that he bribed the Senate or that the Senate was guilty of any impropriety. Indeed, Cicero points to the analogy of his recent defence of Piso which was based on Piso's courageous and honourable performance as consul.[83] It is apparent that a man's illustrious achievements in public life could serve him

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[76]. Cic.*Mur*.58. states that the *sapientissimi homines* were the judges in Cotta's case. It can be concluded that this was an extortion charge: Gruen (1968) 37 note 66. Tacitus. *Ann*. 3.66 also intimates that Cotta was tried for extortion.

Significantly for this study, Cicero refers to the prosecution of Cotta by Africanus in the context of the actions of eminent men (*clarissimi viri*) in protecting the interests of foreign nations. Cic. *Div.Caec*. 66–69.

[77] Val. Max. 8.1.11.

[78] Cic. *Mur*.58–59.

[79] The ex–consular brothers Cn. Caepio and Q. Caepio, and the brothers Q. and Lucius Metelli, ex–consuls and ex–censors. Gruen (1968) 36–38.

[80] Cic. *Div in Caec*. 69; Gruen (1968) 77, note164.

[81] Ps.-Ascon. 204 Stangl: Hic M'. *Aquillius de pecuniis repetundis accusatus est*.

[82] Cic.*Flacc*. 98. This may be a reference to the slave war in Sicily (135–132).

[83] Cic.*Flacc*. 98.

well as a defence. As a result, it cannot be safely assumed that the acquittal of Manius was due to bribery of the senatorial judges.

Nevertheless, in his history of the Mithridatic wars, Appian states that Manius gave Phrygia to Mithridates for a bribe and that he was tried at Rome for other innominate acts that he had done for money. Appian maintains, without providing reasons or confirmation, that the Senate chose to set them aside.[84] However, evidence that these acquittals resulted from the senators taking bribes is lacking. Indeed, the arguments actually loosen Appian's broad allegation that bribery of the senatorial jurors and their acceptance of bribes secured the release of these men and thus lend a lack of credibility to his account.

Other sources suggest that all of the then permanent courts were transferred from the senators to the *equites*.[85] Yet they say next to nothing about Caius' motives. Velleius does not elaborate nor does Tacitus.[86] Florus resorts to hyperbole in describing only the later effects of the statute,[87] while Pliny says that the transfer was to humiliate the senate and curry favour with the people.[88] As noted above, the literary sources show little appreciation of the meticulous provisions of the *lex Acilia.*

So what did the transfer mean? It did not mean that such former courts as had existed disappeared. Thus the 149 court continued in existence, having regard to certain provisions in the *lex Acilia*.[89] Instead, the change in judicial personnel necessitated the creation of the new court with a new procedure.[90]

It is disingenuous to speak of Caius trumpeting the appointment of the *equites* as a rebuke to the Senate. This may have been a consequence, but it was not a purpose, of the law. The role of the equestrian jurors was a feature or function of the permanent court and not a fundament for its existence. The terms of the *lex Acilia* are surely of such sufficiently serious and significant import as to abnegate any suggestion that their main purpose was to subjugate the Senate. The provisions

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[84] App. *Mith*.57.
[85] Vell. Pat. 2.6.3: 2.13.2: 2.32.3.
[86] Tac. *Ann*.12.60.
[87] Florus *Hist.Rom*.2.1.6. 2.5.3.
[88] Pliny *NH*. 33.34.
[89] *Lex Acilia* ll.73–74; 80–81; 16. See Section 9.
[90] Richardson (1996) 50.

excluding senators as jurors were included with a view to convincing *peregrini* that the court with *equites* as jurors only, would be impartial. Although the statute contained many other important provisions judicial and administrative aside from these exclusionary clauses these did not denigrate the *dignitas* of the Senate. They were designed to assure provincials contemplating recovery action that there was a functioning court which could hear their case and had machinery for the awarding and enforcing of a verdict. Indeed, it was rather the rapier like thrusts, which Caius made into the heart of traditional areas of senatorial influence, by his use of the popular voting power to achieve his economic aims, which stunned the Senate.

However, the Senate was far from a being a dead horse, despite the depressing description by Appian of the effect the appointment of the *equites* as exclusive jurors had on senatorial functions and morale.[91] It was but a matter of months before the *patres* warmed to, and implemented, the idea of setting up a contender in the tribune, M.Livius Drusus, to steal Caius' thunder with reforms even more appealing to the people.[92]

If Caius had wanted merely to address the problem of senatorial juries under the *lex Calpurnia* accepting bribes, could he not have seized on the expedient used to bring the praetor, L. Hostilius Tubulus, presiding in his murder court, to heel? [93] Caius could have introduced a law for a standing court, which outlawed the taking of bribes by senatorial judges in the exercise of their functions without involving himself in the melee of foreign affairs. But he still would have faced the other forensic difficulties we have discussed above.

9. Successful prosecutions under earlier laws

The argument that senatorial mismanagement was the sole reason for the promulgation of the statute is likewise not convincing. Despite the allegations of bribery, misuse of the 149 court and reluctance to convict, there were successful prosecutions under the *lex Calpurnia* and under the *lex Iunia*.[94] There is also

[91] App. *BC*. 1.22.

[92] See Section 12 below.

[93] Hostilius was prosecuted in 142 for openly taking bribes in return for rendering corrupt verdicts. Following a request from the *consilium plebis*, he fled into exile. Cic. *Fin*. 2.54.

[94] See also the discussion at Chapter 2, Sections 2 and 8.

evidence of a willingness on the part of the Senate to take cognisance of cases of extortion. The case of D. Iunius Silanus who had been a praetor in Macedonia in 141 and was afterwards the subject of a deputation from Macedonian envoys to the Senate alleging extortion provides an example.[95]

Significantly, the *lex Acilia* specifically provides that where a trial has been or *shall have been* completed under either of these earlier laws a man who has been condemned or *shall have been* condemned under these laws is not at risk of being prosecuted again under the *lex Acilia*.[96] The implication is clear that there were convictions under the earlier laws.

Further, the statute enjoins the praetor from including in the preliminary *album* of 450 any man who has been condemned in a *quaestio* or *iudicium publicum*.[97] This reference must be to the 149 court, or to both the 149 court and any permanent court established in the interregnum. The assumption that the reference is to the 149 court supports the conclusion that there were successful prosecutions.

These clauses mean that conduct, which transgressed either or both of the earlier laws, could also have transgressed and been triable under the *lex Acilia*, were it not for the specific proviso excluding this possibility. Trial and conviction could have been for any kind of conduct prohibited by the earlier laws. We do not at the outset have any knowledge of the scope of the conduct constituting extortion under the earlier laws. However, because of the foregoing provisions of the *lex Acilia*, we have to assume that condemnation under the earlier laws, in respect of any conduct, allowed the man convicted to claim exemption. Any conduct for which a man might have been tried and convicted under the earlier laws could, were it not for the proviso, have exposed him to action under the *lex Acilia.* Thus, the provisions of the *lex Acilia* in relation to the nature of the offending conduct, the person who could be sued and probably the person who could sue, would have to have been co-extensive with those of the earlier laws and therefore probably

[95] Cic. *Fin.* 1.7.24; Val. Max. 5.8.3. Livy *Per*. 54. Valerius Maximus makes it clear that the Senate ceded and deferred its own adjudication to allow the father Torquatus to deliberate on the allegations. That the Senate entertained the case confirms that the *peregrini* had *locus standi* under the 149 court and that its jurisdiction was not restricted to the complaints of Roman citizens.

[96] *Lex Acilia* ll.73–74; 80–81.

[97] Lex Acilia ll.16.

tralatitian.[98] It follows that there were well-defined descriptions of wrongful conduct in the earlier laws.

Further, the use of the future perfect in the *lex Acilia* provisions[99] certainly implies that there might be cases, which could *continue* to be tried under the earlier laws. This would seem to indicate that the earlier laws continued in force[100] and were not repealed by the *lex Acilia*.[101] As the *lex Acilia* allowed for prosecution under its provisions of acts which occurred before its introduction,[102] it is possible that the same conduct could have been actionable either under the earlier laws (which were not repealed) if it fell within their terms, or under the *lex Acilia*.

Therefore, Caius had an existing matrix with which to work when he introduced his statute. And, logically, his enactment embellished and expanded this matrix to meet his purpose. There had certainly been convictions for *res repetundae*. Moreover, it is likely that at least part of the *lex Acilia* may have been tralatitious. This applies particularly to the definition of the proscribed conduct and the possible defendants.

There is thus strong evidence that the earlier laws describing their offences were not to be seen as the playthings of provincial governors and their judicial confreres in Rome as our literary sources seem to imply.

10. The evidence

We have then to balance the inscriptional evidence against the literary sources. These chroniclers claim that it was the propensity of senatorial juries to accept bribes for acquittals, to exonerate on blatantly partisan grounds or to dismiss valid complaints because of the clout of the prosecutor, which caused Caius to introduce his law. The Roman elite were said to be subverting the purposes of the

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[98] This position appears to be accepted by modern scholars: "The relevant extortion statutes were tralatician in nature; that is each statute contained many clauses drawn directly from its predecessor, while introducing some modification or innovation." Alexander (1984) 523.

[99] *Lex Acilia* ll.73–74; 80–81.

[100] Lintott (1994) 154 suggests that actions on certain matters not covered by the *lex Acilia* might still be instituted under the earlier laws.

[101] Richardson (1996) 50

[102] *Lex Acilia* II.58–59. Under these clauses any proven extortion occurring before the passing of the statute was to be assessed as to damages at simple valuation. The statute was retrospective in its operation in this respect.

149 court by using it to settle scores. However, deference must also be given to contemporary inscriptional evidence, and what it implies.

Caius had to take account of the picture reflected in each of our source materials. That there had been successful prosecutions indicates that, despite the antiquated procedure under the *legis actio sacramento*, *peregrini*, and not just Roman citizens, could still sue and obtain relief of sorts.[103] Our argument that the provisions of the *lex Acilia* were tralatitian supports this position.

When Cotta, Salinator and Manius were prosecuted, envoys were in Rome to support complaints against the three "bribe takers".[104] It is reasonable to assume that they were there in support of the right of their citizens to sue. Significantly, the Macedonians were the accusers in the tragic case of Silanus and there were thus *peregrini* and not just Roman citizens among the successful accusers. However, as we have noted, in order to overcome the strictures of the *legis actio sacramento*, *peregrini* would have had to call in aid a *patronus* and plead a *fictio civitatis* or rely on an exception to the *alieno nomine* prohibition.[105]

Nonetheless, Caius must have conscious of the patent weaknesses in the 149 law. The potential for senatorial opposition to his economic reforms meant that he could not be confident that retention of the system under the *lex Calpurnia* would be adequate. The remedy available contained no element of deterrence against repetition of conduct which could prove damaging to his reforms. To back his economic platform, Caius thus introduced a law which addressed the shortcomings in the 149 law. He offered *peregrini* in the *lex Acilia* a more effective means of obtaining relief against expropriation of their property. In doing so Caius intended to secure and bolster the peregrine sources for his revenue flows.

11. Adjudication

The obvious area where reform was required was in the adjudication process, although convictions had previously occurred. The procedure of the *legis actio sacramento* and the adjudication by senators would have been disconcerting for

[103] Chapter 2, Section 10.
[104] App. *BC.*1.22.
[105] See Chapter 2, Section 9.

peregrini. Their opponents would usually be persons of senatorial prominence, foreboding and relaxed in their own environment and surrounded by their families, social equals and clients.[106] Doubts, albeit unjustifiable, as to whether the non-Roman citizen could of his own accord sue under the antiquated procedures of the *legis actio sacramento* would have left anxious *peregrini* searching for sympathetic *patroni*. Further, *peregrini* would have been ever mindful of the betrayal of the Spanish envoys in 171 by the appointed Roman representatives. This was yet another goad to Caius to improve the nature of the jurisdiction.

Who else could have tried senators? The adjudication option was either the *equites* or the people. Caius probably drew up the *lex Acilia* having already decided that the *equites* should be the exclusive arbiters. He could have had no truck with the people as judges. The terms of the *lex Acilia* attest to the serious and permanent legislative intentions of the draftsman. The less than reliable, unpredictable and volatile adjudication shown by the people would not have sat well with Caius' need to provide a jurisdiction which would act as an *in terrorem* threat to malpractice by governors.[107] The *equites* were thus the only viable source for appointment as jurors.

Caius would perhaps have taken account of the allegations of senatorial misjudgement recorded in the literary sources and sought to remove as far as possible any nexus with that order [108] even though our inscriptional evidence shows that there were successful actions under the 149 law

Caius would also have taken into account that some members of the *ordo equester* preferred the rewards of commerce and landowning to the uncertainties of politics.[109] The *equites* were in effect the "non-–political section of the upper class".[110] Their

[106] Alexander (1984) 526.

[107] Mackay (1994) 233 argues that, as in Rome the political system had been in the hands of the wealthy (presumably referring to the magistracies and control of the *comitia centuriata*), it would have been seen as a revolutionary step to have given the people real surveillance of provincial administration

[108] *Lex Acilia* ll. 12–15; Lintott (1992) 21.

[109] Cicero *Clu*.151 intimates that the *equites* were unable or unconcerned to canvass for high office bearing in mind the statutory exposures that came with it.

[110] Mackay (1994) 234. He notes that they were distinguished only by the fact that they did not pursue a senatorial career.

exclusive appointment, however, would have given them the *dignitas* [111] and *splendor*,[112] which men could otherwise have only obtained from a political career. Disinterest in political intrigue might have lent objectivity to their adjudication.[113] Their appointment meant that they sat in judgement on the peculations of senatorial governors. The potential downside for the community was that equestrian jurors might influence the manner in which members of their own order were treated in their provincial business dealings at the expense of Roman governors. However, what we know of their adjudication, at least in the decade succeeding Caius, would suggest that they judged well.[114]

Caius wanted his statute to protect the revenue by reining in extortion. But he did not (apart from the moderate financial penalty provided by the statute) include any capital penalty or other serious penal element to save *peregrini* from the avarice of provincial governors. The statute was concerned with greed not cruelty.[115] The injured party recovered what he had lost and the defendant paid an equal amount to the treasury. The absence of a substantial sanction may have been based simply on political reality. Caius could not, in view of his aristocratic antecedents, face the prospect of exposing members of his own class to the possibility of capital punishment, in effect voluntary exile, at the hands of *Gracchani iudices*.

12. Relevant provisions of the *lex Acilia*

The *lex Acilia* was the instrument whereby Caius sought to reinforce the existing protections of *peregrini* against Roman senatorial predations with a view to ensuring that the revenue stream from the provinces, particularly Asia, was not subverted. The primary reason for making the *equites* the exclusive jurors in the

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[111] Cic. *Rab. Perd*. 20: *qui tum magnam partem rei publicae atque omnem dignitatem iudiciorum tenebant*. Cicero here alludes to the *equites* who supported the *senatus consultum ultimum* passed to attenuate the violence of Saturninus and Glaucia in 100. However, the point is clear, the *equites* dignified the courts.

[112] Cic. *Rosc. Am*. 140: *qui equestrem splendorem pati non potuerunt*. The senators could not put up with the emerging grandeur of the *equites*. Brunt (1988) 154.

[113] We have, of course, Cicero's praise, albeit rhetorical, but containing some truth, of the consistency of judgement and honourable conduct of the *equites*. Cic. *Verr*.1.13.38; 17.51.

[114] We know little of any corrupt conduct of their judicial duties. The nadir of their performance was the intemperate and hasty convictions of the senatorial generals, who had betrayed Roman interests in dealing with Jugurtha, by the *Gracchani iudices* in 109 in the Mamilian Commission and the notorious condemnation of P. Rutilius Rufus in 92 following his secondary role in reforming Roman administration in Asia.

[115] "The law touched only the avaricious. It entirely neglects the principal offences against the state, and atrocious crimes against provincial subjects." Sherwin-White (1982) 28.

court was not to subjugate the Senate. It was to ensure that the *peregrini* no longer had, as judicators of their claims, men whose decisions might, but not always, be distorted by lucre or fears about the influence of powerful men. The improved adjudication was intended to act as a deterrent to those whose actions might jeopardise the revenue flow.

This view might be seen as somewhat at odds with the account of Appian who implies that the Senate was a broken reed. He contends that the Senate was ashamed that its adjudication in the permanent courts had been discredited by bribery. This lead to Caius' decision to transfer the adjudication to the *equites*, and the Senate raised no objection to Caius' initiative.[116] Appian reports what reputedly Caius boasted: "that he had broken the power of the Senate once and for all".[117] Appian also asserts:

> "For this power of sitting in judgment on all Romans and Italians, including the senators themselves, in all matters as to property, civil rights, and banishment, exalted the knights to be rulers over them, and put senators on the level of subjects."[118]

There is a degree of hyperbole in Appian's remarks. In fact, the Senate was not so demoralised that it could not quickly take measures to counter Caius. As already noted, the Senate devised the ploy of engaging Livius Drusus to outbid Caius in order to cement popular support.[119] Again, Plutarch, after providing his own anomalous account of how the *equites* came to participate in the criminal courts, notes that Caius was respectful in counselling the Senate.[120] Plutarch remarks that the Senate was also able to organise resistance to Caius' waning public influence (which no doubt resulted from the enticing promises which Livius made) by supporting Lucius Opimius as its candidate in 121 for the consulship.[121] Lucius

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[116] App. *BC*. 1.22.

[117] Noticeably, Appian *BC*. 1.22 refers to the transfer of the courts of justice (plural) to the *equites*. This supports the views expressed in Chapter 3 that there was more than one permanent court created between 149 and 123.

[118] App. *BC*. 1.22.

[119] App. *BC*. 1.23; Plut. *C.Gracch.* 9.

[120] Plut. *C.Gracch.* 6: "But when he counselled them, it was always in support of measures befitting their body".

[121] Plut. *C.Gracch*. 11.

took action with his senatorial supporters to annul the laws of Caius and eventually secured the passage of the notorious *senatus consultum ultimum*, which lead to the destruction of Caius and his accolytes. Appian's assertions about the Senate being brought to its knees by Caius demonstrate serious shortcomings.

We have argued that the provisions describing the potential applicants (which logically would have included the right to appoint a *patronus*), the offending conduct and the potential defendants were tralatitious. Our contention then is that Caius absorbed into his statute the provisions existing in the earlier laws in this respect.

In the procedural provisions Caius showed himself scrupulous, in particular, with his measures for the selection and empanelling of the jurors and their voting. The presiding praetor had a duty to enrol an *album* of 450 men each year from whom the jurors would be chosen.[122] Caius spelt out the ultimate composition of the panels by forbidding the praetor to enrol certain classes in the *album*. The statute contained prolix listings of the men whom the praetor could not appoint as jurors. Former senators, quaestors, tribunes of the plebs and certain minor magistrates[123] were ruled out as were any close relatives of any of these men. Any man who had been condemned in a *quaestio* or in a *iudicium publicum* was also excluded.[124]

Caius imposed further limitations on the pool of *equites*, otherwise eligible, whom the praetor could draw upon for the *album*. The statute excluded all men not living in the city or nearby; those outside Italy and those aged under 30 or over 60[125] and all for good reason. Men under 30 would be likely to be on military service. The praetor, bearing in mind the timing requirements for the selection of juries,[126] could not possibly have been put to the task of seeking out candidates in the provinces, elsewhere in Italy or in the armies.[127] Roman businessmen of the *ordo equester* who lived outside Rome's environs or who were away from Rome were

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[122] *Lex Acilia* ll. 13; 16.

[123] The statute lists *triumviri capitales*, tribunes of the soldiers for any of the first four legions, and *triumvir*i for the distribution of lands. *Lex Acilia* ll.15–17.

[124] *Lex Acilia* ll. 16.

[125] *Lex Acilia* ll. 13; 17; 22–23.

[126] The praetor was also required to ensure that within twenty days of the denunciation by the plaintiff being made, the plaintiff selected the tranche of one hundred men from whom the final jury was to be selected. *Lex Acilia* ll.21.

[127] Sherwin-White (1982) 22.

excluded from service. Proximity to Rome was essential as the *praetor* was obliged to assemble the *album* expeditiously and the *album* had to be on hand throughout the year.[128] This tends to discredit the account of Diodorus that Caius arranged the affairs of the court to suit the interests of avaricious tax farmers in the provinces.[129] These provisions satisfied the concept of permanency, which was a significant "selling" point to the *peregrini*. The court was permanent because it was set up and its jurisdiction determined by its enabling *lex Acilia*. An admirable degree of practicality on Caius' part is discernible in these stipulations.

Caius also enlisted for his court procedure "the passive force of public opinion"."[130] This accorded with Caius' insistence on utilising the popular vote to advance his onslaughts on senatorial preserves. The people had never enjoyed any voice in the popular assemblies apart from the ability to indicate approval or dissent by shouting or cacophony, or sibillation from the periphery. However, Caius' with his procedures exposed a pecculant governor to the prospect of public disgrace in a trial in the forum. The damage such exposure might do to his *dignitas* would have been a powerful deterrent for a man contemplating peregrine extortion: "The function of the people is thus that of a witness to the truth or of a watch-–dog." [131].

Caius was also concerned to nullify aberrations in the adjudication procedure, which might derail his agenda. The *lex Acilia* permitted but two rehearings of the case.[132] It made jurors who refused on a second occasion to pronounce a verdict liable to a penalty of 10,000 sesterces.[133]

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[128] Sherwin-White (1982) 22.

[129] Diod. 35.25. His is a hostile record. His assertion that "by exhausting the public treasury on base and unsuitable expenditures and favours, he made everyone look only to him as leader" shows him as a jaundiced and biased reporter.

[130] Sherwin-White (1982) 21.

[131] Sherwin-White (1982) 21 adumbrates a number of the public features of Caius' procedure. There was provision for the reciting in the assembly, the publication on boards and the recording in the annals, of the *album* of jurors with the right of a citizen to copy the list. *Lex Acilia* ll.I5; 18. The statute regulated the voting procedures so as to allow the public on the periphery of the court to see how the system operated. ll.50–52; 53–4.

[132] *Lex Acilia* ll.48. Such rehearings known as *ampliationes* would have been of great utility to a defendant. A juror who could not pronounce his verdict could seek a rehearing and abuses occurred. In the action against Aurelius Cotta there were eight *ampliationes*. In the action against the praetors in171, two are recorded. Livy 43.2.6.

[133] It also provided that an *ampliatio* could only be asked for by one third of the jurors and that after a second *ampliatio* jurors who sought it were excluded from voting. *Lex Acilia* ll.49.

There is uncertainty as to whether *provocatio* lay in respect of trials before the standing courts.[134] Arguably, the fact that the meticulous provisions of the *lex Acilia* were passed by the people, following the legislative procedure in the *contiones,* shows that its provisions were intended to be a comprehensive code with no provision for appeal.

Caius sought to put to rest any doubt about actions being thwarted by magisterial intervention.[135] Accordingly, the statute forbade any magistrate or promagistrate from obstructing or delaying a trial or summoning away or abducting a man carrying out a trial (presumably the praetor).[136] It also prohibited magistrates preventing persons, presumably jurors, hearing evidence or argument, considering their verdict or adjudicating.[137] Caius imposed no specific sanction for magisterial disobedience.[138]

We thus see once more that our literary sources err in their implication that Caius surrendered the courts to the *equites*. This mistake is revealed by any examination of the inscriptional sources, which indicate a dichotomy of functions between praetor and *iudices*. Judgement on the proven facts and the valuation of the claims (*aestimatio litium*) were functions of the *equites*. However, the praetor controlled the administration of the actions.[139] Caius also showed himself alive to the failures of the past. We can note, especially the obligation of the praetor to pursue men who had been denounced or fled into exile. Again, if the praetor died or left office, the statute provided for a continuation of the conduct of a case by a

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[134] Lintott (1992) 149.

[135] Caius' provisions were prescient. Sherwin-White (1982) 24 reminds us of how the investigation into Jugurtha's bribery of Roman senators was stopped by a tribunician veto. Sal. *Iug*. 33.2–3; 34.1. However, the proceedings there were in a *iudicium populum* where *provocatio* was all but institutionalised.

[136] *Lex Acilia* ll. 11. Caius had taken notice of the scandalous failures of the past. Livy 43.2.

[137] *Lex Acilia* ll.69–72.

[138] Saturninus learnt from Caius. He imposed in his piracy law a penalty of two hundred thousand sestertii on any magistrate who failed to implement the dictates of the law. And magistrates were obliged to swear an oath that they would uphold the provisions of his agrarian law. Sherwin–White (1982) 24.

[139] In addition to what is discussed in the body of the text, the presiding praetor received denunciations (ll. l.5); had charge of the investigations (1–6); accepted charges (19) appointed a *patronus,* or a second patronus, if sought by the plaintiff (9; 11); selected (13; 16) and publicised the *album* of 450 men *(*14; 15–19); supervised the choice of the final jury (20–25); pursued claims against the heirs where the person denounced had died or gone into exile (29); supervised the judges in taking their oaths to conduct their duties properly (36; 34); fined judges who did not comply with the adjudication obligations (48) oversaw judicial voting procedure (49–55) and secured guarantors for the amount of the verdict (56–58).

succeeding magistrate.[140] This must have addressed the problems with the first two praetors who in 171 had escaped by flight the clutches of the Spaniards. Caius showed thereby that he was concerned to see that there could be no repetition of the type of behaviour indulged in 172 by Popilius or in 171 by Canuleius.

The gathering of evidence for the action was vital to the success of the plaintiff and the statute conferred obligations on the praetor to assist. He ensured an expeditious trial and procedure, arranged searches by magistrates in Italy "presumably for documents, witnesses and stolen property"[141]; heard all relevant matters and instructed and ensured the attendance of witnesses.[142]

The *lex Acilia* also lent rigour to the means by which the successful *peregrinus* might recover the amounts assessed. The detailed provisions would have been of great comfort and given confidence to a *peregrinus* from a far-flung territory faced with the often herculean task of ventilating his rights in Rome.[143]

In terms of propaganda value, the provisions for the gathering of evidence and the recovery of moneys assessed must have been of the highest order.[144] They served well Caius' diplomatic aims in accommodating the *peregrini* and for the protection, ultimately, of the revenue. Sherman-White tellingly points out that both sets of measures were novel and designed "to secure the effective working of the law."[145]

A further point arises from the "lacunose" provisions of the *lex Acilia* concerning men condemned under the earlier laws.[146] The main complaint with the earlier laws had not been the condemnation of the innocent but rather the acquittal of

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[140] *Lex Acilia* ll.72; 79.

[141] Lintott (1992) 125.

[142] *Lex Acilia* ll.30–32.

[143] The praetor ensured that the accused provided guarantors for the moneys assessed. If the accused fails to provide the guarantors the praetor seized and sold the property and the proceeds were passed to the *quaestor*. *Lex Acilia* ll.57–58. There was a strict procedure as to how the *quaestor* was to pay the plaintiff(s). In the event of an insufficiency in the property of the accused or his guarantors, the praetor devised a plan for proportional repayment between the successful plaintiffs following the property auction.

The praetor proclaimed a day for distribution but the plaintiffs had 100 days in which to come to Rome to receive their dues and claims could still be received within five years after which any balance escheated to the state. *Lex Acilia* ll.62–67.

[144] They "were designed to make sure that the plaintiff secures his due despite all possible impediments." Sherwin-White (1982) 27.

[145] Sherwin-White (1982) 27.

[146] *Lex Acilia* ll.73–74; 80–82.

those who were probably guilty.[147] The issue was therefore whether it was only those condemned under the earlier laws as distinct from those acquitted who were exempted from a retrial under *the lex Acilia*. Modern scholars argue that an examination of the text of these provisions allows for the conclusion that those acquitted under the earlier laws were open to prosecution again under the new statute.[148] For a man acquitted under the earlier laws to have no exposure to prosecution, it would be necessary for the word *apsolutus* as well as *condemnatus* to appear in these provisions in its appropriate grammatical form. Textual analysis confirms still further Caius' concern to ensure that peregrines who suffered disappointment with the earlier laws had an opportunity to recover lost ground on a much more effective basis.[149]

It is also important to draw out how Caius called upon the organs of the *res publica* in aid of proceedings under the *lex Acilia*.[150] The functions of the praetor and of the quaestor, described above, bear witness to this. The *lex Calpurnia* with its limited relief meant that only *peregrini* who had suffered substantial misappropriations would be likely to run the risk of a trip to Rome with uncertain prospects.[151] However, the *lex Acilia* allowed for additional compensations. Successful peregrines could acquire Roman citizenship for themselves their sons and grandsons and registration in the tribe of the hapless defendant.[152] Their military obligations were deemed to be satisfied. *Peregrini* who declined citizenship gained the right to *provocatio* against the capricious decisions of Roman magistrates and were freed of military duty.[153] Caius thus sought to encourage *peregrini* in their pursuit of justice and thereby benefit his primary objective.

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[147] App. *BC.* 1.22.

[148] Lintott (1992); Mackay (1994) 209.

[149] Lintott (1992) 152 argues that there is inadequate space for the word *apsolutus* in ll. 74 and that only *condemnatus* appears in the parallel clause in ll. 81. Accordingly an *apsolutus* could not have called in aid either of these clauses by way of defence. Mackay (1994) 206–209 applies a complex grammatical application to reach a similar conclusion to Lintott.

[150] Mackay (1994) 210; 211: "Clearly the lex Acilia greatly assisted the claimants in both proving their case and recovering their property."

[151] Mackay (1994) 211.

[152] *Lex Acilia* ll. 76–77.

[153] *Lex Acilia* ll. 78–79.

13. Summation

Caius needed money for his reform agenda. We have argued that a proportion of the necessary funds were to be derived from provincial sources, particularly, Asia. The *peregrini*, as the wellspring of these resources, therefore required effective protection against the predations of senatorial governors.[154] With the *lex Acilia*, Caius facilitated the prosecution by *peregrini* of governors who had made off with their property. In so doing, he reinforced the diplomatic policy which was the rationale for the *lex Calpurnia*. *Peregrini* would thus quickly recognise the improvements effected by the *lex Acilia* and attribute it to Roman concerns for their welfare. They would believe that the law had been introduced in answer to these concerns. Their attitude could only have become more accommodating as they would see Rome as having given ground.

However, the statute was also directed at protecting the revenue flows necessary for the implementation of Caius' economic reforms. These reforms were intended to win the approval of the indigent urban people and the dispossessed agrarian class. Public works provided jobs. In return for the right to serve as the sole jurors in all standing courts, the equestrian order would therefore lend support to Caius' reform package. *Publicani*, mainly *equites*, also gained in that the deterrent in the law militated against the threat to their receipts from the actions of potentially corrupt governors. In buttressing these reforms, the *lex Acilia* gained for Caius the support of two of the three main political orders.

The thorough and systematic provisions of the law show Caius as a politician conscious of the deficiencies existing in the earlier laws for the protection of *peregrini*.[155] He called upon the resources of the state to superintend the presentation and proof of the cases of peregrine defendants, the selection and surveillance of jurors and the collection and payment of verdicts awarded.

So, the question remains: what consequences flowed from the establishment of Caius' law? It became the paradigm for subsequent permanent courts in its

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[154] This does not mean that that there were not other sources of revenue. See Section 5 above.

[155] Inevitably, there were gaps in the fabric of the statute. The measures of Marius some four years later designed to stop interference with the voting process by narrowing the *pontes* leading to the urns suggests that Caius had not taken the possibility of this physical tampering into account. It is, however, a tribute to Caius' thoroughness that this was apparently the only rift in his system which required attention.

procedural provisions.[156] If we can find fault with the statute it must surely be in Caius' failure to address the need for stronger penal provisions to address recidivism. His aristocratic pedigree ultimately operated as a brake on his handing to the *equites* the power to impose capital punishments on members of his own class. Saturninus, the demagogue, whose programmes some 20 years later aped those of Caius (see Section 12 above) had no such misgivings. The trappings of breeding and aristocratic forebears possessed by Caius did not burden Saturninus. Caius' judgement in appointing the *equites* to his court proved sound. For the next decade there is no evidence that they judged other than fairly. The blemish of their adjudication in the Mamilian commission in 109 may have arisen from a desire to punish, under the guise of the defendants' acceptance of bribes from Jugurtha, men who had been responsible for the deaths of Caius and his supporters.

There was a brief disappointment in 106 when Q. Sevilius Caepio promulgated his law conferring exclusive jurisdiction in the permanent courts on a senatorial panel thereby earning the undying hatred of the *equites* (Cic. *De Orat*. 2.199). It was a short lived expedient as the law of Glaucia (see Chs. 7.7below) in 104 restored them as exclusive jurors. Caepio's *rogatio* was supported by an impassioned speech from L. Licinius Crassus (see ch.7.8 below). His famous words related by Cicero (*Orat* 1.52.225) asking the assembly to save "*nos*" (presumably the Roman people) from the cruelty of those whose cruelty could only be sated with *nostro sanguine* clearly swung the vote.[157]

Yet, does this constitutional change and short period of senatorial participation reflect adversely on Caius' judgement 17 years earlier?

Certainly Cicero in 70 BC regarded the performance of the *equites* as being little short of impeccable (Cic. *Verr*. 1.13.38.). But he had a well recognised axe to

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[156] Badian (1962) 207–208.

[157] The picture painted by Licinius' vehement rhetoric of a bloodthirsty bench of jurors drawn from the equites contrasts with Cicero's more idyllic description (see below). Licinius was concerned with getting the law across the line in the interests of the Senate.(Cic. De Orat. 1.225). However, as Lintott (1994) 93 notes it is possible that the ravening beasts who savaged the senators may equally have come from the prosecutors whose numbers were increasing and who were becoming forensically prominent.

grind - to awaken the senatorial jurors of his day to their ignominious shortcomings. Appian writing centuries after the event asserts that the *equites* became consummate bribe takers were worse than those they replaced and rendered obsolete prosecution for bribe taking (App. BC.1.22). But the distant events and the hyberbolic descriptions detract from the veracity of his account. In any case, Licinius' hyperbole did not dissuade the people from passing the law of Glaucia.

We should not therefore be too quick to impugn Caius' judgement.

No further criticism appears to have been levelled against the *equites* until their judgement at the trial of P. Rutilius Rufus in 92 for his part in the reforming of the Roman administration in Asia.

Caius thus marshalled the power of the popular vote to pass many of the bills for his reforms, often in areas which were in the senatorial domain. In the case of the *quaestio de pecuniis repetundis,* Caius used the machinery of a permanent court set up by the *lex Acilia* not simply to deride the Senate. It was intended as a mechanism to protect and implement his economic agenda by providing an effective means by which *peregrini* could sue for, and governors could be deterred from, misappropriation of peregrine property. Caius appreciated the need to maintain the foreign affairs policy which, as we have argued, the Senate had championed. With the *lex Calpurnia,* the Senate remained in control of the means, the first permanent court, through which the policy might be promoted. With the *lex Acilia* the Senate no longer controlled the court, and Caius and the Roman people he represented were thus in a position to shape policy. Enhancing relations with *peregrini* by improving the structure of the court was surely a move by Caius to seize the initiative for the people in diplomatic policy.

Appendix

The knowledge of the *lex Acilia* by literary sources

There are justifiable grounds for concluding that our sources would have been aware of the provisions of the *lex Acilia*. Thus between the tribunate of C. Gracchus and the start of the Social War there exist:

- parts of three statutes — the *lex Acilia repetundarum*, the "Tarentum fragment", probably from a later second-century *lex repetundarum*, and the *lex agraria* of 111;
- the *sententia Minuciorum* of 117 and the *lex de pariete faciundo* from Puteoli of 105 (both preserved in full); *and*
- part of what appears to be an Oscan statute from the community of Bantia in Lucania (itself apparently derived from the third–century *lex* for the Latin colony at Venusia).

The very existence of this evidence suggests that Roman legislation (1) became more widely diffused in the period of the Gracchi, and (2) would *not* have been as difficult to consult as the fragmentary nature of the surviving epigraphic corpus implies.

Moreover, we know for a fact that any number of senatorial writers of biography, epistolography and history were aware of the relevant epigraphic evidence pertinent to their discussion. Cf. e.g. Livy's Bacchanalian narrative (*SC de Bacchanalibus*: CIL I^2.581 = ILLRP 511), Tacitus' items on the trial of Piso 20 CE (*SC de Cn. Pisone patre*), Claudius' speech about the admission of Gauls to the Senate in 48 CE (CIL XIII.1668), and Pliny's letters to Tacitus (VI.16, 20) on aspects of historiographical practice in the second century CE. This is the tip of the evidentiary iceberg pertaining to the relationship between historical and related writing, the availability of epigraphic/documentary evidence (incl. sources such as the *acta senatus* and *acta diurna*), and the degree to which ancient writers consulted/had access to these sources.

I am grateful to my supervisor, Dr Peter Keegan, for bringing this material to my attention.

Chapter 5. The *Quaestio de Ambitu*

1. Introduction

In Chapter 4 we discussed the *lex Acilia*. We argued that Caius Gracchus needed substantial amounts to fund his economic reforms. He looked to the monies deposited in the *aerarium*. An important source was the fixed fee which the *societates publicanorum* had contracted to pay for the right to farm taxes, particularly in Asia. Caius promoted the *lex Acilia* in order to protect more effectively the property of *peregrini* against the predations of provincial governors who could be seduced into impropriety by the wealth of the new province.

The purloining of the assets of *peregrini* could only undermine their ability to pay the variable rate of taxes based on their harvests to the *societates*. In turn, this could present real difficulties for the *societates* if the peregrine collections were below those on which the *publicani* budgeted in bidding for the farming rights. Importantly, we also argued that the improvement in the recovery facilities available to *peregrini* would have made them better disposed towards Rome and supportive of its policy of maintaining alliances with foreign nations for imperial purposes.

Let us now consider why the Romans people created a permanent court to deal with *ambitus*, which scholars acknowledge was the Latin word for electoral corruption.[1]

We know that the *quaestio de ambitu* was operating in 116 as a standing court. Caius Marius had been elected as a praetor for 115 but narrowly missed defeat.[2] He was acquitted on a charge of bribery because the votes in the court were tied.[3] So the court hearing the case was not an *iudicium populi*.[4] Rivalry for one of the

[1] Lintott (1990) 1; Linderski (1995) 108; Feig Vishnia (2012) 134.

[2] Plut. *Mar*. 5.2. Val Max. 6.9.14.

[3] Plut. *Mar*. 5.4. Valerius 6.9.14.

[4] Had the case been heard before the people there could not have been a drawn vote. In the judicial assemblies, voting was by blocks, either by centuries or tribes. "…even if the full total voted, the odd numbers involved (193 centuries, 35 tribes) made a tie impossible." Cloud (1994) 515.

consulship for 115 led to two other prosecutions in 116 for *ambitus*.[5] Evidence is lacking as to when the law creating the *quaestio de ambitu* was passed. The *terminus post quem* was 149, the date of the *lex Calpurnia*. The *terminus ante quem* was 116. The court was probably created shortly before 116 in the shadow of the *lex Acilia*[6] and the 119 statute of Caius Marius, the *lex Maria*. Its enabling law, no doubt, would have followed the format of Gracchus' statute by defining the offence and by laying down a procedure, *mutatis mutandis*, for the operation of the *quaestio*. [7]

2. The *cursus honorum*

Pursuit of high office was the lifeblood of the Roman aristocrat. Through its attainment he could expect to increase his social and political prestige and enhance any opportunities for material gain for himself and his *gens*.[8] At the pinnacle of the *cursus honorum*[9] were the two consuls. Next in importance were the praetors. In our period the number of praetors was increased to six[10] then from six to eight.[11] Elections were held in the *comitia centuriata*.[12]

The lowest rung on the *cursus honorum* was the quaestorship.[13] Elections took place in the *concilium plebis*. A *quaestor* qualified for admission to the Senate on completion of his year of office.

The pyramid structure of the *cursus honorum* presented a challenge for the ambitious. Elections in Rome were an annual affair. Striving for office was a continuous phenomenon which dictated that there be an unrelenting canvassing of

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[5] P. Rutilius Rufus accused the successful candidate, M. Aemilius Scaurus. Then, on Aemilius being acquitted of *ambitus*, he prosecuted Rutilius equally without success. Cic. *Brut*.113.

[6] Gruen (1968) 124.

[7] Badian (1962) 207–208, assures us that we may safely assume that each court, as it was created, including the *ambitus* court, would have received the same kind of constitution as the *quaestio de pecuniis repetundis* established under the *lex Acilia* and would have been staffed by *Gracchani iudices*.

[8] In particular, by securing as consul or praetor, an appointment as the governor of a province.

[9] Arguably the *lex Villia annalis* in180 gave legal effect to the sequence of offices.

[10] Increasing the number of praetors in 197 would have ramped up by a third the pressure for the consulship, even though it relieved it for the praetorship.

[11] Sulla added a further two in 81.

[12] Election of the praetors in the *comitia centuriata* took place a day or so after the election of the consuls. The sphere of influence or province of each praetor was thereafter determined by sortition. Livy 32.27; 28.

[13] There were eight places from 267 but Sulla increased the number to 20 in 81 in order to augment the size of the Senate.

the electorate.[14] Rivalry was extremely fierce for the consular prize with up to six praetors, before 81 seeking two places. The number of candidates could be increased by men who had in a prior year failed in a tilt for the highest office.

In the case of the praetorship the pressure would have been less. However, determined men would still have been keen for the praetorship as a necessary stepping-stone to power.[15]

Competition might tempt aspirants to use inducements, some legal and others not, to win the support of electors in canvassing for office. The presence of several candidates[16] and the increases in the magistracies[17] was an encouragement to corruption.

3. The dilemma in defining *ambitus*

Ambitus and *ambitio* are derived from the verb *ambire*, meaning:

> "to go around, in practice, to solicit votes. While ambitio was considered an acceptable attribute, ambitus was always associated with irregular, if not downright illegal means of securing votes." [18]

The distinction between acceptable behaviour and what was culpable was the issue for Roman legislators, faced as they were with the pressures for securing office, inherent in the political system.

Roman politicians rarely canvassed on specific issues which were of significance or interest to would-be voters. A candidate had a limited range of tools with which

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[14] Tatum (2003–2004) 203. Mouritsen (2001) 126: "Republican Rome was in the grip of constant electioneering; every year was an election year with no fewer than forty-four political posts up for reappointment, in addition to lower officials. The number of candidates for these is unknown but already in the second century there were five to seven candidates for the consulship…"

[15] There could be strong competition as well for the lower offices. An aedile could organise and present games. The office could be a vote winner for the ambitious. The actions of P. Cornelius Scipio the Elder in 213 and T. Sempronius Gracchus in 182, provide examples. Bauerle (1990) 14 argues that electoral malpractice was: "largely — though by no means exclusively — a feature of elections for the consulship". This statement underplays the vigorous contests that did exist for other magistracies.

[16] Tatum (2003–2004) 207 notes that where there were several candidates for the higher offices, the lower classes in their centuries in the *comitia centuriata* might be called upon to vote. An ambitious candidate in a multi-candidate election might have to treat with all voters and solicit as many votes as he could over all classes. He could not make any assumptions in advance.

[17] Lintott (1990) 4.

[18] Feig Vishnia (2012) 134–135; Lintott (1990) 1.

to encourage voters to abandon their daily routine and vote for him at the relevant assembly. The solicitation of votes, and open (games and spectacles) or secret influence and bribery, were among the various means by which a candidate endeavoured to get electors to support him. For the well-to-do reliance on patronage and one's *clientela* may have lent support. However, the extent to which these factors played a role has been questioned.[19]

We know little about the content of the statutes up to and including the enabling law for this court, or, indeed, thereafter. As Riggsby asserts: "The definition of the offense is unknown." [20] For Cloud *ambitus* is untranslatable: "…roughly speaking, it denotes the making by a candidate for office of the wrong sort of approaches to the electorate, most often involving bribery."[21] The little we do know indicates that the offence went beyond the exchange of money for votes. It included, for example, the provision of grain and spectacles and banquets to the people.[22]

4. The *lex Poetelia* of 346

Livy, writing several centuries, later records two laws, an innominate law[23] of 432 and the *lex Poetelia* which he describes, in effect, as the first *ambitus* law.[24] This confirms that the 432 law was not an *ambitus* law. Scholars give little credence to its existence.[25]

The *lex Poetelia* proscribed the conduct of new men in roaming around markets and fairs, presumably for the solicitation of votes. It had the authority of the Senate and therefore represented a real concern of the Senate to ensure that the

[19] See Section 14 below.

[20] Riggsby (1999) 22.

[21] Cloud (1994) 515.

[22] Riggsby (1999) 22. Cic. *Mur*. 67 concedes that certain practices could infringe the *lex Calpurnia* of 67, the *ambitus* statute then in force: "If men were paid to meet the Candidate, if their companions were hired, if places were given to the tribes indiscriminately at the gladiatorial games and if dinners were given indiscriminately."

[23] Livy 4.25–13–14. The law prevented canvassing candidates from whitening their togas. Livy does not refer to it as an *ambitus* law. The conduct proscribed was not *ambitus* as no inducements were involved. "And the measure, even in Livy's eyes, failed to qualify as an ambitus law." Gruen (1991) 235 note 16.

[24] Livy 7.15.12–13.

[25] Gruen (1991) 235 note 16. Lintott (1990) 3 and note 12. Cloud (1994) 516. Brennan (1990) 219.

election canvassing of *novi homines* was restricted to Rome to avoid their natural advantage.[26]

Livy does not state that there was any bestowal of largesse involved in the behaviour of the *novi homines*, such as bribing their rural countrymen in return for their support. It was more the apprehension of the *optimates* about the threat to their success in elections resulting from a natural advantage of the *nobiles homines*. His account does not suggest that any question of venality was involved in either case.[27]

We know of no other statutes until 181 directed at what merited punishment as *ambitus*. It is, of course, possible that the elusive nature of *ambitus* was such that the Romans, at this time, preferred to allow its parameters to be determined by the people in their courts on a case-by-case basis, similar to a "common law" crime in today's parlance. The problem presented for the *iudicia populi* and, indeed, later, for those drafting the plebiscites, was to determine when the means adopted for climbing the *cursus honorum* had morphed into conduct which should be proscribed.

In the first two decades of the second century, there was a profusion of contested elections, success in which was secured by various means. These included reliance on fraternal connections and even the distribution of largesse. However, our sources do not indicate that there was any action instigated against these activities until 182. Proud members of the elite probably secured office under the open ballot by dint of their personal prestige and familial wealth. Other aristocrats who lacked the funds required to cover a costly canvas, exacerbated by a plurality of candidates, might have had to borrow.

The ultimate prize for the lucky few might be a provincial command. From such an appointment a candidate might hope to recoup his own or borrowed moneys. But the greater the number of candidates the greater the pressure to spend. Appointment was determined by lot (*sortitio*) and a magistrate could never be

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[26] The natural advantage was that new men would be likely to come from areas outside the capital and their credentials would be well known to and appreciated by local voters as against the candidate from Rome. This would be a significant factor for the voters who would be more comfortable in supporting men from their own districts.

[27] Linderski (1995) 90 also notes that the law contains no intimation of outright bribery. From the limited mischief at which these statutes were aimed, their value, even assuming they existed, as an ongoing deterrent would have been limited.

sure of the opportunities which might come his way.[28] Not all provinces at this time presented easy pickings, as did, for example, Sicily. Moreover, as we shall suggest, the drive to recover outlays might expose the Roman commander to claims for *res repetundae*. What began as possible *ambitus* might end up certain *res repetundae*.[29]

These two laws probably represent a transposition of later events to these earlier times to give them an authority backed by tradition.[30] Modern scholars are sceptical about the existence of the *lex Poetelia*.[31] Indeed, Broughton refers to the *lex Baebia de ambitu* of 181 as the first bribery law.[32] Even had they been a reality, a law against the whitening of togas, or, a law prohibiting *novi homines* canvassing at markets, would hardly have been the stuff to meet the unstable electoral conditions of the early second century. From the limited mischief at which they were aimed we can see that the value of these statutes as an ongoing deterrent would have been limited.

5. Early second-century measures

Endeavours were made in the first two decades of the second century to rein in electoral expenses although we read only of *senatus consulta*, not *plebiscita*. In these decades, the contest for office was robust, to say the least. Men engaged in rivalrous competition for all offices in the *cursus honorum*. Often, there were several candidates for the consulship, which intensified the rivalry.[33] On

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[28] See Section 10 below.

[29] Mouritsen (2001) 126 suggests that the successes of Roman armies in the Mediterranean raised the stakes in magisterial elections to a level where the benefit of office holding outweighed any risk of sanctions.

[30] Cloud (1994) 516.

[31] Lintott (1990) 4. Linderski (1995) 90: "the law in question may be a figment of the annalists."

[32] MRR 1.384.

[33] Evans and Kleijwegt (1990) 184 assert: "Multiple candidates for the senior offices of the cursus are well attested in the literary sources for the two decades after 197." These scholars identify a number of examples (1992 184–185) in the sources.

- In 194 13 men competed for a curule aedileship. Plut. *Aem*.3.1.
- In 193 seven candidates vied for the consulship, three patricians and four plebeians. Livy 35.10.1.
- In 192 three patrician candidates were seeking the one consular place. Livy 35.24.4–6. This conduct amounted to bribery.
- In 190 there were four patrician candidates for the consulship and the competition was keen. Livy 37.47.6–7.
- In 189 there were three candidates. Livy 38.35.1.

occasions there were imputations of intimidation.[34] Multiple candidacies dictated determined competition for other offices.[35] Lintott finds what he considers to be the first unassailable proof of bribery in the consular elections for 193. Livy's account hardly supports this conclusion[36] and there is apparent a lack of evidence to support a claim that there was a spate of bribery at this time. However, it must assuredly have occurred thereafter when there was so much competition to obtain high office and an absence of effective prohibitions.

Contemporaneously with the flurry of electoral contests, there were several measures which scholars see as a programme intended to stem this competitiveness.[37] The promulgation of the *lex Villia annalis* and sumptuary laws were additional tools to which recourse was had in an effort to stifle electoral excesses. These proved inadequate to the task.

- In 185 there were four patrician candidates for the one seat and three plebeian candidates. Livy 39.32.5–9.
- In 181 there were two plebeian candidates for the one place. Livy 40.37.6.

[34] Livy implies this in the case of the campaign of Appius Claudius Pulcher for his brother:

> "consul for 185, secured the successful election of his brother, P. Claudius Pulcher, to the patrician place, not without intimidation. His campaign was zealous and he was active in the forum engaging in heated exchanges with tribunician opponents. His conduct resulted in the deferral of the elections several times. The plebeian candidate won because his canvassing was conducted with moderation rather than vis Claudiana." Livy 39.32.10–14

[35] Evans and Kleijwegt (1990) 185.

- In 189 there were six distinguished candidates (*multi et clari viri*) challenging for the censorship. Livy 37.57.9.
- In 184 nine influential men vigorously competed for this this office. Livy 39.40–41.
- In 189, on the death of the praetor, C. Decimius Flavus, four men contended for the praetorship. Livy 39.39.

[36] Two of the patricians, competing in 193 for the one spot, P. Cornelius Scipio and L. Quinctius Flaminius made use of the military reputation of their brothers in their canvassing. Lintott (1990) 4 argues that here we find "our first unimpeachable evidence of bribery". It is difficult to justify this conclusion. Livy reports nothing other than to suggest that the two highly decorated *imperators* canvassed for their brothers and drew attention to the fraternal military accomplishments. This scarcely allows a suspicion of bribery to be inferred.

[37] Lintott (1990) 5. In addition to *senatus consulta*, our sources attest to the *lex Baebia de ambitu*, the *lex Baebia de praetoribus* (reduction in the number of praetors), the *lex Villia annalis* (setting ages for offices) and the *lex Orchia* (sumptuary law).

CHAPTER 5

6. *Senatus consulta* and the *lex Baebia de ambitu* of 181

6.1. *Senatus consulta*

Livy is specific as to the terms of the *lex Baebia*: *et legem de ambitu consules ex auctoritate senatus ad populum tulerunt*.[38] It was carried by the consuls before the people with the imprimatur of a *senatus consultum*.[39] It was a law of some moment therefore[40] It was a law about *ambitus* whatever that expression connoted in 181.

The law was passed in the midst of real contention about the level of tolerance, which should be allowed to Roman politicians in expending money for their political advantage. One method by which candidates had sought to sway votes in their favour and increase their influence, before the *lex Baebia*, was by the presentation of games and spectacles. Expenditure had patently become extravagant. In several cases, the funding for spectacles dedicated to this purpose was "contributed" by allies and peregrines. In the *senatus consulta*, passed at this time, we detect a concern about the use of peregrine and allied funds, as well as a desire to limit expenditure. The presentation of games was not only intended for the enhancing of the *dignitas* of the politician/general but also for winning office, albeit in a few years. The nexus between the presentation of spectacles and the canvassing for office was not always immediate but was nevertheless traceable.

Polybius tells us that the consent of the Senate was required for the promotion by *imperatores* of their military successes and for funding their games.[41] The Senate relied on *senatus consulta*[42] in granting approvals for the presentation of games which generals vowed to hold following successful campaigns. Conditions limiting the amount to be spent and prohibiting the "collection" of funds from friends and allies were imposed by the decrees.

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[38] Livy 40.19.11.

[39] Pino Palo (2011) 121 notes that all known consular laws dealt with matters of great import including the fight against corruption. Pino Palo argues that the consuls legislated when the Senate thought it desirable to have consular support for a bill, which the Senate believed, was of great importance to the state.

[40] Livy 40.19.11.

[41] Polyb. 6.15.4.

[42] In discussing the limitations placed on expenditure and the raising of funds in 181, after the extravagance of Sempronius Gracchus in 182, Livy makes clear that the Senate passed a *senatus consultum*. Livy 40.44.10.

The Senate was merely regulating the expenditure on games and thereby exerting some control over the political kudos the general might earn. The Senate could not make laws. Its decrees, which imposed the conditions for the spectacles, were advisory and depended on respect for its *auctoritas* for compliance. The holding of games was not before the *lex Baebia* illegal as such, since were there to have been a law in place dealing with these matters it would have been unnecessary for an approach to be made to the Senate. And as we note hereafter, it is arguable that the *lex Baebia* did not concern itself with expenditure on, and the holding of, games.[43]

Spectacles and games, which would have been of obvious political benefit in creating a favourable feeling by the people towards the promoter, were not then a breach of the law. Thus, the presentation of spectacles for a political purpose would not have constituted *ambitus* within the meaning of the statute.

In 187, by way of example, Q. Fulvius Nobilior (cos.189) sought approval to hold his Great Games in 187 in honour of Jupiter Optimus Maximus. He claimed he had vowed to present these on the day in 189 when he took Ambracia. The Senate approved his request on the condition that his expenditure was limited to 80,000 sesterces. He had asked the Senate for permission to use the 100 pounds of gold "contributed" by the Aetolian cities for this purpose. It is more than likely that this "contribution" was an example of an exaction which victorious Roman *imperatores* were wont to levy on the vanquished foe.[44] The games he presented in 187 were like nothing Rome had experienced before.[45] The *largesse* and magnificence of his games, in addition to his reputation as consul and promagistrate, would have been retained in the public collective memory and surely have helped him to attain the censorship in 179.

In 182, a more egregious example of the connection between expenditure on games and electoral excess occurred. The Senate was driven to pass a decree in reaction to the lavish amounts Tiberius Sempronius Gracchus, as curule aedile, expended on games. Livy notes that Sempronius' expenditure had proved a

[43] See Section 6.1 below in relation to the request made to the Senate in 179 by Q. Fulvius Flaccus.
[44] Livy 39.5.7–11.
[45] Livy 39.22. 1–2.

burden not only to Italy and the Latin allies, but also to the provinces abroad.[46] It may have exceeded the limit imposed in 187 on Nobilior (see below). The expenditure was apparently made in anticipation of a praetorship.[47] As with Nobilior, the peregrines and allies were bearing the brunt of the cost of Roman political ambitions.

Even in 179 Q. Fulvius Flaccus (cos.179) sought the approval of the Senate to hold his games.[48] Significantly, the fact that the consul importuned the Senate, although after the *lex Baebia*, suggests that the statute was not directed at restraining excessive spending on spectacles and that this was to remain a matter for senatorial regulation. Whatever form the concept of *ambitus* took under the *lex Baebia*, it did not extend to games.

A senatorial decree was passed whereby permitted expenditure was limited to the same amount the Senate had applied in 187 to Nobilior.[49] The Senate also forbade Fulvius from levying or accepting funds or doing anything contrary to its earlier decree in relation to Sempronius.[50] This decree had been passed in 182. It limited the expenditure allowed on future games in the light of Sempronius' excesses.[51] Fulvius had possibly contravened this decree of 182 since he had "collected" money from the Spaniards for the holding of his games. Notably, Fulvius was successful in 174 in being appointed as a censor.

The brilliance of Nobilior's games, in addition to his reputation as consul and promagistrate, would have been retained in the public collective memory. The same position would have obtained with Fulvius. It is therefore difficult to deny that the holding of games, which were excitingly different (and Fulvius would surely have not been outdone by Nobilior), would be remembered and would be

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[46] Livy 40.44.12. How Sempronius as an aedile who had held no military command was able to obtain financial support from Latins and peregrine allies remains a mystery. In 190 he had been an emissary from the Scipios to Philip of Macedon seeking to secure the return of the Roman army to the Hellespont. Perhaps, he was a *quaestor*, attached to the command of Scipio Asiaticus and responsible for the distribution of booty and the payment of the troops. This may have given him some access to foreign resources.

[47] Livy 40.44.12. Sempronius was no doubt seeking to solicit votes for a praetorship. He was not *praetor designatus* although he gained the office in 180. The personal popularity engendered by the games would have stayed with him for the next year's election.

[48] Fulvius claimed that he had vowed to hold games in honour of Jupiter Optimus and to erect a statue after he had defeated the Celtiberians. Livy 40.44.8.

[49] Livy 40.44.10.

[50] Livy 40.44.10.

[51] Broughton 1 MRR.382.

beneficial in both Nobilior's and Fulvius' campaigns for censorships. With Sempronius the connection appears nearer in time.

The peregrines and allies were clearly bearing a sizeable portion of the cost of Roman political ambitions and the Senate showed concern. Through its decrees the Senate was clearly seeking to curtail extravagant moves by aristocrats to win potential electoral popularity.[52] These moves would have come at a cost to those whose resources could not match the well-to-do. We may surmise that the controls were also intended to discourage demands on the provincials for contributions to political ambition. The Senate may have worried about the undermining of Roman foreign policy designed to develop a serviceable relationship with its friends and allies.[53]

In the decade before the *lex Baebia de ambitu*, then, the Senate, using one of its customary powers, attempted to clip the wings of those who sought to promote their reputation or progress their candidature by extravagant games.[54] It is likely that the Senate also sought to protect the friends and allies of Rome from enforced contributions. Significantly, it was to its decrees to which the Senate looked to achieve these objectives and not to law.

The Senate did not face up to the scourge of electoral bribery, which, as we have suggested, must ineluctably have been the handmaiden of multiple candidacies for limited offices. Until 181, the Senate and the Roman people were not apparently concerned to introduce legislation to curb, but in fact tolerated, such bribery. The people derived largesse and the open ballot for elections meant that the bribers from the senatorial order could monitor and control the voting of the electors they had suborned. In 181, however, matters changed.

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[52] Whilst the decrees were not law the insistence by the Senate on compliance with their terms as a condition of approval of games indicates an intent to maintain a consistent ongoing approach which a statute might have required.

[53] The nature of which we have discussed in Chapter 2.

[54] Polybius 6.15.7 records that the consent of the Senate was required for all triumphs and other means sought by *imperatores* to advertise their military successes and for funding the spectacles.

6.2. *Lex Baebia*

The passing of the *lex Baebia* implies that there had been no *law* dealing with *ambitus* before this time[55] or that whatever existed was ineffectual in overcoming the agitation for office.[56] With this law the Romans must surely, after many years of unrestrained electoral rivalry, have been seeking to define the kind of electoral conduct employed by candidates which exceeded the bounds society was willing to tolerate; or, perhaps, the bounds which less affluent members of the elite were able to pay. There may still have been some principled figures who thought that such practices were contrary to the revered notions of *mos maiorum* and thus campaigned on their own merits.

Possibly, the *lex Baebia* introduced the crime of *ambitus*. The prosecution in 189 of M. Acilius Glabrio, supports the argument that before 181 there were no statutes defining the crime. Acilius (cos.191) stood for the contested censorship.[57] The people favoured him because he had distributed largesse (*congiaria*) among them.[58] The old nobility resented the popularity of the *novus homo* over their own candidate.[59] Two tribunes, no doubt suborned by the *nobiles*,[60] prosecuted Acilius before the people, although not for *ambitus*.[61] They accused Acilius of not observing the niceties in respect of a treasure he had obtained from his conquest of Antiochus.[62] The charge was probably *peculatus*.[63] M. Porcius Cato, a rival

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[55] Broughton MRR 1.384 describes the *lex Baebia* as the "first bribery law". Broughton must be regarded as doubting the existence of any earlier bribery laws. In contrast, Walbank (1951) 741 asserts that: "The need for such a law is evidence for a growth of electoral corruption in the second century." It is likely that the two earlier laws did not seek to lay down the ingredients of an offence. They simply identified particular conduct which they proscribed,

[56] The two laws probably represent a transposition of later events to these earlier times to give them an authority backed by tradition. Cloud (1994) 516. Even had they been a reality, a law against the whitening of togas, or, a law prohibiting *novi homines* canvassing at markets, would hardly have been the stuff to meet the unstable electoral conditions of the early second century.

[57] Acilius, a *novus homo*, held the consulship in 191. He was assigned the war in Greece against Antiochus as his *provincia*. He routed Antiochus and the Aetolians at Thermopylae. As a result he came into possession of spoils taken from the camps of Antiochus. Livy 37.57.10–12.

[58] Livy 37.57.11.

[59] Livy 37.57.11.

[60] Livy 37.57.11: *P. Sempronius Gracchus et C. Sempronius Rutilus, tribuni plebis, ei diem dixerunt.* A prime example of two ambitious men offering their legal powers to the *nobiles* in order to promote their own political advancement. This was in dereliction of the duty, which Polybius describes, of serving the interests of their people. Polyb. 6.16.

[61] It would have been difficult to maintain a charge of electoral bribery by Acilius when the distribution was not directed at particular individuals. Lintott (1990) 5.

[62] He had not displayed any of the treasure or spoils in his triumph nor had he accounted for any of it to the treasury. Livy 37.57.12. Nevertheless, there is doubt whether any law required a

candidate for the censorship, gave evidence. He had noticed gold and silver plate amongst the royal booty when the camp of Antiochus was taken. Cato had not seen any of it in the triumphal procession.[64] Glabrio withdrew his candidature. The tribunes sought a fine of 100,000 asses. The case was argued for two days and then on the third hearing day the people refused to impose a fine.[65] Livy makes no reference to the charge being *ambitus,*[66] although this behaviour would surely have attracted sanctions under the later bribery laws.[67] If so, it might have, in 189, invited prosecution had an *ambitus* law existed.

Senatorial backing of the law is significant. It represented concern on the part of the elite that electoral corruption had been present in the tumult of the elections in the twenty-year period. Not all candidates had a powerful or adequate *clientela* base. If they could not rely on clients, then, in a bitter multi-candidate election, they would have had to resort to various ploys to gain elector support.

According to Gruen, it was normally candidates who were insecure about their *clientela* base who would have had recourse to electoral bribery.[68] Under the oral ballot the decision of the voter could be monitored, and influence brought to bear. Every citizen's vote was known.[69] Candidates compelled to distribute largesse rather than invoke the loyalty of a *clientela* could therefore exercise surveillance over those whom they had traduced. They could have some confidence that the

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victorious *imperator* to deposit booty with the treasury (see below). Failure to do so or to display it in a triumph may have amounted to a breach instead of *mos maiorum*.

[63] Shatzman (1972) 192 acknowledges the scholarship to the contrary but argues that Acilius was not prosecuted for *peculatus* because Livy does not mention it. Yet, nor does Livy mention any charge of failing to produce account of the spoils which Shatzman argues would have been the basis of the prosecution. The failure of Livy to mention that the ground for prosecution was *peculatus* does not rule it out. Livy is rarely scrupulous on the intricacies of criminal law.

[64] Livy 37.57.14.

[65] Livy 37.58.1. The prosecution had little prospect of success. Acilius would have been popular with the people because of the distributions and the trial would have taken place before the people in the *concilium plebis* (a fine only was sought). Acilius was a plebeian candidate.

[66] Livy 37.57.11. Recourse would surely have been had to *ambitus* had it lain on the facts. It would have been harder to make a case for *peculatus* bearing in mind the contentious issues over the rights of a victorious *imperator* to *praeda* argued by scholars. The differing views are collected and argued by Shatzman (1972) 177. Feig Vishnia (1996) 129 claims that there was no law requiring a Roman *imperator* to give an account of the booty, which he brought back to Rome after a victorious campaign.

[67] The fact that the largesse was distributed to the people at large would certainly have made matters worse under subsequent laws. Cicero adverts to this in *Leg*. 3.39: "*omittam largitione corrupta suffragia*". *Largitio* could be used in a bad sense to convey bribery or corruption in obtaining public office.

[68] Gruen (1968) 124.

[69] Taylor (1966) 34.

electors would out of apprehension adhere to their commitment. On occasions the existence of the open ballot allowed for incidents of intimidation.[70]

If we accept this analysis, the odds under this statute, backed by the senatorial imprimatur, would have been stacked against those without a strong support and against *novi homines* seeking to enter the lists. It would have favoured the established elite who could rely on their reputation. (For divergent views as to the political reality of *clientela* see Section 14 below.)

It is possible that the statute imposed the extreme penalty.[71] Walbank argues for this although the position is not conclusive.[72] However, whatever conduct was the subject of a statutory prohibition or whatever penalty was imposed, the *ambitus* laws were forever battling the hankering of the Roman elite for office and the associated prizes. The laws could define from time to time conduct which legislators wished to extirpate. Intrepid candidates would eventually find ways around the proscribed conduct, or simply ignore it, in their desire to secure what they saw as their destiny. Statutes initially restrained the mischief but ultimately, we may suppose, it became necessary to adjust the limits of *ambitus* and to refresh and renew their provisions. The harsh realities of Roman electoral politics forced candidates to engage in risky conduct. If this was outside the purview of the statute, then the question of the need for reform necessarily arose.[73]

7. *Lex Baebia de praetoribus* of 181

In 197, when the two Spanish provinces were formed, the number of praetors, originally increased in 227 to four to allow for the administration of Sicily and

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[70] Livy 40.19.11.

[71] Polyb. 6.56.

[72] Walbank (1957) 741. However, it is not certain whether Polybius who was writing around 146 when Carthage was destroyed is referring to the *lex Baebia* or to the *lex Cornelia Fulvia*, discussed below. It would seem better, contra Walbank, to associate the capital penalty with the *lex Cornelia Fulvia*. Perhaps some adjustment was required to the parameters of what constituted the elusive offence of *ambitus* and a harsher penalty was imposed in an endeavour to repress the wrongdoing. Yet the Romans did not see fit to include any severe penalty in 149 in the *lex Calpurnia*, and arguably, there was a correlation between extortion and bribery, as we shall later note.

[73] "As competition intensified, the rules imposed to regulate the process were increasingly flouted." Mouritsen (2001) 126. He argues that the attempts to introduce stricter rules regarding electoral canvassing failed when the elite could no longer "contain the growing dynamics within its own ranks." (2001) 125.This must surely have been well underway between 181 and 159.

Sardinia, was further increased to six.[74] Thus, six men, or perhaps more,[75] of praetorian status now competed for the two consular places. This augmentation contributed to the fierce consular contests in the ensuing years, as discussed above. It was inevitable that candidates would turn their minds to sharp practice.[76] Thus, control of the number of praetors was vital if, in consular elections, extravagant canvassing was to be checked.[77]

The answer the Romans adopted was the *lex Baebia de praetoribus* of 181 whereby the election of four or six praetors in alternate years was enjoined.[78] Some scholars believe that this law was but another provision of the *lex Baebia de ambitu*.[79]

The intent was to reduce electoral misbehavior by reducing the number of potential candidates for the consulship. But, as Bauerle notes, whilst the purpose of the law was to relieve pressure on competition for the consulship, its effect would have been to create vigorous rivalry for the reduced number of praetorships.[80]

The *lex Baebia de praetoribus* either fell into desuetude or was repealed circa 177 since Livy informs us that in 177 six praetors were again elected.[81] Presumably, in the intervening three years the Romans hoped that the *lex Baebia de ambitu*, aided by the *lex Villia Annalis* would provide an effective restraint on excessive canvassing. However, the practice of consuls during the second century armed with *imperium* leading out their armies to deal with incursions or wars meant that the promise of spoils was there to be seen and was a continuous enticement.

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[74] Election of the praetors in the *comitia centuriata* took place a day or so after the election of the consuls. The sphere of influence or province of each praetor was thereafter determined by sortition. Livy 32.27; 28.

[75] Praetors disappointed by failure to achieve the consulship in previous years could also be among the aspirants.

[76] Brennan (1990) 217: "patricians could not risk more than one or (at most two) defeats in the electoral comitia. This increased competition would result in in increased ambitus, electoral bribery." Brennan notes the "bottleneck" caused by Sulla's appointment of two more praetors in 81. This would also have been an apt description for the position from 197. Brennan (2000) 639.

[77] Brennan (1990) 315.

[78] Livy 40.44.12. Brennan (1990) 219: "(in effect at an average of five per year)".

[79] Brennan (1990) 219.

[80] Bauerle (1990) 42.

[81] Livy 41.8.1–2. Evans and Kleijwegt (1990) 182.

8. The *lex Cornelia Fulvia* in 159

Again, we have scant details of this second statute nor do our sources show evidence of prosecutions after 181. Indeed, the same position pertains between 149 and 116.[82] Nevertheless, the absence of evidence of trials cannot mean that there were no prosecutions for *ambitus* during this lengthy period. Our sources may just have seen them as not being of sufficient notoriety or as not occurring often enough to warrant transcription. Perhaps, conduct, which might contravene the statute, was simply not prosecuted for political reasons. Obsequens notes that in 166 the Senate was forced to convene on the Capitoline to discuss the fact that elections were being conducted with extremities of canvassing.[83]

The need to legislate further indicates that the effectiveness of the provisions of the 181 statute may have been diminishing as the demands of Roman political life either led candidates to find ways around its provisions or simply to ignore them.[84] We may suppose that the *lex Cornelia Fulvia* was tralatitious, as were most Roman laws, and intended to reassert and expand the principles enshrined in the *lex Baebia*. The law may also have addressed any *lacunae* in the 181 law exposed by novel conduct deemed undesirable.

9. The *lex Gabinia Tabellaria* of 139

The *rogatio* for this statute was passed by open ballot.[85] It was a radical measure[86] It stipulated that the secret or written ballot was to apply in the election of Roman magistrates in both assemblies.

Up to 139, the open ballot had applied. Individuals in each century or tribe announced their votes orally to a teller (*rogator*) who recorded them.[87] Voting

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[82] Alexander finds no record of any *ambitus* trials in the period 149 to 116. He does not list any in his 1990 work "Trials in the Late Roman Republic; 149 to 50 BC". Lintott (1990) 6 refers to the period as an age of violence in the assemblies rather than bribery.

[83] Obseq. *Prod.*12.

[84] As an example, the constant renewal of the sumptuary laws on which we shall touch suggests that their provisions were not being observed. Feig Vishnia (1996) 166.

[85] Cic. *Leg*.3. 35: "There are indeed four such balloting laws in existence. The first is concerned with the election of magistrates; this is the Gabinian Law." In 131 the *lex Papiria* introduced the secret ballot for the adoption or rejection of laws. Cic. *Leg*.3. 35.

[86] Lintott (1990) 7.

[87] Taylor (1966) 8.

was therefore "a very public affair". [88] It allowed candidates to satisfy themselves that any bestowed generosity, lawful or otherwise, was recompensed by a favourable vote. They could observe or hear when the *rogatores*, stationed on the *pontes*, which lead the voters to the *cistae*, recorded the votes audibly. The elector had little freedom of choice.[89] The overt nature of the voting procedure ensured that an apprehensive or obligated voter kept his part of the bargain. It must also have given confidence to the donor of the largesse.[90]

The statute was designed to forestall instances of electoral bribery, as was the *lex Maria* of 119. Cicero makes this clear.[91] It failed dismally in this respect as the number of *ambitus* laws passed by the Romans thereafter testifies. Cicero also has Quintus say:

> "But everyone knows that laws which provide a secret ballot have deprived the aristocracy of all its influence (*omnem auctoritatem optimatium*). And such a law was never desired by the people when they were free, but was demanded only when they were tyrannized over by the powerful men in the State (*oppressus dominatu ac potentia principium*)."[92]

The lost influence in the case of the 139 law was, of course, that of influence over electors; the ability to manipulate, in an open ballot, their voting.[93] Quintus' remarks also suggest that the people as voters had continued to be subject to intimidation from the *principes* and that this drove them to introduce the statute.

The fact that the *lex Gabinia*, a law so intrinsically contrary to the interests of the *nobiles*, was passed, raises doubt on whether they really had the capacity to

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[88] Hall (1990) 193.

[89] Yakobson (1999) 125: "the necessity to vote openly under the watchful eyes of superiors could not fail to hamper the voters' freedom of choice". He suggests that there were many types of influence which could be brought to bear. Not only that of patron but also a military superior, a landlord or a powerful neighbour. Yakobson (1999) 126.

[90] Burckhardt (1990) 92: "Here one should not forget that open voting gave the leading elite a good check on the content of the vote and also made any non-conformist actions difficult."

[91] Cic. *Leg*. 3.38–39: "The Marian Law even made the passages narrow. If such provisions as these are made to interfere with the buying of votes, as they usually are, I do not criticize them." By "such provisions" he is referring to all laws which ensured the secrecy of the ballot.

[92] Cic. *Leg.*3.34. It is not clear whether Cicero here is seeking, deliberately, to distinguish between the conduct of the *optimates* and that, presumably, of an inner circle, namely, the *principes*.

[93] Marcus proposed to restore the balance by proposing in his model law that the people should have their secret ballot subject to their votes being shown to the aristocracy (*bonis*). Cic. *Leg.*3.38–39.

control an open vote in the *concilium plebis* in which the tribes determined the outcome.[94] But the law did certainly serve the interests of the electors who presumably supported its passage.[95]

Linderski regards the introduction of the secret ballot as "the most important event in the spread of ambitus".[96] Yakobson notes that the secret ballot might have defeated bribery by making it unprofitable.[97] However, the Roman political class did not abandon it but in fact greatly increased the use of bribes.[98] Nevertheless, the law made bribery a precarious venture; a candidate could never be sure that the compromised elector would honour his part of the bargain. But to recognise the risk is to ignore the realities of Roman electoral practice. Despite the uncertainties, the strong motivating factor which symbolised Roman elections was the desire of members of the Roman political elite to embellish their own reputations and do honour to the *dignitas* of their ancestors. The decision to continue to bribe was imposed on aristocrats by the pressure of competition for the limited prizes available.

A candidate could no longer rely on mild forms of intimidation or perhaps allegiances resulting from patronage.[99] The new regime worked loose traditional associations. The individual's vote was now a secret. An elector could bargain with his potential market — the competing candidates and their supporters. A candidate could not depend on electors, even if they had been adequately rewarded, to deliver their votes. Higher offers from rival candidates tested allegiances. Votes became a marketable commodity.

Among the elite there were those who possessed a name but not a strong *clientela* or indeed only limited means. Like all aristocrats they would want to uphold the

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[94] It also raises considerable doubt on whether the *nobiles* really had substantial groups of clients under their control whose voting power they could have brought to bear in an open ballot in the *consilium plebis* to achieve their (*nobiles*') political aims.

[95] Electors could look forward to their vote having a market value in that the effect of the ballot was that aspirants for office would have to compete with offers of money or other largesse to secure the vote of an elector.

[96] Linderski (1985) 91.

[97] Yakobson (1999) 146: "a candidate would be reluctant to pay for a product whose eventual delivery was doubtful".

[98] Yakobson (1999) 146.

[99] Yakobson (1999) 125 and note 5 to ch.3. As we shall note, modern scholarship is moving away from the belief that Roman assemblies were dominated by politically oriented patron–client blocks which could influence political decisions.

family reputation. Under the open ballot they were driven to methods which may have transgressed the existing *ambitus* laws.[100] The 139 law meant that the securing of high office could prove a still more challenging pursuit in the face of electors with such a strong bargaining chip. The price of a vote would escalate in a competitive situation necessitating additional funding or worse still borrowing. A candidate now had to be ready to meet the market if he wished to secure the vote(s) of an elector. He would have to offer a bribery price higher than that offered by a rival candidate and then be prepared to increase his offers until his competitor withdrew, or his own resources were exhausted. Moreover, the clients of an aristocratic candidate could invoke the clandestine opportunities of the *lex Gabinia Tabellaria* to seek the best possible price for their votes, even from a competing candidate. Again, approaching and persuading an elector who had been loyal to another candidate to change his vote would have proved costly. In either case, betrayal of a loyalty would have demanded its own fee.

The *lex Gabinia Tabellaria* was not a criminal statute. Any excesses of canvassing which might arise from pursuing the advantages given to voters by its provisions would still fall for consideration under the *lex Cornelia Fulvia*.

Modern scholars remain divided on the effect of the law. Gruen sees no evidence that the Roman elite regarded the ballot laws as undermining its dominance.[101] The consular elections over the next 25 years show no indication of any weakening in the *auctoritas* of the *optimates*.[102] He concludes: "Plainly, the written ballot did nothing to shake the ruling class' hold on the voting populace."[103] But this does not mean that the rival candidate did not try to win the votes of the electors with bribes only to be defeated ultimately by voter affection for establishment figures in the ruling class.

Was there between 139 and the postulated date for the Enabling Law, any evidence which might suggest the continuation of conduct which infringed the

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[100] Gruen (1968) 124.

[101] Gruen (1991) 259: "The ballot laws gained approbation and acceptance. No evidence suggests efforts at repeal or any public challenge to the new system."

[102] Gruen (1991) 259. He notes that 40 of the 51 consuls elected had predecessors with the same *nomen* and *cognomen* in that office. Nine others belonged to consular *gentes*.

[103] Gruen (1991) 259. However, Yakobson (1995) 428 quotes the concerns of Q. Cicero about the ballot laws (Cic. *Leg* 33-39) as destructive of the powers of the *boni*. Yakobson concludes from this that contrary to the views of some scholars, the elite were timorous of the Gabinian law.

159 law as *ambitus*. The *elite* dominated in the consular elections in the next 25 years. But how did they get there? Gruen dismisses the idea that elections "were normally decided through the mobilisation of *clientelae* for leading figures, families and factions." He describes the proposition as "shaky and unfounded".[104]

The rejection of the *clientela* position is fashionable now (see Section 14 below). Therefore, we must look elsewhere for the answer to the question. If the elite candidate did not possess strong support bases then, inevitably, they would have to bargain with electors to secure election. Bribery was certainly not off the agenda. Gruen argues that the electors were presented with candidates from the same establishment families with whom the electors were familiar and for whom they were pleased to vote.

Arguably, however, there was always the possibility of challenges to the serried ranks of ruling class candidates by men who, even if they were unsuccessful, could show the colour of their money. And once this happened, the hunger for honours would require even elite aspirants to contemplate recourse to bribery.

10. Provincial commands

The increasing pressure on the two consulships and the six praetorships may have led to problems for Roman relationships with its burgeoning friends and allies in the West and in the Mediterranean. As we have argued, candidates looked to a praetorian or consular command at the end of their term which might allow them to recoup the elections expenses paid for out of familial or borrowed funds (see Section 4 above). The opportunity also beckoned of using these commands as a source not only for recouping expenditure but importantly for extracting additional resources for assuring the governor of a comfortable retirement. Inevitably, some governors stooped to exactions of property from their provincial subjects which would have run counter to Roman foreign policy.[105]

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[104] Gruen (1991) 260. He previously argued that it was normally men who had a weak client base who needed to engage in bribery. Gruen (1968) 124. The implication was that the existence of strong client relationships shored up an elite candidate. Gruen's later approach indicates the real force of the arguments of the Fergus Millar school, and its adherents, which deride the concept of *clientela*.

[105] In Chapter 2 we argued that a purpose of the 149 statute, the *lex Calpurnia*, was to persuade *socii* and peregrines of the genuine interest of the Senate in protecting their property from incursions by governors and thereby convincing them that the Senate was concerned with consolidating existing or creating new allied relationships.

Drogula identifies a difficulty which confronted potential governors, namely the distinction between permanent and military provinces.[106] He argues that permanent provinces represented conquered territories and were defensive commands, meaning that there was little need for military action.[107] By comparison, the traditional or military provinces were theatres of war and were usually allocated to consuls. Blosel notes that only a very few provinces offered prospects of waging war and thus enrichment and martial glory.[108]

Praetors were appointed by sortition to the permanent provinces which offered limited opportunity for enhancing profit or *dignitas* as offensive campaigning was not the requirement.[109] In the traditional provinces the conquest and plundering of enemies bought *praeda*, which the general could deal with as he saw fit and win honour and the prospect of a triumph. For praetors the expectations of recovering moneys expended in gaining office could be tenuous.

Drogula further notes that the increase in the number of praetorian places from four to six in 198 would have given praetors even more incentive to try to derive some personal benefit from their provinces. Only two of those six could reasonably hope to win the prestige of the consulship and the prize of a consular province.[110] All of these men would have been anxious to profit in wealth and status from their praetorian command. Their expectation would be that they could thereby enhance their standing in the consular elections. Or they would hope to enrich themselves from what would probably be their final opportunity of making a contribution to their family's wealth and their own reputation.[111] This would have imposed pressures on those who had borrowed heavily, particularly if what was allotted was a permanent province.

It is probable that sometimes Rome may have been engaged in hostilities in more than two theatres. Whilst the consuls would have been appointed to the more serious conflicts, a fortunate praetor might well secure by lot a command which involved military operations and all of its previously adumbrated benefits

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[106] Drogula (2015) Ch. 5.

[107] Drogula (2015) 233–234.

[108] Blosel (2016) 80 notes Gaul, Syria, Cilicia and the eastern part of Asia in the late Republic.

[109] Drogula (2015) 234.

[110] Drogula (2015) 273. As has already been noted there was also the prospect of competition from candidate who had previously been unsuccessful.

[111] Drogula (2015) 273.

This possibility aside, however, the upshot was that the enthusiasm of praetors for securing their future could lead to conduct which might expose them to the risk of prosecution for extortion. Unhappily for praetorian governors, it was not necessarily Roman foreign policy, when foreign conquests were achieved, to provide opportunities for gain by establishing new provinces or garrisons.[112]

Inevitably, these men, particularly those who were pressed by shortage of wealth and the demands of creditors, would have become contemptuous of the extortion statutes, in the face of their cupidity to recover or enhance their position. The exigencies meant that the conduct to which they might resort in order to improve their lot could damage Rome's image in the minds of *peregrini* in the provinces concerned. It could be, or border on, *res repetundae* and imperil foreign relations. It could damage the end purpose of the 149 statute and the *lex Acilia* for which we have argued.

In summary, the shortage of military provinces meant that electoral bribery resulting from multiple candidatures could ultimately result in a praetor being liable to a charge of *res repetundae*.[113]

11. Possible alternatives to a foreign command

A praetor who had means, or who had not spent excessively in securing office, may well have considered other possible options for advancing his political career, rather than a prolonged military posting in the provinces. Connections which might be extenuated by a not so lucrative sojourn in a foreign command could be better served by time spent in the Roman forum as a lawyer or professional witness or as an experienced advocate for a cause in the *contiones*. Maintaining contacts with influential men in Rome could buoy a former praetor in a tilt for the consulship.[114] Rhetorical and judicial activities offered during the second century an additional means whereby Roman aristocrats could pursue their

[112] Drogula (2015) 273. Thus, the conquest of Illyria in 229 produced no new provincial commands.

[113] The appointment of magistrates to permanent provinces and the consequent temptation to abuse status and extort wealth from the unfortunate provincials suggests that *ex post facto* prosecution of the governors under the extortion statutes was not stopping these abuses.

[114] Blosel (2016) 80.

inherited quest for familial honours.[115] The overall effect must have been to take some pressure off the number of men who sought a provincial appointment in the expectation of recovering their expenditure.

12. Candidates and trade

Proceeding in tandem with the quest by the Roman senatorial class for office, for the augmentation of *dignitas* and for the enhancement of familial reputation, was the pursuit of wealth and the maintenance of primary status. However, it should not be assumed that in order to maintain or establish their wealth the primary recourse of the senatorial aristocracy was to the political roller coaster of the *cursus honorum* and a command. Wealth could be being, or already have been, made from agriculture or maritime or local trade.

In the second century senators invested in land with small to medium sized estates particularly in central-western Italy and urban properties.[116] They would have derived income from the sale of wine, oil and cereal crops (though the returns from the latter could be threatened by cheaper imports from Sicily).[117] Scholars are inclined to emphasise that land was the prime source of senatorial wealth, the chief form of livelihood and the safest investment.[118]

Further, between 240 and 120 the Romans succeeded in controlling a major part of the Mediterranean world.[119] These acquisitions resulted from the continual involvement of Rome in hostilities from the beginning of the second century.[120]

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[115] Blosel (2016) 80–81. He cites evidence of a demilitarization of the aristocracy in the second half of the second century.

[116] Kay (2014) 135–136.

[117] Kay (2014) 152. However, he notes (151) the views of other scholars that urban properties and non-agricultural commercial ventures provided a much greater share of a senator's income than that resulting from the sale of crops.

[118] Kay (2014) 133 cites the relevant scholarship both in support of, and questioning, these views.

[119] The Romans had annexed Sicilia, by 227, Corsica and Sardinia by 228, Gallia Cisalpina by 197, Hispania Citerior and Hispania Ulterior by 167 Illyricum by 147, Macedonia, by 146 Africa and by 120, Gallia Transalpina.

[120] The main wars, largely successful, were, the Second Macedonian Law 200–196, the Seleucid War 192–188, the Aetolian War 191–189, the First Celtiberian Law 181–179, the Third Macedonian War 171–168 the Third Illyrian War 169–167, the First Lusitanian War 155–151, the Fourth Macedonian War, the Second Celtiberian Law, the Third Punic War 149–146, the Numantine War 143–133 and the Servile War in Sicily 135–132.

The expansion of Roman power in the Mediterranean created the potential for new sources of wealth through long distance sea trade.[121]

The passing of the *lex Claudia.* in 218 indicates that aristocrats (and therefore candidates) were engaged in maritime trade as well. It provided that no senator or senator's son should own a sea-going ship, which could carry more than 300 amphora.[122] Significantly, the bill met with determined opposition from the Senate, which Livy records.[123] Yet, unless senators were substantially involved in trading before 218 there would have been no need for the limitation in the law or the all but unanimous senatorial opposition to it.[124]

In addition to mercantile and agricultural trade, our evidence indicates that Romans engaged in money lending. Cato viewed usury as dishonourable and considered that the speculative nature of trade, while potentially profitable could be disastrous. In so criticising, he admitted its existence.[125] Yet, Plutarch records that Cato invested in both shipping and in money lending so hypocrisy attends Cato's self-protestation.[126] He certainly had recourse to indirect investment as a shareholder in *societates* involved in maritime trade, arguably to avoid the 218 law.[127] Polybius notes that reputable money lending was acceptable.[128] Scholars, in support of senatorial trading, point to Pliny's account of the contemporary encomium for L. Caecilius Metellus in 221,[129] of wealth gained by reputable methods.[130]

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[121] Dari-Mettiacci and Plisecka (2010) 18.

[122] Livy asserts that this was reckoned to be sufficient to transport the produce from a senator's estates. Livy 21.63.3

[123] Livy 21.63.3 notes that the tribune, Q. Claudius introduced the law which had the backing of Gaius Flaminius alone of all the Senate. It is somewhat surprising that the law passed, with this opposition. Where was the pliant tribune suborned to impose his veto? The bill had the support of the people and perhaps the tribunes decided that opposition was pointless.

[124] Kay (2014) 14 citing D'Arms (1981) 33.

[125] Cato *De Agri Cultura* 1–3: "It is true that to obtain money by trade is sometimes more profitable, were it not so hazardous; and likewise money-lending, if it were as honourable."

[126] Plut. *Cat*. 21 4–6

[127] Plut. *Cat*. 21 4–6.

[128] Polyb. 6.53.1–3.

[129] Here Pliny *NH*.7.140 cites as one of the virtues of Caecilius that he made great wealth by proper means. Kay (2014) 14. Kay also argues that a reason for the law may have been that senatorial interest in trade may have clashed with foreign policy decisions.

[130] Sallust *Iug*.17.6 in speaking of Roman virtues, before corruption set in following the fall of Carthage lauds the Romans for this: "Praise they coveted, money they lavished; they wanted vast renown and riches gained honorably."

Of our contrary sources, Livy comments that all form of profit from trade was regarded as unbecoming for senators.[131] Cicero damns trade with faint praise. It is vulgar on a small scale but tolerable if it involves importation on a large scale.[132] Yet, neither source abnegates the existence of trading by senators. Further, in 70, Cicero intimated that the Claudian law had been moribund for some time.[133]

D'Arms notes the disparity between attitudes and actual practices. He argues that the language used in these sources: "functions as camouflage, an aristocratic literary convention, related to the negative senatorial attitudes towards commerce and trade". However, on balance, the deprecatory comments from some sources, themselves frequently inconsistent, do not negate the conclusion that senators were involved in trade.[134]

We conclude that candidates who relied on an appointment and a subsequent command were either those unsuccessful in business or who elected to pursue a military or political career.

13. The *comitia centuriata*

Scholars have generally regarded the *comitia centuriata*, which elected praetors and consuls as well as censors, as an assembly dominated by the votes of the wealthy,[135] "where the property owners were able to carry the vote on their own",[136] and "whose structure gave decisive voice to the wealthy"[137] particularly the top two classes.[138]

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[131] Livy 21.63.4.

[132] Cic. *De Off*. 1.151: "Trade, if it is on a small scale, is to be considered vulgar; but if wholesale and on a large scale, importing large quantities from all parts of the world and distributing to many without misrepresentation, it is not to be greatly disparaged."

[133] Cic. *Verr*. 2.5.45. He notes that there had been times when the flouting of the law would have been a serious offence

[134] D'Arms (1980) 77:

> "It is nevertheless clear, and it becomes clearer with the passing of each archaeological season, that the Roman privileged classes of the late Republic, senators and equites, were in fact involved in economic activities of a kind and to an extent which we should never imagine, were we to rely primarily on the impressions conveyed by passages such as those which I have just cited."

[135] Lintott (1990) 11.

[136] Mouritsen (2001) 115.

[137] Gruen (1991) 253.

[138] Burckhardt (1990) 93. Hall (1990) 197: "It is important to remember that the voters who mattered in the comitia centuriata which elected praetors and consuls were those who belonged to the *equitum centuriae* and at most the two top classes."

The composition of this assembly after the third century reforms comprised 183 centuries.[139] There were then, 18 centuries of *equites*, 70 centuries of the first class (originally drawn from the *pedites*), 30 of the second class, 20 of each of the second to fourth classes, 30 centuries of the fifth class and finally five of the *proletarii*, the urban poor, the *capite censi*.[140] Each century cast a single vote comprising the decision of the majority of its voters. The order of voting was the *centuria praerogativa* (one century selected from the *iuniores* of the first class by lot), then the remaining centuries of the first class, then 12 cavalry centuries, followed by the century of the carpenters, next the six ancient cavalry centuries and then the centuries of the second, third, fourth and fifth classes and lastly the bottom four centuries of the *proletarii*. Voting ceased once a majority was achieved. The order of voting indicates that the lower classes may often have been denied the opportunity to exercise their suffrage.[141]

A Roman senator seeking office needed to win a majority of the 183 centuries. Faced with rival candidates for the same office, he had little choice but to make competing offers of largesse. His predicament was that wealthy electors would have been the least susceptible to financial inducements and they predominated in the centuries of the higher classes because of the centurial distribution based on wealth.

The issue which has puzzled scholars has been why was it worth bribing members of the lower classes in this assembly when its timocratic nature meant that decisions on successful candidates would be determined by the voters in the upper classes. Bribery of the latter could have involved expenditure well beyond the means of a moderately rich or of a financially over extended candidate. Yet, the various attempts in the late Republic to suppress bribery indicates that aspirants were continuing to solicit electors.[142]

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[139] Rosenstein (2012) 9–10 explains that the censors assigned Roman citizens to classes dependent on their wealth. The voting centuries, originally 193, but reduced to 183 after reforms introduced in the third century, were distributed among these classes and further divided in the classes on the basis of age. The distribution of centuries was inevitably weighted in favour of the wealthiest classes of citizens.

[140] Rosenstein (2012) 10.

[141] Rosenstein (2012) 10

[142] Yakobson (1999) 25–26. Brunt (1988) 426.

Yakobson seeks to solve the puzzle by suggesting that the *centuria comitiata* was not as oligarchic as scholars have thought.[143] He argues that the first class should not be assumed to be: "'elitist" or 'oligarchic' in any real sense",[144] and that the underlying assumption in the sources is that the votes of the humble men (*homines tenuiores*) did count.[145] Yakobson counsels against identifying the first property class as a whole with the wealthy. He believes that the same applied to the second class without whose vote a candidate could not get elected.[146] We conclude that it is Yakobson's position that overall the assembly was not composed of plutocratic decision makers.[147]

His especially significant argument is that the first class and the 18 centuries of knights would be dominant in the assembly over the lower classes, only if their centuries voted unanimously. The upper classes would not necessarily have closed ranks in voting on candidates. The elections were "fiercely competitive contests within the ruling class",[148] and "the ruling class was divided against itself".[149] This meant that a deep split in the vote of the upper classes of the assembly would be quite normal, precisely because all the candidates belonged to the rivalrous upper class.[150] Such a split would mean that the required absolute majority of centuries might not be reached without the votes of the lower property classes. The greater the split (in the classes of knights and the first class as well as below them), the lower the classes which would have to be called upon to vote. Thus,

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[143] Yakobson (1999) 25.

[144] Yakobson (1999) 48.

[145] Yakobson (1999) 41–42: "To sum up: members of the Roman ruling class aspiring to the higher offices are regularly described by the sources as bribing the urban plebs, or treating it with generosity, and are frequently said to have obtained those offices by such means."

[146] Yakobson (1999) 60.

[147] A candidate, therefore, would not be embarrassed by having to buy the votes of very wealthy men as the voters, whose suffrage he required in order to be elected, might not be made up of these men.

[148] Yakobson (1999) 48.

[149] Yakobson (1999) 48–49:

> "It is quite misleading to talk of the influence, formal or informal, of the Roman ruling class on the electoral process, without bearing in mind the fact that the very essence of the elections was that the ruling class was, at the polls, divided against itself. The resources at the disposal of the rival candidate (family prestige and connections, great wealth and the readiness to use it, personal popularity and perhaps political support, personal and political amicitiae, patronage) must have been, in most cases, of the same order of magnitude."

[150] Yakobson (1992) 51: "But the ultimate test and measure of dignitas for a republican nobilis (and no less so for an ambitious homo novus) was his ability to reach higher office."

their vote could make the difference for a candidate and could hardly be described as having no influence.

A decision by a candidate then to court the upper echelons,[151] but ignore the lower classes of voters on the basis that the assembly was controlled by the former could redound to his detriment as the lower classes could be a potent force in an electoral contest. There would be advantage in his bribing the second and third classes because they could be instrumental in securing his election. If they were not rich, as Yakobson contends, they would be the more susceptible to "selling" their vote.

With the complex system voting system in this assembly, a candidate could never be sure whether the election would be decided by the votes of the *equites* and the first two classes or whether the lower classes might also be required to vote in order to obtain a result.[152] This could leave a risk adverse candidate with the possibility that he might need to distribute bribes amongst all voters, at huge cost. Failure to take account of this contingency could cost a candidate dearly.[153]

Mouritsen argues that Yakobson's deep split would have been entirely a matter of chance. Members of the lower classes could never predict whether it would be worthwhile for them to attend the assembly.[154] However, to the contrary, where there was an election with multiple candidates the rigours of competition would surely have exposed rifts within the elite and accordingly the possibility of splits in the upper class voting. The vote of the lower centuries would then materialise in their relevance and would demand the attention of the aspirants.

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[151] Yakobson (1999) 60 argues that this might have been effected through displays of personal attention such as banquets and social networks - less vulgar means than outright contributions of money.

[152] Cic. *Mur*.71.

[153] Yakobson (1999) 52. "The uncertainty, inherent in the centuriate system, must have been most beneficial to the lower orders. Even if the voting actually descended to the lowest property classes in only a relatively small minority of cases, no candidate …could be quite sure that this would not happen in his case; wherever it did happen, anyone who denied the lower orders their due risked certain defeat." Yakobson acknowledges the contrary view of Bauerle (1990) 19 who argues that successive voting meant a candidate could have confined his donations to men in the upper class of voters.

[154] Mouritsen (2001) 95.

14. *Clientela*

Is it right to retain, without reservation, the concept of a Roman elite whose progress through the *cursus honorum* was dictated by the strength of its *clientela*?

Recent scholarship has disputed whether there really was a functioning system of political *clientela*, which kept the formal voting powers of the people under strict control.[155] Mouritsen concedes that *clientela*, as a social practice, pervaded much of Roman private and public life and went beyond electoral procedures.[156] However, *clientela* did not provide "a socio-political structure which could form the basis for long-term political domination by a ruling majority".[157] Mouritsen provides a number of arguments in support of this claim.[158] In essence these rest on the premise that the structure and operation of the assemblies militated against the *clientela* system.[159] In particular, he draws attention to the methods of campaigning and the patterns of voting. Mouritsen contends that the personal approach to voters supports the perception of an independent electorate open to persuasion, He points out that the independence of voters is implicit in the resort to widespread bribery. Yakobson notes that the legislative assemblies frequently voted against the wishes of the *nobiles*; that the hordes of supposed dependants

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[155] Mouritsen (2001) 68. Cotton (1977) 25, cited by Yakobson (1999) 71 note 3, is most dubious: "The total absence almost of any reference almost to patron–client relationships found in Cicero's correspondence casts doubts on the familiar picture of Roman society as portrayed by later historians. This picture of the social texture as made up of blocks of patrons and their dependents is nowhere reflected here where we would have expected it most."

[156] Brunt (1988) 423–424 suggests that the ties were too weak to keep the masses obedient when patrons were responsible for or oblivious to serious social and economic grievances. He argues that the importance of aristocratic patronage in elections is exaggerated, on closer examination.

[157] Mouritsen (2001) 73.

[158] Mouritsen (2001) 68 argues that the *clientela* view assumes "a politicised plebs which would otherwise have acted as an independent legislative body". Such a position would have been impeded by "the structural limitations imposed on popular participation". Mouritsen (2001) 68. By this we may suppose him to mean those who voted comprised only a modest part of the total franchise as many rural voters, could not attend the assembly.

[159] Mouritsen argues that the size of the institutions weighs against the concept of *clientela*. Until at least 145, the assemblies numbered less than 3600 people. This was not easily reconcilable with the idea of control and political manoeuvring of the whole of the citizens. There is a gap between those expected hypothetically to provide political support and the very limited turnout, which was possible as a matter of reality. He refers to the size of the population, which negated its entry into significant relationships with a few hundred members of the elite. Mouritsen cites Wallace-Hadrill, A. (1989) *Patronage in Roman Society*: *from republic to empire*, in Patronage in the Ancient World. (London-New York) at p 69.

were therefore unable to dominate and that there is no reason why the same would not have obtained in the electoral process.[160]

If these arguments are accepted, certain matters flow. The grandees holding the lion's share of high office over the years after the *lex Gabinia*, and other candidates, would be dealing with electors on a highly competitive basis. They would not be dealing with "blocks of clients which could be used as going currency in deals between ambitious nobles".[161]

We surmise that it is questionable whether there was an active political *clientela* which supported aristocratic ambitions in demanding voting loyalty at elections. Aristocratic candidates were now exposed to the risk of defeat if they could no longer "influence" electors who were not necessarily shackled by a client relationship and who were now protected by the secret ballot. So, candidates could no longer be totally assured of voter loyalty at elections.

If the ballot insulated electors from overweening surveillance, did it also make bribery less effective? It is possible that a reason for the 139 law was to stem the practice of bribery. It made the position of the elector, but not the briber, more effective. An elector, for example, could accept largesse from several sources and a candidate would never know whether his investment would provide the required return. This was now a hazard of the system.

However, the law could not inhibit bribery. It ran up against the ingrained pretensions of Roman aristocrats. A candidate, pressed by a heart-felt duty to advance the *dignitas* of his *gens* in a contested election, had little choice but to resort to political graft to win votes. It beggars belief that abstention from resort to bribery on the basis that it might not be as effective as before the *lex Gabinia* would have been considered by an aristocratic candidate. Again the mischief, at which Marius aimed his law of 119, whereby he narrowed the *pontes*, was the unremitting desire of the elite to exert control over suborned voters as they proceeded to the urns, even after the 139 law.

Arguably, then, recourse to bribery would have been an unavoidable and constant feature of elections, primarily to the higher offices, between 139 and the

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[160] Yakobson (1999) 69.

[161] Yakobson (1999) 65.

introduction of the Enabling Law. Finally, the passage of the *lex Gabinia Tabellaria* may also be regarded as an argument in support of the view that the *nobiles* did not have substantial "blocks of clients" with which to defeat this *plebiscitum*.

The traditional position that there was a strict *clientela* structure whose members supported the aspirations of Roman politicians still finds support. Burckhardt seeks to maintain Gelzer's theory of the dominance of the *nobilitas*.[162] Burckhardt reiterates Gelzer's view that the retention of political power by the *nobilitas* was dependant on social connections and patronage, which pervaded Roman society, and particularly on the *fides* of client towards his patron.[163]

However, it is significant that Plautus, whom Burckhardt cites in support of his views,[164] is scathing about the *fides* of clients.[165] Those who support the concept of a *nobilitas* with a powerful client base cannot elude the issues arising from the 139 law. The elector was no longer exposed to patronal oversight of his voting intentions. It would now be a test, on Burckhart's analysis, of the extent to which supposed loyalty (*fides*) towards a patron could hold the line against bargains and opportunities presented by other candidates. Plautus implies that *fides* was a precarious concept. Whilst the issue can never be free of doubt, the arguments of Mouritsen are very persuasive.

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[162] Burckhardt (1990) 77–99 refers to Gelzer's arguments, expounded in his *The Nobility of the Roman Republic* (Leipzig and Berlin, 1912), that a small political elite, described as the *nobilitas*, ruled Rome. Burckhardt contends that the arguments adduced by English scholars, such as Brunt and Millar in revision of Gelzer's theory, do not justify their conclusions based as he claims they are on a misinterpretation of Polybius in his sixth book (1990) 77. He asserts (1990) 93 that "there can be no question of equality of the assembly with the senate or with the magistrates."

[163] These manifested themselves in the support of the client in the courts and of wards, the commitments to freedmen upon manumission, the connections between soldier and general and colonist and founder and those of economic dependence. These relationships gave rise to mutual moral rather than legal commitments and were cemented by *fides.* In return, the obligation of the client was essentially one of political assistance. Burckhardt (1990) 78–79; 89; 94–96.

[164] Burckhardt (1990) 94.

[165] Plaut. *Mem*. 4.2:

> "All wish their dependents to be many in number; whether they are deserving or undeserving, about that they don't enquire. Their property is more enquired about, than what the reputation of their clients is for honor (*res magís quaeritúr quam cliéntum fidés cuius modí clueat*). If any person is poor and not dishonest, he is considered worthless; but if a rich man is dishonest, he is considered a good client. Those who neither regard laws nor any good or justice at all, the same have zealous patrons."

15. The enabling law for the *quaestio de ambitu*

To recapitulate: we know of no other *de ambitu* legislation between 159 (*lex Cornelia Fulvia*)[166] and the year when the enabling law is thought to have been passed. The significant laws in this interregnum for our purposes are the *lex Calpurnia de pecuniis repetundis* of 149, *the lex Iunia* (provenance unknown), the *lex Gabinia Tabellaria* the *lex Acilia* of 123 and the *lex Maria* of 119.

The *lex Maria* was introduced by Caius Marius in 119 ostensibly to strengthen the *lex Gabinia*. Cicero implies that the law was designed to overcome the buying of votes.[167] As Marius directed his attention to the narrowing of the *pontes,*[168] the mischief he sought to address must have been the interference with electors as they passed over to the voting urns, even though the ballot itself was secret. This secrecy was obviously not protecting the electors who could still be intimidated. They could be reminded, by the occasional "nudge", of their side of the bargain or of a counter offer for their vote as the stakes rose.

Plutarch's less than satisfactory account tells us that the law was intended to lessen the judicial power of the nobles only. This cannot be correct.[169] The law was bitterly opposed by the consuls, of whom one was L. Caecilius Metellus, and the Senate.[170] The Metelli were to enjoy, after the Gracchi, an "amazing series" of consulates from 123 to 109.[171] Caecilius and his *gens* were representative of those *optimates* who wanted to hold onto the status quo and not see any further inroads on canvassing practices.

Marius' threat to imprison the consuls, and the subsequent withdrawal of the senatorial opposition, resulted in the *lex Maria* being enacted.[172] Its provisions would have applied in the election of magistrates and in the legislative and

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[166] We have no knowledge as to the contents of this law.

[167] Cic. *Leg*. 3. 39

[168] Wiseman (1971) 5 suggests that Marius' purpose was to ensure that, because of the narrowed *pontes*, the voters could only have crossed in single file. There would then have been no room for the *primores viri* to exert moral influence over the voters before they deposited their votes into the urns. Lintott (1968) 71 is largely of the same opinion.

[169] Plut. *Mar*.4.2–3 By 119, judicial proceedings were held before the people in the *iudicia populi* or in the emerging *quaestiones perpetuae*, where the *equites* were jurors. The aristocrats played no role.

[170] Plut. *Mar*.4.2–3.

[171] Mattingly (1960) 417. He points out that this was unprecedented and remained a record for a single family.

[172] Plut. *Mar*. 4.2–3.

judicial assemblies, including the *quaestio de ambitu* soon to emerge. Opposition was unlikely to have come from any source, other than members of the senatorial order.

The secret ballot potentially made the price of a vote determinable by the competitive market. A candidate had to meet the market, as far as he could, in the hope that the gaining of office would produce a lucrative appointment. This might be at the expense of those very peregrines whom the Senate was seeking to court with the *lex Calpurnia* and the *lex Acilia* as we have argued. The financial commitment required to fund an election campaign was substantially increased by dint of the *lex Gabinia*. Clearly, candidates had engaged in practices to circumvent, or which simply defied, the conduct which the *lex Gabinia* and the 119 law identified and sought to eradicate. The proscriptions must have made it harder still for candidates to maintain a nexus with the last minute intentions of voters so vital to their interests.

What reasons can we postulate for the introduction of the enabling law? *Ambitus* was a crime of the elite political class and its victims were those who lost as a result of its being committed. Under the enabling law the disappointed candidate had *locus standi*.[173] The competitive pursuit for high office was an ever-present characteristic of the Roman nobility. The few offices available acerbated the position for aspirants. Desire for office could lead men to challenge the boundaries of permissible canvassing and eventually to commit extortion.

The effect of the secret ballot and attendant competition was to encourage candidates to offer electors bribes which were far more favourable than those which electors had been able to secure under the open ballot.[174] A successful candidate might look to recover the resulting additional expense from a provincial command. For a praetor, this would depend on whether he was allocated a province where there were hostilities in train [175] or a praetorian province. In the latter event he might have to risk the prospect of prosecution for extortion if he had recourse to his unfortunate subjects in the absence of war booty.

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[173] The prosecutions in 116 show this. See Section 1 above.

[174] Thus, in 101 Marius was returned to his sixth consulship, though not, says Plutarch, because he was especially popular, but because he employed excessive bribery to win over the voters (Mar. 28.5).

[175] These were usually allocated first to consuls — see Section 10 supra.

We have argued that the ambition for office would render many candidates heedless of their exposure to prosecution for extortion when exercising their provincial command.

The promoters of the *rogatio* for the enabling law would have been formulating its provisions against the backdrop of the detailed and reasoned provisions of the *lex Acilia* and the proscriptions of the *lex Maria.* The statute of Caius, passed but five or less years before the enabling law, was directed at the repression of *res repetundae*. It was concerned with stamping out the conduct clearly defined in its provisions. The policy behind the law was to convince allies and peregrines, who had been ill-used by rapacious Roman governors, that by this statute they now had a reliable right of recovery and *iudices* who were not tainted by senatorial partisanship.

This study has argued in detail that the *lex Acilia* should be regarded as an instrument of Roman foreign policy.[176]

It is quite possible that the reforming proponents of the *lex Acilia* realised that whilst they had, by consensus, produced an effective statute, they had not treated the cause of the mischief at which the statute was directed. This mischief was the plundering of Rome's provincial subjects and allies both existing and potential. Most of this mischief can be attributed, as we have argued, to the cupidity of the Roman governors and their penchant to seek recompense for their electoral outgoings from *peregrini*. The Roman people may have judged that the time was now appropriate to introduce a statute limiting the terms on which a candidate could canvass for office and thereby protecting provincials from the potential for despoliations on this account.[177]

For some time before and even after the *lex Calpurnia* of 149, the rights of the peregrines to recover wrongfully expropriated property had been of questionable benefit. The prospect that the potential benefits which might emerge from the passing of the *lex Acilia* could be undone by the weaknesses in the prosecution of the 159 *ambitus* law and its consequences must have played heavily on the minds of the proponents of the Enabling Law.

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[176] See Chapter 4.

[177] Governors might, of course, have sought as well to extract monies or property, including objets d'art, from *peregrini* to fund their extravagant life styles when they returned to Rome. This conduct would remain a matter for prosecution under the lex *Acilia*.

The proponents would have been conscious of the shortcomings of the people's judicial assemblies,[178] in which *ambitus* prosecutions under the 159 law would then have been heard. The capacity of these assemblies to provide a reliable forum for the determination of guilt was highly questionable. They were cumbersome and lacked the formalities expected of a responsible tribunal.[179] Despite its complexities, the Gracchan court presented a much more controlled and orderly process.[180] The absence of a statute for any particular form of wrongdoing allowed the people in their judicial assemblies, with constant changes in personnel, absolute freedom of adjudication in the defining and redefining of the wrongful conduct. There is little reason to suppose that in the chaos of the *iudiciae populi* there would have been brought to bear any more precision in interpreting or reinterpreting and enforcing a statutory instrument.

It seems irresistible that the proponents would have turned their attention to the format and procedures of the *quaestio* created by the *lex Acilia* in considering reform. They needed a reliable structure.[181] The answer was the creation of the *quaestio de ambitu* following the precedent of the *lex Acilia*. No doubt, it was expected that the creation of a *quaestio de ambitu*, constituted in the form of the *quaestio* established under the *lex Acilia*, would become a supportive tool in foreign policy.

The establishment of the permanent *quaestio de ambitu* would have required the passing of the *rogatio* for the enabling law in the *consilium plebis* describing the terms of the offence and the procedure, penalties and any other necessary features.[182] Whether there might have been resistance to the law in the *contiones* is discussed later (see Section 16).

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[178] It is not clear whether prosecutions would have been heard in the *comitia centuriata* or the *concilium plebis*. If, contrary to Walbank's view the capital penalty was introduced in 159, then it may have still been the penalty in 120, in the absence of any intervening statute. If so, prosecutions would have taken place in the *comitia centuriata*.

[179] Brennan (2000) 365 with examples in note 60 page 769: "from the perspective of the senatorial establishment popular trials in general had a certain notoriety for capriciousness, lawlessness and violence".

[180] Brennan (2000) 366.

[181] As Brennan (2000) 365 puts it: "Comparisons were inevitable with the quaestio perpetua."

[182] If the voting procedure set down in the *lex Acilia* were used there would be another justification for the enabling law, namely to avoid the literacy issue presented for voters in the assemblies. Harries (1990) 27 suggests that the problem may have been acute with multiple candidacies. Even in the more wealthy domain of the *comitia centuriata*, there would still have been a problem with the lower classes.

We can usefully ask, *cui bono*, in relation to the enabling law. The plebeians, though they had a contingent financial interest, stood to lose if the statute lead to a reduction in electoral bribery.[183] The *equites* would favour the bill because they stood to gain in the increase of their judicial powers. Senators who supported the foreign policy initiative would have favoured this reforming statute, subject to some tolerance being allowed for what was generally accepted as reasonable canvassing practices.[184] What was acceptable would surely have been ironed out in the debate on the *rogatio* for the enabling law in the *contiones*.

The opposition of certain leading figures to the *lex Maria* suggests that not all of the *nobilitas* would have been happy with the enabling law. They may have foreseen the advent of an enabling law with the additional indignity of the *equites* adjudicating over their conduct in candidature for high office as well as their provincial administration.

The draftsmen would have to address what provisions were required in order to restrict the extent of the despoliation to which provincials might be exposed. A definition of *ambitus* must have been included. The precedent of the *lex Acilia* would have suggested the desirability of a reasonably precise definition of the offence. It is possible that it laid down the limits permitted for expenditure on games and banquets, on the hiring of retainers, and claquers for the promotion of a candidature. However, the main issue would have been how to deal with payments to electors for their support in the light of the operation of the secret ballot. It does not seem that we can sensibly describe what other steps the statute could take to proscribe what was punishable. The distinctions the Romans were later to draw indicates the elusive nature of the concept. Indiscriminate bribing could offend whilst targeted bribing did not. Perhaps the enabling law allowed the jurors, *Gracchani iudices*, to determine guilt on a discretionary basis. It would not seem possible that, in light of the secret ballot and the competitive nature of elections, any limits could be placed on how much a candidate might spend. But

[183] However, the plebs might still enjoy such generosity from candidates as were not specifically forbidden by the statute.

[184] Support may also have come from those whom Hall (1990) 194 marks as being active in 139: "men of aspiring social and political importance and wealth and men who had served well in mid-century campaigning". These men possibly supported an ostensible effect of the 139 law namely the severing of elite domination of the open ballot. If so, they would have favoured the enabling law.

the interests of the peregrines had also to be considered. The *quaestio de ambitu* may have been where such issues had to be decided.

If we further suppose that the enabling law was tralatitious, it may have retained the death penalty, which would have been a deterrent.[185] If the law simply provided for exclusion for office for a period of time a successful prosecution would have put an end to a potentially illustrious career. If so, the law would have served its purpose.

Interestingly, there is also the possibility that the *lex Acilia* could have operated so as to inhibit *ambitus*.[186] The laws may thus have been intended to be of mutual benefit.[187]

Our argument then is that that the enabling law was, ultimately, intended to go in support of the concern of the Senate for the welfare of the peregrines. This accords with the attitude of the Senate in the 180's. At that time the Senate expressed its disquiet about the use of moneys obtained from provincials to fund games and temple building, to support the canvassing or reputation of the elite (see Section 6 above). These examples of the senatorial intent serve to maintain the argument made in this study that the Senate was concerned to substantiate relations with foreign nations.

16. A final question

Why, if resort to bribery became pressing for those seeking high office, do we not read of resistance from this quarter to the creation of the *quaestio de ambitu*. There is no apparent mention of objection to the court in our sources.[188]

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[185]. This issue remains controversial, but there is a preference for the 159 law carrying this penalty.

[186] The prosecution of a governor for extortion, which arose from his desire to exact from his subjects the moneys required to fund his canvassing for office, might well forestall any candidature based on the distribution of largesse. The point is illustrated by the prosecution of M. Aemilius Scaurus in 54 for alleged extortion in the province of Sardinia and Corsica which Asconius records (Asc. *Mil*.45.C.) and to which Linderski refers (1985) 90.

[187] Linderski (1985) 90, who refers to a nexus between *ambitus* and *res repetundae*, does not appear to see the other connection for which we have argued.

[188] In the case of the *lex Maria* a few years earlier, Plutarch records in detail the vigorous opposition of certain members of the aristocracy to the bill. Plut. *Mar*. 4.2–3. But, in contrast, we lack any specific source material about the passing of the enabling law, wherein it might be expected that opposition would have been recorded.

We do not know the substance of the enabling law. However, an effective response may be that the aristocrats who hungered for high office as their perceived birth right spoke vigorously against the *rogatio* for the law in the *contiones* preceding the vote in the *comitia centuriata*. The *rogatio*, which materialised from the *contiones* and was passed into law, would have been a compromise measure. The opponents of the law would have had full opportunity to vent their disapproval in the *contiones* and further attempts to have the bill rejected in the assembly would have been met with resistance surely on the basis of its approval after vigorous debate. That there is no record of opposition simply means that the law as passed met with majority acceptance.

This law was intended to strengthen the force of the Roman foreign policy behind the *lex Acilia* by dissuading candidates from engaging in bribery which might ultimately lead to the despoliation of *peregrini*. It represented a continuum of this policy. Plausibly the same senatorial interests as backed the *Lex Acilia* — those who wished to maintain Rome's stated diplomatic policy — would have promoted the enabling law as a support for the *lex Acilia*. These interests may well have been powerful enough to convince the audiences in the *contiones* that just as the people had passed the *lex Acilia* so should they pass the enabling law. The underlying reasons were the same. An appeal to the benefits of maintaining Rome's imperial interests may not have been lost on a voting public which had already endorsed the policy.

Faced with this analysis, prospective candidates given to bribery may not have considered resistance to the passage of the law worthwhile. We know that bribery persisted so that these men presumably felt disposed to take the risk of prosecution.

The record of those elected as consuls over the ensuing 25 years shows that the successful candidates continued to emerge from the elite. But it is likely that electoral pressures may have compelled even these haughty aristocrats to stoop to bribery. [189] Reputation derived from ancestry and military and political achievements may not always have been sufficient. Possibly the senators behind the enabling law represented the establishment figures. Their intention may also have been that the law, by outlawing bribery, would remove the pressure upon the

[189] Gruen (1991) 259.

elite to compete in the electoral bear pit and permit them to continue to rely on their *auctoritas*.

17. Summation

In the first two decades of the second century there was rivalrous competition for the high offices. The first bribery law, the *lex Baebia* was passed in 181. However, in view of the terms of various *senatus consulta* giving consent to the presentation of magisterial games on specific conditions, it is apparent that the statute did not concern itself with expenditure on games or, indeed, the holding of the spectacles themselves. *Ambitus* was not involved.

A second law the *lex Cornelia Fulvia*, introduced in 159, suggests that some strengthening of the law was required and that the 181 statute had proven inadequate. There is next to no evidence of cases of electoral bribery in the several decades after 159 but the features of Roman elections dictate that it must have occurred.

As to the potential accused, candidates who resorted to bribery were normally those who did not have large client followings, though we have noted that some scholars now seriously question the traditional idea of a socio-political structure based on a patron-client rapport.

In 139, the *lex Gabinia* introduced the secret ballot for elections. Before then open voting allowed bribers to keep a weather eye on those bribed to ensure that the voting bargain and their investment remained intact. Now the vote had real value, because the candidates might have to face competition in a volatile market. There was also the uncertainty of voter loyalties which could turn. The records of the 25 years after 139 show that the consulships were the prize of a few rich families. They too may have had to produce money for office, although it is likely that the voters may have been persuaded by breeding and military success. The secret ballot still did not impede the attempted seduction of the electors. The law did not deter bribery because of market place dynamics. The number of laws introduced thereafter in an effort to extirpate bribery demonstrate its failure.

We have argued that the purpose of the enabling law was to discourage senators from engaging in bribery in order to obtain office. The law was intended to reinforce Roman diplomatic policy which was underpinned by the *lex Acilia*. By

proscribing electoral bribery the enabling law sought to remove the factor which might have driven some governors, particularly those appointed to more peaceful provinces, to exact recompense from their peregrine subjects.

Chapter 6. The *Quaestio de Peculatu*

1. Introduction

We argued in the last chapter that the law establishing the *quaestio de ambitu* was passed in support of the extortion statutes. It was promoted in an effort to preclude from ultimately securing a proconsular appointment, men who engaged in bribery to obtain political office. These men, having offended once, were less likely to have scruples about engaging in *res repetundae*.

The enabling law for the *quaestio de peculatu* was passed a decade, or a decade and a half, after the probable date for the *ambitus* court discussed in the last chapter.[1] As with the standing courts for *res repetundae* and *ambitus*, those who were pursued as defendants in this new court would largely have been the elite — men of senatorial rank.

Our case will be that the enabling law for the *quaestio de peculatu* was introduced as an instrument of foreign policy (which we have earlier contended was the case with the enabling laws for *res repetundae* and *ambitus*) to demonstrate, albeit indirectly, Rome's concern to protect the interests of allies and friends.

What were the features of *peculatus*? Some contemporary scholars are content to render *peculatus* as embezzlement, but it appears from the jurists that the theft of public or sacred funds, without any requirement that what was purloined be in the custody of the offender, is a more accurate description.[2] And, as we later observe, *peculatus* extended to the looting of sacred objects and works of art.

The Roman jurists provide us with their appreciation of the structure of *peculatus* under two laws, probably introduced by Caesar.[3] In the absence of evidence of any statutory provision in the early first century, we can do little better than endeavour to distil some clues as to what constituted *peculatus* from remarks in

[1] Probably in 120 but no later than 116. A date in 101 or 100 seems plausible for the establishment of the *peculatus* court.

[2] Williamson (2016) 336 is a recent proponent. However, Riggsby (1999) 224 note 11 argues on the basis of remarks by the jurists (Ulp. *Dig*. 48.13.13) that *peculatu*s need not connote funds which are in the specific charge of the defendant. Therefore, the use of "embezzlement" as a translation is wrong.

[3] *Lex Julia Peculatus* and *Lex Julia de Residuis*. Both laws are named in the *Digest* in the chapter dealing with *peculatus* (48.13) but they are probably the same law.

the sources. It is somewhat heartening to find that there seem no major divergences as to the features of *peculatus* between the Verrines, a major source in the first century, and those discerned by the jurists from the Julian laws. A broad summary of the pronouncements of the jurists (*Dig*. 48.13) indicates that liability arose under the laws where a person who received public monies intended for a specific purpose, retained them and did not employ them for that purpose (*Dig*. 48.13.2 Paulus; 48.13.4 Modestinus). Ulpian suggests that the element of application for personal benefit was an additional ingredient (*Dig*. 48.13.1).

2. The Verrines

We find similarities in the ingredients of the offence in the early first century when we examine relevant passages in Cicero's prosecution of Caius Verres,[4] who had been *propraetor* in Sicily from 73 to 71.

2.1 *Pecuniae publicae*

In the Verrines, Cicero describes Verres' illicit dealing in corn and grain stuffs involving public money (*pecunia publica*), contrary to statute.[5] In some cases Cicero specifically states, in others he implies, that the enumerated conduct constituted *peculatus*. Cicero further calls attention to Verres' looting and despoiling of the temples of the Sicilians and to his purloining and making away with statues, images of deities and works of art. These were properly acts of sacrilege (*sacrilegium*) but were actionable as *peculatus*.[6] We can identify parallels in the law relating to *peculatus* under the Julian laws as expounded by the jurists. Little had apparently changed in the two limbs of the offence.

Cicero provides a clear example of what constituted *peculatus* in the late 70s in describing Verres' unscrupulous lending activities. He attacks the conduct of

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[4] Some 20 years after the likely enactment of the enabling law for the *peculatus* court.

[5] The *lex Terentia et Cassia frumentari* passed in 73 BC imposed a duty on Verres to make purchases of corn. Cicero *Verr*. 2.3.163. notes that there were two kinds of purchases. The first purchase was a further tithe. The other, a requisitioned amount, was to be 800,000 pecks a year borne equally between all of the grain growing cities and not just those subject to the tithe. Cic. *Verr*. 2.3.163; 171. Pritchard (1971) 226.

This further tithe was to be of the same amount as that provided by the original tithe. Verr. 2.3.163. In Cicero's time about three million *modii* of grain were exacted as the primary tithe from Sicily. This was probably sufficient to meet the needs of the army and the whole population of Rome for two months. Pritchard (1971) 226.

[6] Cic. *Verr*. 2.1.7; 9.

Verres in lending public monies (*pecuniae publicae)* at interest for his own benefit. The Senate gave to Verres annual amounts specifically to pay to the farmers of Sicily for the purchase of grain, as was his duty.[7] He diverted the whole of the money to his own advantage.[8] His scheme was to lend the funds for these purchases at interest to the Sicilian companies to whom it should have been paid in return for their corn. Verres should not have lent these public moneys out. Moreover, the interest on these public moneys should have been paid to the state and not pocketed by Verres.[9] We can glean from Cicero's remarks that the essence of *peculatus* lay in the retention of, and failure to apply, *pecuniae publicae* for the purpose for which they were conferred. This accords with the opinions of the jurists. The element of benefit to the offender is also present.

It is interesting to reflect on Cicero's approach. He, of course, was appearing as counsel for the Sicilians and not as advocate for the Roman people. Strictly the question of *peculatus* was not relevant to the Sicilian complaints but was pertinent to the misuse of Roman public funds. It seems that Cicero's ploy was to introduce prejudicial character evidence to blacken Verres. If the Sicilians had any claim at all in respect of this conduct of Verres, their port of call was surely the citadel of the extortion court.[10] Cicero had no brief to argue for the Roman state. Yet it was the state which had incurred the primary loss and demanded a remedy. Extortion, whilst available to the Sicilians, could not assist the Romans. It is therefore questionable whether the Roman people would have *locus standi* under the extortion statutes to sue to recover from Verres.

Cicero also chides Verres for his manipulation of the sale of the corn tithes of the Acestans. His swindle was two-fold. Verres first "knocked down" to his acolyte Docimus the tithe for 5,000 pecks of wheat and a "transaction" fee. Verres then forced the Acestans to acquire the tithes from Docimus at the same figure. Next Verres falsified his accounts, recording only 2,000 pecks as the amount at which he sold the tithe and himself pocketed, or allowed his acolytes to pocket, the

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[7] Cic. *Verr*. 2.3.163.

[8] Cic. *Verr*. 2.3.164.

[9] Cic. *Verr*. 2.3.165.

[10] It is probable that the Sicilians could have sued Verres under the *lex Acilia* for his misappropriating of monies due to them from the sale of corn they had agreed to supply.

difference.[11] Cicero rebukes Verres for his audacious forgery of the public accounts.[12] The parallels with the *lex Iulia* expounded by the jurists continue. They record that anyone who retained any public money from leases or purchases[13] or who entered on a public register any amount less than the proceeds of a sale or lease was liable under the *lex Iulia* for *peculatus*.[14] There was little change in the nature of the offence in this respect.

Thus, Verres misappropriated the greater part of the proceeds of the sale of the tithes for which proceeds he was answerable to the Roman people. And he wrongfully exacted from the Acestans an amount equal to the sale price for the tithes.

Cicero taunts Verres with the prospect of a prosecution in the *peculatus* tribunal, even if bribery or violence allowed him to elude the extortion court.[15] He lambastes Verres for his shameless robbery of the allies and his unscrupulous theft from the Roman people involving falsifying of public accounts. In so threatening Verres, Cicero insinuates that the whole of the above conduct concerning the Acestans, which had been ventilated in the extortion court, was pertinent to a prosecution for *peculatus*. But Cicero cannot surely mean that the Acestans had a right to sue for *peculatus* in respect of the repurchase of the tithe, which Verres compelled them to make and, by analogy, of any of the other exactions of Verres. *Pecuniae publicae* were not involved, only the private property of the Acestans. The repurchase was certainly actionable as extortion at the behest of the Acestans and therefore properly prosecuted before the *quaestio de pecuniis repetundis*.

Cicero castigates other practice of Verres. From the citizens of Halaesa he demanded an annual tithe of corn of 60,000 pecks. Verres then rejected their corn and insisted instead that they pay to him an amount equal to the current price for the amount of the tithe. The citizens thus paid over no grain but only money. Verres audaciously pocketed the *pecunia publica* entrusted to him from the *aerarium* for the purchase of the tithe whilst satisfying the tithe for Rome from his

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[11] Cic. *Verr*. 2.3.83.

[12] Cic. *Verr*. 2.3.83: "*audacius tabulas publicas commutavit*".

[13] Dig. 48.13.4.3 (Marcianu).

[14] *Dig*. 48.13.10 (Marcianus).

[15] Cic. *Verr*. 2.3.83.

own corn.[16] Through this scam Verres stole first the public monies from the *aerarium* and secondly the receipts illegally procured from the citizens of Halaesa.

Cicero identifies Verres' behaviour as *peculatus*.[17] Verres sent to Rome corn (his own) bought with the money of the Sicilians and stole the *pecunia publica*. The remedy of the Roman people thus lay in *peculatus*. The Sicilians could have sued in the *quaestio de pecuniis repetundis* for the monies Verres extorted.[18] Again Cicero expatiates on a matter not strictly relevant to the claim of his clients.

Cicero excoriates Verres over the issue of commuted corn. The Senate had decreed that Verres should have the right to procure corn for his own maintenance. The Senate fixed the price payable to Sicilian farmers at four sesterces for a peck of corn.[19] Instead of purchasing the grain from the farmers with the money provided by the Senate, Verres demanded that the growers commute the corn (for his "maintenance"). He exacted money instead of corn. He had wrung eight sesterces a peck from the unfortunate growers despite the fact that the market in Sicily was then two to three sesterces for a peck.[20] Verres eventually received a total of 12 sesterces per peck, because again he dishonestly retained the monies paid to him from the *aerarium.*[21] Cicero resorts to the traditional language of the charge of *res repetundae* to describe Verres' behaviour, [22] while in his concluding remarks he implicitly refers to the misappropriations he has described as *peculatus*.[23] Here Verres, insisting on commutation at a figure twice that fixed by Rome, had robbed the Sicilians. Their claim again was in extortion and that of the Roman people in *peculatus*, for the

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[16] Cic. *Verr*. 2.3.170–171. Cicero tells us that Verres devised the scheme when a proquaestor in Achaia. He demanded corn, hides Cilician rugs and sacks from the inhabitants of various cities in Lycia, Pamphylia, Pisidia and Phrygia and then exacted the money value instead of the chattels. Cic. *Verr*. 2.1.95.

[17] Cic. *Verr*. 2.3.177: "*iste in hoc genere peculatus non nunc primum invenitur, sed nunc demum tenetur*. *Vidimus huic ab aerario pecuniam numerari quaestori ad sumptum exercitus consularis, vidimus paucis post mensibus et exercitum et consulem spoliatum*." The reference to the earlier despoliation is to his conduct as a quaestor under Cn. Carbo.

[18] Cic. *Verr*. 2.3.172; 177.

[19] Cic. *Verr*. 2.3.188.

[20] Cic. *Verr*. 2.3.188-189.

[21] Cic. *Verr*. 2.3.194-195.

[22] Cic. *Verr*. 2.3.194: "*utrum tibi pecuniae captae coniliatae videntur adversus leges, adversus rem publicam, cum maxima sociorum iniuria*".

[23] Cic. *Verr*. 2.3. 206.

public funds misappropriated. The retention of the funds for a purpose other than the purchase of grain was *peculatus*.

Cicero provides further examples of *peculatus* on the part of Verres. In the *Divinatio in Caecilium*, he denounces Verres for withholding from the Sicilian grain farmers the money owed to them for grain bought pursuant to a *senatus consultum* and his retention thereof.[24] These moneys, which he converted to his own use, represented funds which had been explicitly given to Verres by *senatus consultum* from the *aerarium* and earmarked for the purchase of Sicilian grain. These were *pecunia publica*, the property of the Roman state, and were conferred for a particular purpose. This remedy lay in the *peculatus* court and the Roman people could have taken action.

In a further example, Cicero harks back to Verres' quaestorship under Cnaeus Carbo in Cisalpine Gaul (84). He asserts that Verres absconded with money specifically entrusted to him as *quaestor* from the *aerarium* for the provisioning of a consular army.[25] The circumstances again seem to fit the offence as *pecuniae publicae* were involved. Cicero leaves us in no doubt that this was an early example of *peculatus* on Verres' part.[26]

We may suggest a probable reason for the introduction of statutory *peculatus*. The provisions of the *lex Acilia* suggest that it is doubtful whether the Roman people as a polity had *locus standi* under its provisions to sue its governors to recover its stolen property.[27] Moreover, it is not clear that even if a Roman citizen appeared as a representative of the state seeking to recover public property he would have *locus standi*.[28] The property would not be his. Arguably then, the *peculatus* court was set up to provide the Roman people with standing to pursue administrators and others who made off with its public property.

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[24] Cic. *Div.Caec*. 10.32.

[25] Cic. *Verr.* 2.1.11–12; 34–35. Verres received the money in Rome as quaestor and proceeded to Gaul to join the consular army. He took the first opportunity, according to Cicero, to appropriate to himself (*aversa pecunia publica*) the *pecuniae publicae* given to him. The Senate would have entrusted the monies to him as funds for provisioning the army in accordance with the standard procedure.

[26] Cic. *Verr.* 2.3.177.

[27] See Chapter 2, Sections 8–10.

[28] Lintott (1992) 110 notes Cicero's several protestations in the Verrines that the jurisdiction of the extortion court was for Roman allies and friends. He also argues that the reference to Roman citizens in line 87 of the *lex Acilia* could be to a Roman citizen acting as a *patronus*.

Cicero levelled at Verres in the *quaestio de pecuniis repetundis* a series of charges, a number of which would certainly not have fallen within the terms of the *lex Acilia* and thus not have constituted extortion. He adopted a broad-brush technique in presenting his case. As we have seen, in threatening Verres with action in the *quaestio de peculatu*, Cicero, most confusingly, made it clear that the charges which he was arguing in the extortion court would also be pertinent in the *peculatus* tribunal even though we observe that some of those involved extortion.[29]

In the end, we must concede that there were sound reasons for Cicero's approach. First, by adumbrating the extremes of Verres' appalling behaviour, Cicero might expect that some mud would stick. By "throwing the kitchen sink" at Verres he might sway the judges into finding against Verres on charges which fell within the terms of the *peculatus* statute, thus securing the conviction so laboriously sought.[30] Secondly, by bringing all the charges under the one "umbrella" Cicero thereby avoided having to proceed, seriatim, in each *quaestio* having the jurisdiction for each particular offence of which he was accusing Verres. If we recognise Cicero's gambit and its purpose, and are not confused thereby, we can with some confidence accept that the features of the offence of *peculatus* in relation to public moneys and its purpose were largely those described by the jurists.

Verres' cunning and cupidity meant that he robbed not only the Roman people but at the same time defrauded the *peregrini*. But if there were in future efficient *peculatus* prosecutions of provincial governors by the Romans, *peregrini* might be encouraged to take up the cudgels under either the extortion (or perhaps *peculatus*) statutes. In effect the facts which were the substance of the abuses to both the Romans and the *peregrini* and, accordingly, the supporting evidence, might be very similar so that where the Romans prosecuted, the *peregrini* would have had an indication of their prospects of success.

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[29] Cic. *Verr*. 2.3.83.

[30] That is to say, the senatorial judges might decide from Cicero's "scatter gun" approach that Verres' character was such that he could well have been guilty of the charges alleged against him. The character evidence (probably inadmissible under modern criminal law systems) would suggest that he was just the sort of person who would engage in the impugned conduct.

2.2 Statues and artefacts

There was a secondary area for which Cicero indicates the *peculatus* court catered. This comprised the ransacking of the sacred shrines of *peregrini* and making off with statutes and artefacts.

Cicero records the flagrant thefts of objets d'art by Verres. Firstly, he refers to Verres absconding with the monuments to Marcus Marcellus and Publius Scipio Africanus,[31] which had been "gifted in name by these illustrious Romans to cities of friends and allies in Sicily".[32] Cicero specifically uses the word *peculatus* to describe Verres' conduct. If these statues were in law gifts, then the Sicilians, and not the Roman people, were the owners. And if, as we have argued, the permanent court for *peculatus* was created to enable the same Roman people to recover their property, then how could *peculatus* have been available when the Romans had given away title to the chattels? It is possible that the Sicilians might have been able to sue Verres for the recovery of the statues but their action would have been in extortion. If Cicero is right, then there must have been an exception which allowed the Roman people to sue in *peculatus* to regain possession of these objects. Perhaps it was the precious and diplomatically significant nature of the chattels which justified the exception. Perhaps, too, the Roman people had the privilege of pleading a legal fiction of ownership, even though title remained in the provincials by reason of gift. Arguably, the repossession of the objects was of sufficient import to demand action by the Romans as the *peregrini* might have been less than zealous about suing in Rome for recovery, presumably under the extortion statutes.

Cicero also adverts to still more notorious thefts — the statue of Diana from Segesta and the statue of Mercury from Tyndaris. These too were "gifts" from Africanus to the cities.[33] Verres coveted the statues and had them stolen. Although

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[31] Africanus and Marcellus had set up memorials and statues in Sicily to commemorate the defeat of Carthage in 146 to which the loyal parts of Sicily had made a major contribution. Cic. *Verr*. 2.2.3–4.

[32] Cic. *Verr*. 2.1.11:

> "*erunt etiam fortasse, iudices, qui illum eius peculatum vel acerrime vindicandum putent, quod iste M. Marcelli et P. Africani monumenta, quae nomine illorum, re vera populi Romani et erant et habebantur, ex fanis religiosissimis et ex urbibus sociorum atque amicorum non dubitarit auferre.*"

[33] Africanus had restored a famous statue of the goddess Diana to the people of Segesta in Sicily, as a memorial of the Roman victory over Carthage. On the plinth of the statue was an inscription

these chattels were gifts, Cicero asserts that the statue of Diana was the property of the Roman people[34] as was the statue of Mercury.[35] He contends that the carrying off of a statue, that is the Mercury, which belonged to Rome, was *peculatus*. In view of the similarity in the circumstances, we may take it that the plunder of the statute of Diana was also *peculatus*.[36] If Cicero is right, there is no difficulty here as the Roman people would be seeking to recover what was actually their property.

Interestingly, whilst he is specific in indicating that the statues of Diana and Mercury were the property of the Roman people, he makes no such claim in the case of the statues of Marcellus and Africanus although, as has been noted, he states that Verres' theft constituted *peculatus*.

So, at least in the case of statues of diplomatic significance, the Roman people could sue for recovery from the robber in the *peculatus* court even if they had "gifted" the statutes to a foreign nation to whom they had intrinsic religious or sentimental value. The statues described by Cicero were clearly articles of immense superstitious awe and had a symbolic worth in that they were a means by which Roman power and influence exemplified by the exploits of the victorious generals could be publicised. These icons were in the gift of the generals concerned. It can be reasoned that there was a diplomatic initiative in their restoration to the Sicilians and that a further purpose of the *peculatus* court was to provide a means to protect incursions, which might threaten this type of enterprise in foreign affairs.

We have argued above that a legal fiction may have been employed in support of the action. Perhaps, too, the concept of the Roman people "gifting "chattels of this nature as diplomatic gestures requires reconsideration. A gift to foreign peoples of

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recording Africanus' name and how he had restored the statue after his great victory. They revered the statue, which had been stolen from the city by the Carthaginians during the war. Cic. *Verr*. 2.4.73–75. The statue of Mercury was also set up in the town of Tyndaris by Africanus and had an equally distinguished pedigree. It was given to commemorate his victory but in addition as a reward to a loyal ally. Cic. *Verr*. 2.4.84.

[34] The Segestan magistrates explained to Verres that because it belonged to Rome they could not deliver up the statue of Diana to him. Cic. *Verr*. 2.4.75.

[35] Cic. *Verr*. 2.4.88.

[36] Cic. *Verr*. 2.4.88. Cicero also contends that the conduct described constituted *res repetundae* and *maiestas*. It is also possible that as booty taken from the Carthaginians the statues would have fallen within the proscription contained in the *Digest* 48.13.13. where it is stated that stealing of such booty exposes the wrongdoer to a quadruple damages. We cannot know whether Verres faced such a penalty, as Cicero makes no mention.

a statue may simply have been of the right to enjoy the chattel as a bailee with obligations to deal with, and hold, the object at Rome's direction and for the purposes indicated above. Turning to the *Digest*, again there is similarity as to this aspect of the offence. The jurists confirm that liability arose under the Julian laws where persons stole sacred articles from a temple [37] or money received from sacred sources.[38] The jurists are not unanimous in specifying whether ownership of the stolen property was a feature of the offence under the Julian laws.[39] Further, the jurists record severe penalties for this form of *peculatus* or *sacrilegium*, even death,[40] and this may well be the reasons for Verres' flight to Massilia after the first *oratio*.

3. The creation and purposes of the court

How stood the position with *peculatus* before the blistering indictment of Verres in 70 by Cicero in the Verrines?

In 104, proceedings were instituted against the proconsul Q. Servilius Caepio.[41] The allegations were that Caepio or his agents had made away with the treasures from the temple of Apollo at Tolosa.[42] The stolen treasures were huge.[43] On one view the charge was either *sacrilegium* or *peculatus*.[44] The treasures apparently disappeared en route to Massilia, presumably for transportation to the *aerarium* in

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[37] Ulpian asserts that anyone who perforated the walls of a temple or stole anything by this means committed the offence. *Dig*. 48.13.11 (1). The entry into and removal from, a sanctuary of sacred property incurred liability.

[38] *Dig*. 48.13.1 Ulpian.

[39] Paulus has it that the articles must belong to the public. *Dig*. 48.13.9 (1). Ulpian does not specify this as a necessary ingredient of the offence. *Dig*. 48.13.1.

[40] Paulus states that the penalty was capital. *Dig*. 48.13.9 (1). For Ulpian the penalty for this offence was to be blinded. *Dig*. 48.13.11 (1). There was some flexibility in the terms of the offence. Paulus warns of the need, presumably for judges, to consider what is deemed sacred and as to what acts should be included in the crime. *Dig*. 48.13.9 (1).

[41] Caepio had campaigned in Gaul in 106 as consul against the Tectosages (Dio, 26, fr. 90).

[42] The Roman army under Caepio secured a nocturnal entry to the city of Tolosa by stealth and came upon the sacred treasures situated in the temple of Apollo. (Oros. 5.15.25). The temple was pillaged and the sources are generally uniform in attributing the theft to Caepio (Strabo 4.1.13; Iustin. 32.3.9; Gell. 3.9.7).

[43] The treasures comprised some 100,000 pounds of gold and 110,000 pounds of silver (Oros. 5.15.25).

[44] The sources are not conclusive as to the charge. Strabo 4.1.13 calls Caepio a temple robber — *ἱερόσυλος*. This would indicate that the charge against him was *sacrilegium*. ἱερόσυλος. To like effect, Quintilian 7.3.10 states that it was sacrilege to steal sacred property from a temple. Gruen (1968) 162 argues for *peculatus* on the basis that theft of funds from temples, which were not Roman, would not be regarded as *sacrilegium*.

Rome. Bauman believes that the treasures were the property of the Roman people,[45] presumably as the booty of war. The jurist Modestinus states that a person stealing booty taken from the enemy was liable under the *lex Iulia* for peculation.[46] This accords with Bauman's position. It is possible, therefore, that there were two charges available against Caepio, one for *sacrilegium* (temple robbing) and one for *peculatus*.

However, it is apparent that the court which heard the charges against Caepio was a special *quaestio*. Cicero provides us with compelling material in a passage in the *De Natura Deorum*[47] in which he has Cotta associate the enquiry into the affair of the gold from Tolosa with the investigation of the Jugurthan conspiracy, the Mamilian commission. He also associates the Servilian enquiry with the earlier trial of Hostilius Tubulus for giving a bribed verdict and with the later trial in 113 of the three Vestals for incest. Scholars accept that this association by Cicero of Caepio's enquiry with known special *quaestiones* indicates that in 104 there was no standing court and that the prosecution involved a special commission.[48]

Brunt deduces from the passage from the *De Natura Deorum* that, in using the word *cotidiana*, Cicero is referring to permanent courts when compared to the earlier special courts. He also points out that Cicero distinguishes between forgery, which was a novel offence as it arose under a *nova lege*, and *peculatus* (as well as *sicae* and *veneni*), which by implication must have been introduced by earlier legislation before the *nova lege*.[49] The reference to *nova lege* must be to Sullan legislation.[50] It follows that the *peculatus* court was in existence before Sulla's reforms.

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[45] Bauman (1967) 42, pace Shatzman (1972) 179–205. Cicero intimates in the Verrines (*Verr*. 2.4.88) that the booty taken from Rome's enemies (Carthaginians) was public property, which the Roman people could sue to recover.

[46] *Dig*. 48.13.13. The sentence was an award of quadruple damages.

[47] Cic. *N.D.* 3.74:

[48] Gruen (1968) 162 and note 28 on 162 and 177; Marshall (1985) 196; Hillman (1998) 182: "Surely no standing court de peculatu was operating in 104, when a special quaestio for this crime was convened to try Q. Servilius Caepio, cos. 106, for his embezzlement of the gold of Tolosa."

[49] Brunt (1988) 218.

[50] Cloud (1994) 511 note 115 suggests out that the dramatic date of the *De Natura Deorum* was 77–75 so he infers a reference to Sullan legislation.

The *quaestio de peculatu* was certainly operating by 91. We see this from a passage in the *De Oratore*, the dramatic date for which is considered to be 91.[51] In a dialogue between M. Antonius, the grandfather of the triumvir, and Q. Lutatius Catulus, Cicero has M. Antonius adumbrate to Catulus his approach as defence counsel in pleading to charges brought against a client:

> "*Ac nostrae fere causae, quae quidem sunt criminum, plerumque infitiatione defenduntur. Nam et de pecuniis repetundis, quae maximae sunt, neganda fere sunt omnia, et de ambitu raro illud datur, ut possis liberalitatem atque benignitatem ab ambitu atque largitione seiungere; de sicariis, de veneficiis, de peculatu infitiari necesse est.*"[52]

Antonius adverts first to *res repetundae* and *ambitus*. He asserts that with these offences it is his practice to deny all allegations made against his client by the prosecution. We know that by 91 these offences were tried in permanent courts.[53] His use of the words *de pecuniis repetundis* and *de ambitu* suggests that he is adverting to trials of the offences.

Significantly for us, Antonius also groups with the first two the offences *de sicariis, de veneficiis* and *de peculatu*. He adopts the same approach, a denial of guilt, with these charges. And again he utilises the preposition *de* before each offence. Antonius here indicates that the trial of the offence of *peculatus* is in the same category and like extortion and bribery. Thus, Antonius provides us with evidence that by 91 a permanent court was in place for *peculatus* as well as for assassination and poisoning.

Gruen suggests, albeit tentatively, that the prosecution of the praetor, L. Licinius Lucullus in 103 was before a standing court. He notes that in his life of the "Ciceronian" Lucullus, the consul in 74, Plutarch states: "*ὁ μὲν πατὴρ ἑάλω κλοπῆς*". Gruen poses that *κλοπῆ* entailed a charge of *peculatus* and may be suggestive of a standing court for *peculatus* having recently been set up.[54] Keaveney relies on Diodorus Siculus' account of the conduct of Lucullus in his

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[51] Introduction to the Loeb edition of *De Oratore* at page xiii.

[52] Cic. *De Orat*. 2.105.

[53] From 149 and from no earlier than 116, respectively.

[54] Gruen (1968) 177.

command against the rebels in Sicily in 104.[55] He contends that we have, in the praetor's conduct, for which he was prosecuted, evidence of *res repetundae* rather than *peculatus*. Diodorus' account indicates none of the features of *peculatus*.[56] Keaveney points in particular to the language used by Diodorus: "*ὁ στρατηγὸς εἴτε διὰ ῥᾳστώνην εἴτε διὰ δωροδοκίαν οὐδέν· ἀνθ' ὧν καὶ δίκην ὕστερον κριθεὶς Ῥωμαίοις ἔδωκε*". The words *διὰ δωροδοκίαν* indicate the receipt or taking of bribes so that the offence was more akin to extortion. It is also possible that the conduct constituted *perduellio* so the case for a standing *peculatus* court in 104 is not strong.[57]

Gruen then argues that soon after the passage of the *lex Appuleia de maiestate* in 103 would have been an apt time for the introduction of a bill for a standing court for *peculatus*.[58] This view is persuasive. The failure to secure the conviction of Caepio before the *quaestio extraordinaria* in 104 for *peculatus* and or *sacrilegium*, and the reconstitution of juries in the permanent courts under the *lex Glaucia* were significant matters. Caepio's initial success in escaping justice was salt in the wounds of his political foes, probably through the *gratia* of the Metelli. He had represented their interests as consul in 106.[59]

Men, like Saturninus or Glaucia, were demagogues pressing for the people, through use of its institutions, to challenge senatorial traditions. They would certainly have seen the establishment of a permanent court as a means of striking at their political foes since it was members of the senatorial class who would be the main defendants in the *peculatus* court. But what concern did these men have in repressing the abuse of public moneys or the defiling of sacred artifacts by Roman generals, and what would have stimulated them to create the court?

It may simply have been an indignant response to Caepio's escape from prosecution in the special court. There would now be a standing court with a

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[55] Keaveney (1982) 113–114 note 8. Hillman (1998) 184 concurs.

[56] Dio 36.8.4. notes that the Romans under Lucullus initially won a brilliant victory and the slave army was routed. The praetor, however, for reasons of his own, declined to capitalise on the rout. Dio 36.8.5 attributes the irresolute campaigning of Lucullus in 103, to indolence or to bribery. 36.8.5. Lucullus was condemned and went into exile for this misconduct. Dio, 36.8.5; 36.9.2.

[57] Dio's account, annotated in the last note, says nothing of extortion on the part of Lucullus. However, his dereliction of duty and exposure of the armies and the reputation of Rome to danger and disrepute surely amounted to *perduellio* rather than to any other charges.

[58] Gruen (1968) 177 note 95.

[59] Gruen (1968) 157; 162.

defined jurisdiction, which would serve to avoid the uncertainties of special courts.

It seems clear that these men were concerned about Roman foreign policy as the promulgation of the piracy law in 101 or 100, which is discussed in Chapter 7, Section 13, probably by one of them,[60] would show.[61] The subject matter of this law evinces a clear intention on the part of these men or their supporters to intrude unashamedly into the senatorial prerogatives in foreign affairs, utilising the popular will.

Sumner regards the main purpose of the law as the securing of the seas for Roman citizens and traders against the threat of piracy.[62] He argues that bulk of the law was devoted to mobilising resources and opinion in Roman Anatolia and the Levant to deal with the privateer problem. The overall theme of the law evinces a desire to convince Roman friends and allies in the East that Rome regarded their protection and the security of the area as important to Roman interests. We might also note that the law required the governors in Asia and Macedonia to give prompt attention to the collection of the revenues in Asia and Macedonia.[63]

The law imposed the magistrates, on whom functions were conferred, to carry them out in accordance with the law. This is suggestive of government by the people. The employment of the *plebiscitum* identified in the piracy law marks a determination to expand the influence of the Roman people by giving the people in their assembly a role in the development of Roman diplomacy.[64] In the *contiones*, in which the *rogatio* for the law would have been debated before it was introduced into the voting assembly, the subject matter would have been ventilated. The people would know its contents and have had the opportunity by noise and gesticulation to make their views known, albeit they had no right of audience.

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[60] The attribution is based essentially on the fact that the piracy law and the agrarian law of Saturninus had a similar procedure for enforcing obedience by magistrates to their dictates.

[61] Delphic text commonly known as the "Piracy Law" and the text from Cnidos, both assumed by scholars to be two different renditions in Greek of the same Roman law. Hassall, Crawford and Reynolds (1974) 197; Lintott (1976(b)) 65–66. Lintott is content with 101 or 100 as the enabling date.

[62] Sumner (1978) 225. He refers to the texts at Cnidos II l; Delphi B l Off.

[63] Hassall, Crawford and Reynolds (1974) 213 refer to direction to the governor first to apply himself to the collection of revenues as an interesting example of Roman priorities.

[64] In column 2 lines 1–4 there are specific references to the law being confirmed by the people.

The piracy law was novel (apart from Saturninus' agrarian law) in its requirement that named magistrates and future magistrates were obliged to make an oath to observe its provisions and to put them into effect. Failure to comply would subject the lawbreaker to a fine of two hundred thousand sestertii for each offence. The piracy law also provided that the fine, payable to the people, could be recovered in a new court presided over by a praetor.

The setting up of the *quaestio de peculatu* would, therefore, not have represented any novel enterprise. Saturninus or Glaucia had had experience with the establishment of the *maiestas* court and arguably the special court under the piracy law. Moreover, providing a means for the Roman people as a polity to police their administrators, who abused public monies intended for foreign policy purposes or desecrated religious sites sacred to *peregrini*, would not have been inconsistent with their objectives or political interests.

The imposition of these strictures would have gone in support of the policy, which Sumner has identified as underlying the piracy law. The wealth of the East to be found in the new provinces to be established and administered as provided in the piracy law could tempt a governor to speculate with funds entrusted for the essential purposes of the law.

The fact that the new court would have juries made up of *equites* with an enabling law, which defined the offence, must also have been an encouragement to action. Against the precedent of the *quaestio de maiestate*,[65] it would have been useful politically for the demagogues to reinforce their relationship with the equestrian order, which was not as secure as in 103, by appointing them as well to the bench of the new *quaestio*. There would be non-senatorial control of gubernatorial wrongdoing in the misappropriation of the property of the Roman people, which had eluded punishment in 104 in Caepio's case.

This study has already argued that the *peculatus* court was created to provide the Roman people with standing to pursue and recover from administrators and others who made off with its public property. Assuming Saturninus or Glaucia to have been a proponent of the court, the creation of the tribunal in 103 would have enhanced still further the purposes of the demagogues to use the tools of the

[65] As Gruen notes, the *equites* resented the efforts of Caepio to remove them as judges in the permanent courts in 106. Gruen (1968) 166.

people in the *concilium plebis* and the tribunician office to intervene in the traditional prerogatives of the Senate.

The inability or unwillingness, in the past, to rein in governors, who had sidestepped financial obligations owed to Rome to their own benefit, would have done little to inspire in provincials confidence in their prospects of recovery of their property, despite the existence of standing courts in Rome. Cicero points to the serious effects on the morale of the friends and allies of the Roman people which the wanton and iniquitous deeds of Verres would have if they were allowed to go unpunished.[66] The implication is that misappropriation of Roman property could seriously threaten Rome's diplomatic relationships. And, if this were so in 70, we can see that the threat to the foreign initiatives presented by Rome's inability to police the recovery of its property would be a justification for the initial creation of the court. *Peregrini* might easily have believed that if the Romans had no recourse for the fraudulent misappropriation of state property they would pay scant regard to the petitions of their subjects for relief. However, the establishment of the standing court for *peculatus* would have been intended as a clear message to *peregrini* that the Roman state had now a permanent court in which it had standing to recover state property.

It is important to recognise the effects of the jurisdiction. A Roman governor now knew that any chicanery with *pecuniae publicae* earmarked for application for especial purposes, or with sacred artefacts of provincials, could expose him to prosecution by the Roman people for *peculatus*. The Romans wanted *peregrini* to comprehend that the Romans demanded of their magistrates that they act lawfully in dealing with the property, not only of provincials, but also of the Roman people.[67]

4. Summation

Before the establishment of the *quaestio de peculatu*, the Roman people as a polity would have been unable to recover by legal process *pecuniae publicae* misappropriated by provincial governors, as exemplified by Verres. The Roman

[66] Cic. *Verr*. 2.3.207; 4.126–127.

[67] The Acestans would have been disdainful of Rome if, whilst they had the right to sue Verres under the extortion law, the Roman people had no right of action for the defalcations it suffered.

people did not have *locus standi* under the extortion statute. This is also indicated by Cicero's approach in the Verrines. He was suing in the extortion court on behalf of the Sicilians. Yet he intimates, *obiter dicta*, that much of Verres' impugned conduct (which affected Roman property) could also pertain to *peculatus*, thereby suggesting that it was in the *peculatus* court that the Roman people might recover their property.

With the creation of the permanent court the Romans had a forum in which to recover public moneys or property (particularly sacred artefacts), which had been purloined by provincial governors. The jurisdiction of the court was attuned to the same purpose as the extortion and bribery courts, namely the protection and enhancing of good relationships with provincials. It was good sense to show *peregrini* that, in theory at least, the Romans were keen to ensure that their provincial magistrates did not fleece the Roman people any more than their allies or ransack temples and make off with sacred objects, with impunity.

We conclude that the rationale behind the creation of the court was to provide a means for the Romans to recover state property and thereby to bring home to the *peregrini* that Rome was concerned to ensure that its governors acted honestly in relation to dealing with Roman public property. This would have been of particular importance to *peregrini* where public moneys were earmarked for dispersal for their benefit. Misappropriation of those funds could create great hardship for *peregrini* and lead to disenchantment with and loss of confidence in the Roman people. Prosecution of magistrates for *peculatus* protected the funds of the Roman people but also the likely benefits or rights thereto of the *peregrini*. The court therefore, in principle, added to the potential protection for the *peregrini* and to the maintenance of stable relationships for Rome in the provinces.

Chapter 7. *Lex Appuleia de maiestate* 103

1. Introduction

In Chapter 6 we argued that the *quaestio de peculatu* was established as a means for the Roman people to recover public monies and Roman sacred artefacts or memorials misappropriated by its provincial governors. Timorous *peregrini* might previously have been apprehensive that their own petitions for relief against extortion would hardly merit consideration, if the Romans showed little concern about protecting their own property. The new court would thus have instilled some confidence. We may also see in its creation the same diplomatic intent as we have argued for the other courts.[1]

After the creation of the *quaestio de ambitu*, the Romans did not seek to expand their criminal justice system by creating further standing courts for some time. Then in 103,[2] considered the preferable date, the tribune, Lucius Appuleius Saturninus, introduced the *lex Appuleia de maiestate* whereby the permanent *quaestio de maiestate* was established.[3]

The statute was concerned to prohibit conduct which diminished *maiestas populi Romani* — the greatness or sovereign power of the Roman people. The expression "*minuere maiestatem*" indicated any act which derogated from this *maiestas*.[4] The offence was to be distinguished from *perduellio*. This concerned conduct which damaged specifically the *res publica*, exemplified by loss of armies. The people determined cases of *perduellio* in their judicial assembly which Saturninus did not disturb.

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[1] A desire on the part of the Romans to cement existing relationships with friends and allies and to create the opportunity for ties with new ones.

[2] The dates are 103 or 101, the date of Saturninus' second tribuneship. Scholars support 103 based on the fact that Norbanus was tried in 94 for his seditious conduct as tribune in 103 under the *lex Appuleia de Maiestate* for *minuta maiestas*. Cic. *De. Or.* 2.199; 201. Broughton MRR 565 notes 4 and 7 (following Mommsen). Gruen (1965(b)) 59; Bauman (1967) 48–49; Jones (1972) 126 note 5.

[3] Any question whether a permanent court was set up under the *lex Appuleia de Maiestate* and whether the *equites* were the jurors in the court is surely answered by the remarks of Marcus Antonius to Sulpicius, his opposing counsel, as to how he used the law. Cic. *De Or.* 2.199; 201.

[4] Cicero *Inv*. 2.17 outlines the offence, but not its ingredients, thus: "*Majestatem minuere est de dignitate, aut amplitudine, aut potestate populi aut eorum quibus populus potestatem dedit, aliquid derogare*."

In this *interregnum* matters of significance arose requiring magisterial investigation. The Romans did not regard these as opportunities to establish new permanent courts. Instead, they reverted to special courts, *quaestiones extraordinariae*. Tribune sponsored *rogationes* before the people lead to statutes creating *quaestiones* in 113, 109 and 105.[5]

In the *De Natura Deorum* Cicero lumps all the trials together. He contrasts them with those in the permanent courts whose jurisdiction Sulla reviewed.[6] The trials were in special courts formed for the occasion. Cicero also tells us that *Gracchani iudices* were responsible for the adjudication in the Mamilian Commission.[7] Badian assures us we can assume that *Gracchani iudices* also manned the other courts of the period, special (including the trials of the Vestals) and permanent alike.[8] As the *quaestio de maiestate* was a standing court, it too, in accordance with Badian's precept, would have been modelled on the *lex Acilia* and been manned by *Gracchani iudices*.

These special courts were not homogeneous in their procedure. L. Cassius Longinus Ravilla, the quaesitor, had a reputation as a stern and unrelenting jurist who exercised strict control over his court.[9] The notorious *cui bono* remark he was wont to make to his jurors exemplified this.[10] His adjudication of the Vestal trials was a model of sternness and propriety.[11] This compares starkly with the louche attitude which prevailed in the Mamilian Commission. The proceedings were conducted harshly, hearsay was accepted, and popular caprice influenced the investigation.[12] Things were little better in the court which dealt with the Tolosan treasure. The political

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[5] These courts were concerned with the prosecution, respectively, of the incestuous Vestals and their paramours including M. Antonius (Val. Max. 3.7.9); of the senators, allegedly bribed by Jugurtha, in the Mamilian Commission ((Sall. *Jug.* 40.1) and of the consular Q. Servilius Caepio (Caepio the Elder) over the alleged theft of the treasure from Tolosa. The offence was probably *peculatus.* Gruen (1968) 162 and note 28 on 162 and 177; Marshall (1985) 196. Hillman (1998) 182: "Surely no standing court de peculatu was operating in 104, when a special quaestio for this crime was convened to try Q. Servilius Caepio, cos. 106, for his embezzlement of the gold of Tolosa." See also Chapter 6, Section 3.

[6] Cic. *ND*. 3.74.

[7] Cic. *Brut*. 128.

[8] Badian (1962) 208:

> "We happen to know that the lex Mamilia, establishing a special quaestio, used Gracchani iudices; and we may safely assume this of other courts of the period, special (e.g. the trial of the Vestals) or permanent (e.g. the ambitus court that acquitted Marius)."

[9] Val. Max 3.7.9

[10] Asc. *Mil*. 45

[11] Asc. *Mil*.46.

[12] Sall. *Jug*. 40.

machinations of the time indicate that the proceedings, probably for *peculatus*,[13] would have been volatile. Caepio the Elder could not have looked forward to anything less than a stormy and partisan hearing.

This want of conformity in creation and procedure was manifested in many earlier major *quaestiones extraordinariae*. Thus, the prosecutions of the Bacchanalians by the consuls in 186, the poisoning investigations in the late 180s and the Silva Sila homicide investigations all differ noticeably in their structures or procedures. Special courts were created with readily identifiable potential defendants and reprehensible conduct in mind. Once the accused had been tried, punished or acquitted, the special court was *functus officio* and disbanded.

However, permanent courts were being created with a view to investigating and reinforcing the particular legal policy described in their enabling laws. Policy considerations were to the fore, rather than the intent merely to target individuals. The lawgivers wished to proscribe repetition of particular conduct. Thus, we have the *lex Calpurnia de pecuniis repetundis* of 149 (directed at the scourge of extortion by provincial governors) and the *lex de Ambitu* (directed at electoral bribery). The Romans were looking to extirpate, for the future, categories of conduct. An applicant with *locus standi* could apply to a permanent court, which could be readily assembled by the action of a praetor or other *quaesitor* in accordance with an enabling statute. This defined the offence. Unlike the *quaestiones extraordinariae*, there were no immediate defendants to be punished. Once a permanent court was established, there was no need for further legislation, and this was the optimum.

1.1. Purposes of the law

A primary purpose of Saturninus, in introducing the *maiestas* statute, was to provide a forum, firmer than the *iudicia populi*, in which aggrieved persons might effect the prosecution of senatorial governors or generals. The accused would be senators who had lost armies through incompetence or whose conduct had previously been actionable as non-statutory *perduellio* or perhaps *maiestas*. Saturninus was zealous about eradicating the irresponsible campaigning which had been the bane of Roman

[13] Gruen (1968) 162 concludes, from his subsequent prosecution for *perduellio* for his part in the disaster at Arausio, that Caepio escaped condemnation on this first charge. He contends it was *peculatus* and that the composition of the jury in the court, which tried Caepio, may have been mixed and therefore have helped his cause.

citizens for at least a decade. However, from the wording of the conduct proscribed by his statute Saturninus can also be seen as anxious to repress conduct which could injure the interests of *peregrini*. He thereby indicates a concern to maintain the stability of relationships with allies and friends, which was the bedrock policy behind the creation of the earlier standing courts. The possibility that the inscriptional laws from Delos and Cnidos are attributable to him suggests an interest in improving provincial administration — an area traditionally regarded as the dominion of the Senate. And it was with the tools of the people's principal legislature and the authority of the tribunate that he sought to achieve his aims.[14]

Importantly, Saturninus also drafted his statute in such a way in 103 as to allow its use as a means of repressing his political opponents (see Section 14 below).

2. *Quaestor Ostiensis*

Let us first consider Saturninus' political background. His family had had no recent distinctions. A forebear, of the same name, held in 166 a praetorship and was appointed to a diplomatic mission in 156 to Asia.[15] "However, in 104, Saturninus was appointed quaestor and received by sortition the role of *quaestor Ostiensis*. Saturninus must have seen this as a significant achievement, particularly as there is no reason to doubt that competition for office persisted. He thereby gained senatorial status.[16] He might have expected that this appointment presented a route for the recovery of his familial fortunes, promising as it did the possibility of entry to the Senate at the expiration of his office. Moreover, as the quaestorship was the first rung in the *cursus honorum*, Saturninus may have been hopeful of a political career. His ancestor had after all held the praetorian office and been a diplomatic representative.

Further, Saturninus could regard this appointment as a measure of popular trust in his competence since securing the supply of adequate grain was of such fundamental

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[14] Scholars have seen Saturninus as a pioneer. Sherwin-White (1956) 4: "[A] real innovator…fostering a scheme …that would enable tribunes …to interfere in the administration and to subject the upper magistrates to detailed control of their activities". Seager (2001) 144: "a popularis seeking to assert the rights of the people to legislate, to administer public affairs and to control and chastise its appointed officials, in total independence of the Senate".

[15] MRR 1.437.

[16] Morstein-Marx (2003) 205 note 2.

importance.[17] The office imposed no little degree of responsibility on the incumbent and, whilst the sources are not specific as to the duties of the office, we can reason that it was far from a sinecure.[18]

However, a temporary spike in the price of grain resulted in a distrustful Senate removing Saturninus and appointing in his place M. Aemilius Scaurus, the *princeps senatus*. Cicero does not suggest any impropriety on Saturninus' part.[19] The Senate may simply have felt that Saturninus was incapable of dealing with the repercussions of the price increase for Rome.[20] On the other hand, Cicero tells us that Saturninus knew that his demotion was done to disgrace him (*per ignominiam*)[21] and that *dolor* drove him to become a friend of the people.[22] The fact that Cicero, *twice* remarks that Saturninus was afflicted with *dolor* by the decision of the Senate to appoint Scaurus in his place implies unfair treatment. The dissatisfaction and resentment would have been heightened by the knowledge that, when supplies again became plentiful, the kudos would accrue to Scaurus and his senatorial brethren.[23]

Saturninus must now have decided that if he wished to advance his political interests in Rome he could not expect consideration from those members of his order who had been party to his humiliation. The stance and *modus operandi* of an earlier demagogue in Caius Gracchus, whose senatorial pedigree was far more illustrious, therefore recommended itself. It was to wielding the power of the people, through the authority of the tribunate and the legislative clout of the *concilium plebis*, to which Saturninus would look as the means by which he might progress his career and

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[17] As *Quaestor Ostiensis* Saturninus was charged with the supervision of the grain supply at Ostia and its transportation to Rome. Cic. *Har. Resp*. 43; *Sest*. 39; Diod. Sic. 36.12. Diodorus' account shows a distinctive bias against Saturninus.

[18] Chandler (1978) 330. Caius Gracchus arranged, by means of legislation, for the regular sale of grain to Roman citizens at a price of six and a half asses per modus. Garnsey (1985) 20. The continuation of this benefit was something that the populace had no doubt come to expect. In addition, the increasing demands of imperial expansion and frontier protection meant that a reliable supply of corn for distribution to the legions was a necessity. Garnsey (1985) 22–23. The overall supervision and implementation of these requirements must have come within the purview of the office.

[19] Cic. *Har. Resp*. 43; *Scaur*. 39.

[20] The contrast between the status of his replacement, the *princeps senatus*, Scaurus, and his own humble position must have aggrieved Saturninus. The duties of the office may have required a man who had more talents and experience than he possessed. Beness (1991) 35 suggests that the fact that Saturninus was replaced in the management of the grain supply by no less a person than the *princeps senatus* suggests an exceptional situation — one that may well have brought discredit upon Saturninus with the urban plebeians. Yet, this did not stop the plebeians electing him as tribune for 103.

[21] Cic. *Scaur*. 39.

[22] Cic. *Har. Resp*. 43

[23] Last (1932) 165.

recover his family reputation, long obscure. His aims may also have gone beyond mere personal ambition and extended to foreign policy issues with his *lex Appuleia de Maiestate.*

Finally, we should not see Saturninus as dejected and entirely driven by *dolor*. In 104 Saturninus probably canvassed for the tribuneship for 103 with the promise of land allotments for Marius' veterans returned from the African wars and cheap grain for the urban poor. He had no doubt already set his mind to the office of the tribuneship well before his dismissal. The adoption of the causes of the lower classes in Roman society may thus have been his platform to advancement long planned rather than despondency and a sudden epiphany. Saturninus sought the popular office and was elected for the very next year.[24]

3. The *popularis*

Once elected to the tribuneship, Saturninus proceeded quickly with the introduction of his initial programme. From the legislation, we observe that Saturninus sought to forge a coalition of the urban plebeians,[25] the *equites*[26] and the Marian veterans[27]. [28],Saturninus was to call upon in 100 as rural voters to support his bill for the distribution of the Cimbrian land to the people (*App. BC. 1-29-31*). Scholars, drawing on the programmes of Saturninus, refer to him as a leader of the *populares*.[29] Who then were the *populares*?

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[24] The fact that at the tribunician elections for 103 in July 104 he could secure appointment to the tribunate suggests that the *plebs* did not see his performance as *Quaestor Ostiensis* as detrimental to the interests of the people. Significantly, Diodorus Siculus, a hostile source, associates the appointment with the adoption by Saturninus of a more serious demeanour. Diod. Sic. 36.12.

[25] Appian. *BC.* 1.21 asserts that Caius Gracchus gained the support of the plebeians with his grain law and we may assume that Saturninus took this as his cue with his own more generous measure. Regard should be had to note 44 on page 185 for the likely purpose of the statute."

[26] Appian *BC.* 1.22 says that Caius Gracchus made a separate approach to the *equites*, presumably offering the exclusive adjudication in the standing courts, with a view to winning their help for his programmes. Again it is likely that here as well Saturninus followed Caius'lead. In the absence of ancient sources (note 86 p.196) we argue in ch.7.9 that Saturninus' political ally Glaucia had secured the passage of his law in 104. In Ch. 7.7 we argue that the permanent courts were in the hands of the *equites* as a result of Glaucia's law in 104. The opportunity existed for Saturninus to appoint the *equites* therefore to his new *maiestas* court. Glaucia his protagonist had the support of the commons and enjoyed the confidence of the *equites* because of the benefit they derived from his law (Cic. Brut.224). These factors surely assisted Saturninus' in bonding with the *equites* and the commons.

[28] Gruen (1968) 169. De Viri1 Illustribus 73. See also Ch.7.6.

[28] Gruen (1968) 169. De Viri1 Illustribus 73. See also Ch.7.6.

[29] Williamson (2016) 337 refers to "lawmakers from the side of the *populares* like Saturninus".

In the *Pro Sestio*, Cicero addresses the struggles between politicians in terms of a distinction between *optimates* and *populares*.[30] He contrasts the two classes although his language hardly provides elucidation as to the meaning of *populare*s. He merely states that those who wished everything they did and said to be agreeable to the masses (*multitudini iucunda*) were reckoned as "friends of the people" (*populares*). The *optimates,* the aristocrats, were those who sought by their proposals to gain the approval of the *boni.*

But, as Seager notes, in this definition there is no indication of the features which were *multitudini iucunda.* Seager describes what he discerns as the constituent elements of the *popularis* tradition — the *plebis commoda*. These include agrarian laws, grain laws and colony laws; the tribunate was also part of the tradition.[31] As the tribunes promoted laws which were often opposed by the Senate, the repudiation of the *auctoritas* of the Senate and the affirmation of the rights of the *concilium plebis* were techniques of the *populares*. Seager identifies the ultimate rationale of the *populares* as being the imitation of acknowledged models, chiefly the Gracchi and after his death, Saturninus himself. [32]

Saturninus' programmes emulated much of what the Gracchi had sought to do and he showed reverence in his attitude towards their achievements.[33] Saturninus was then a politician in the mode of the *populares*. However, this does not mean that he joined or formed any political party. The expression "*populares*" did not carry with it the idea of a coordinated political body or an organised movement.[34] Seager notes that whatever aspect of a *popularis ratio* predominates in any context, "there is no trace at any time of a party". [35]

Yet the scope of the expression remains elusive. Mouritsen reminds us that the *commoda publica* were not the sole preserve of the demagogues. The

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[30] Cic. *Sestio 96.*

[31] Sources are provided by Seager (1972) in footnotes on page 332.

[32] Seager (1972) 332–333.

[33] Saturninus showed an admiration for the Gracchan programmes. Beness (1991) 39–40 notes that Saturninus was likely responsible for the claims of L. Equitius to be of Gracchan parentage and that Saturninus intended to identify and ally himself with the Gracchan heritage, and thus with this potentially popular figure. In 100 he secured the appointment of L. Equitius as a fellow tribune for 99.

[34] Morstein-Marx (2004) 205 reminds us: "It is important to realize that references to *populares* in the plural do not imply a co-ordinated 'party' with a distinctive ideological character, a kind of political grouping for which there is no evidence in Rome." To the same effect are the remarks of Mackie (1992) 49 and Mouritsen (2017) 115.

[35] Seager (1972) 338.

ultraconservative politicians could implement them. For example, M. Livius Drusus, in 91, could pass both grain and agrarian laws with the approval of the Senate.[36] Mouritsen provides further examples of "popular" legislation introduced by archconservatives in Lepidus, Cato and Sulla.[37] He also remarks, succinctly, that if, as Cicero claims, the *optimates* were the senatorial elite then "the so called *populares* — qua senators — themselves became '*optimates*' precluding any meaningful distinction".[38] Mouritsen further notes: "If *optimates* was a category to which all politicians naturally belonged, then *populares* cannot for obvious reasons have been defined as its opposite."[39]

Robb has recently pointed out that the word *popularis* covered a much greater range of meanings than had previously been understood, positive negative or neutral.[40] Describing a man as a *popularis* would not therefore have been intelligible as a political label because of the ambivalence of its connotations.[41] And, indeed, as Morstein-Marx has argued, all Rome's aristocratic political core had to claim to be a *popularis* when before the people in the *contiones*.[42]

Saturninus clearly satisfied most of the elements of the *popularis ratio* inherited from the Gracchi and he certainly emulated that tradition. However, this was a tradition and not an organised political structure. Saturninus was advancing causes similar to those espoused by the Gracchi in opposition to the *optimates*, the leaders of the senatorial aristocracy.

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[36] Mouritsen (2017) 113.

[37] Mouritsen (2017) 113–114. The grain law of Lepidus in 78 passed *nullo resistente*, the corn law of Cato in 68 passed with the approval of the Senate, and the land redistributions of Sulla. Young aristocrats might resort to the use of the tribunate to embarrass other senators in the courts and thereby garnish public regard for a later tilt at high office. Despite initially adopting the *public commoda* these men would enjoy in their later years the benefits of senior senatorial status. Gruen (1968) 164.

[38] Mouritsen (2017) 118.

[39] Mouritsen (2017) 119.

[40] Robb (2010); Mouritsen (2017) 118 summarises the various usages resulting from Robb's research. *Popularis* might have a pejorative use in the sense of "populist" or "pandering to the lowest instincts of the people". It could cover "popular" in the sense of "well-liked". An even more positive usage was "friend of the people" which appears to be its meaning in the passage from the *Pro Sestio* 96. Neutral was its meaning as "countryman". Finally, it could denote any type of activity linked to the people.

[41] Mouritsen (2017) 119.

[42] Morstein-Marx (2004) 239; 243.

4. The timing for the *Lex Appuleia de Maiestate*

In January 104, Caius Marius had celebrated his triumph over Jugurtha. His veterans ominously may have remained in Rome expecting the assignment of land as reward for their efforts. We have suggested above that Saturninus canvassed for the tribuneship with proposals of land allotments for Marius' veterans returned from the Numidian wars and subsidised cheap grain (see Section 2).

The first proposal would have won the support of the soldiers.[43] He made good his promise by introducing his agrarian law early in 103 assigning 100 *iugera* allotments in Africa to Marian veterans.[44] The second promise would have pleased the urban poor no end. He executed this with the promulgation of a generous grain law (*lex frumentaria*), surely designed to bring over the indigent.[45] Saturninus could thereby look forward to a favourable vote from both the rural and urban proletariats. His next step was to secure the loyalties of those members of the *ordo equester* who had lost their judicial powers under Caepio's 106 law. The combination of the *equites* and those who stood to gain by his reforms would present a formidable political challenge to the *boni*.

The year 103 is the preferred date for the *lex Appuleia de Maiestas* and this statute was the first of the laws to be passed, early in the tribunate. We conclude that two important trials were conducted under the statute in 95.

First, C. Norbanus, who was also a tribune in 103, was prosecuted in 95 for the disgraceful way in which he had conducted the impeachment *apud populum* of Caepio the Elder for *perduellio* in 103.[46]

Second, Q. Servilius Caepio (Caepio the Younger), the son of the consular of 106, was prosecuted in 95 for the violent manner in which as *quaestor* he had responded

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[43] Beness (1991) 36 note 16.

[44] *De Vir*. ill. 73.1.

[45] The grain was to be sold at five-sixths of an ass. Auct. *Ad Herr*. 1.21. Assuming this was the charge for a modius, it was one-eighth of the price set in 123 by the law of Caius Gracchus. Beness (1991) 37 suggests that the likely passage of the *lex Octavia* after 100, a law which repealed "*the lex Sempronia frumentaria*, seems to indicate that the Appuleian bill never became law". This does not mean that the bill was not passed into law. If, as Beness concedes, it was a *lex*, then it was a statute passed as such irrespective of what may have occurred several years later. Therefore, in 103 there was in force a statutory grain measure of Saturninus. Lintott (1994) 98 accepts that the grain law was passed despite the intervention of Caepio the Younger.

[46] We learn of Norbanus' violent behaviour from the proceedings in 95 when P. Sulpicius Rufus prosecuted Norbanus for his conduct in this impeachment of Caepio. Cic. *De Or.* 2.197. Norbanus' counsel, Antonius, conceded Norbanus might have been guilty of a capital offence. Cic. *De Or*. 2.199.

to Saturninus' dogged insistence on securing the passage of his *lex frumentaria*. Stung by the disgrace heaped on his father, Caepio was no doubt acting at the instigation of Saturninus' political opponents in the Senate. Caepio had initially persuaded the Senate that the grain bill would be a severe drain on the treasury. Saturninus may have again regarded this as a personal slight, bearing in mind that he would have had considerable experience with grain management as *quaestor Ostiensis*. His judgement on the economic feasibility of the distribution could have been as sound as that of Caepio, who had an axe to grind. The Senate decreed that if Saturninus carried his law before the people, he would seem to be doing so *adversum rem publicam*. Undaunted, Saturninus presented his law. Tribunician colleagues interposed their veto. Saturninus ignored their injunction and had the voting urn brought forward so that the vote could proceed on his bill.[47] The vote was abandoned after Caepio, with the aid of the *boni*, destroyed the *pontes* over which voters passed in order to cast their votes, threw the ballot-boxes down and blocked any further progress with the vote.[48]

The *maiestas* statute must have been passed before the prosecution of Caepio the Elder, as Broughton points out, since Norbanus could hardly have been justly prosecuted in 95 under the *maiestas* statute unless the prosecution of Caepio came after it.[49] For the same reason the statute must have been passed before the opposition of Caepio the Younger to the *lex frumentaria*.[50]

Scholars have argued that the grain law was passed early in the tribunate of Saturninus.[51] The *maiestas* statute preceded the introduction of this grain bill and probably his agrarian bill. Therefore, it was carried very early and its provisions, particularly those conferring discretion on the *equites*, which we discuss later, were

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[47] *Auctor*. *Ad Her*. I.21: 2.17.

[48] *Auctor*. *Ad Her*. I.21.

[49] Broughton 1.MRR.565 note 4.

[50] To the contrary, Lintott (2008) 116 note 32 argues that the Romans had no objection to retrospective legislation where procedure was introduced to deal with offences recognised as injurious to the people. But he makes no mention of Broughton's view, which is logically the more appealing. It must surely be arguable that, unless specific provision is made to the contrary, a statute should not be construed as having retrospective effect. If Lintott is right why should his principle not be applied to all Roman statutes, which refined an earlier "common law" right. Roman politicians could then have used statutes not in contemplation when actions occurred subsequently to prosecute that conduct.

[51] "That the *lex frumentaria* — that stock device of demagogy — belongs to the first tribunate of Saturninus, and early in it, is recognised by all the best modern scholars." Badian (1957) 319 note 9. Beness (1991) 36: "It is therefore preferable to assign his lex frumentaria to his first tribunate and probably early in it."

in place before either Norbanus or Caepio the Younger perpetrated their violence. Otherwise neither could have been "justly" prosecuted under the statute in 95. Before proceeding to the reasons for the introduction of the *lex Appuleia de Maiestate* there are certain issues which require our consideration.

5. Trials of Caepio the Elder and Cnaeus Mallius Maximus

The trial of Caepio the Elder in 103 displayed all the pent up rage of the Romans against a man who, as proconsul, had presided with the consul Cn. Mallius Maximus over one of the worst military defeats the Romans had suffered — the destruction in 105 of the Roman armies by the Cimbri at Arausio.[52] A stunned populace voted to abrogate Caepio's imperium. Caepio suffered further humiliation with the passage of a bill introduced in 104 by the tribune L. Cassius Longinus, providing that a man condemned, or removed from office, by the people should not remain in the Senate.[53] The mood in 103 would not have been helped by the fact that Caepio had eluded a charge for *peculatus* brought against him in 104 in respect of the disappearance of the Tolosan treasure.[54] In this instance, Caepio had relied on the defence of accident.[55] It is possible that it was this defence which enraged the prosecution and the *plebs* in the judicial assembly. Feelings ran high in the public arena[56] where the trial was held.

Saturninus also proposed a decree, which the people passed, for the exile of Cn. Mallius on the same charge as the disgraced Caepio.[57] The charge was surely

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[52] The Roman people mourned the destruction of the armies at Arausio in 105. Cic. *De Or*.124. Eighty thousand Roman and allied soldiers were slaughtered. Oros.5.16.3–4. Anger would have been inflamed by the fact that this was the latest and worst of a series of disasters arising from the arrogance and incompetence of senatorial generals. These included Carbo in 113, Silvanus in 104 and Popillius in 107 in campaigns against Germanic and Gallic tribes. To anger was added superstitious fear for the safety of the city arising from memories of the Gallic incursions at the beginning of the fourth century. Oros. 5.16.7.

[53] Asc. *Corn*.78.

[54] The people instituted a special enquiry into the disappearance of the Tolosan treasure during the campaign of Caepio in 106. Orosius 5.15.25, our main source, is unclear about Caepio's responsibility for the loss. Caepio may have escaped condemnation on the charge. Gruen (1968) 162. Dio 26.fr.90 suggests that the soldiers may have made off with the treasure as booty resulting from their successful campaign. Such appropriation was a recognised entitlement of Roman soldiers and may have been pleaded by Caepio in his defence. See also Chapter 6, Section 3.

[55] The defence involved relying on extraneous matters. *Auct.Ad Herren*. 1.14. 24. This is implicit as well in Cicero's remark: "*Q. etiam Caepio, vir acer et fortis, cui fortuna belli crimini, invidia populi calamitati fuit*". Cic..*Balb.28.*

[56] Cic. *De Or*; 2.197: "*ex templo*".

[57] "*Cn. Ma<l>lius ob eandem causam quam et C<a>epio L. Saturnini rogatione*

perduellio, which had become the standard accusation against magistrates whose negligence, or cowardice brought about the loss of a Roman army.[58]

Saturninus and Norbanus were working to the same end. Indeed, Scholars see a connection between these successful tribunician prosecutions.[59] Saturninus was seeking to tap into the disgust of the people with the disastrous campaigning of senatorial generals over the past decade. Both prosecutions were *apud populum* even though the *lex Appuleia de maiestate* was, as we have argued, already law.

6. Legislative programme — 103.

The programme, given Saturninus' political experience, was opportunistic to a tee. It comprised plebiscites designed to attract the various voting groups on whose support Saturninus would depend for the furtherance of his career. Saturninus needed a support base if he was to improve his familial prestige through demonstrating his capacity for higher office.

After the passing of the *lex Appuleia de Maestate* Saturninus introduced an agrarian law,[60] and a grain bill. The grain bill was passed early in the tribunate. As both laws were directed to the same purpose, the interests of the poor, it is logical that the agrarian law too was passed at an early stage, but after the *maiestas* statute.[61]

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e civitate <plebis>cito eiectus". *Gran. Lic*..33.13. We should interpret Granius' remarks as Mallius having been condemned by the people with Saturninus as prosecutor.

[58] Gruen (1968) 164.

[59] Broughton MRR 1.563 suggests a connection between the prosecutions. Badian (1964) 35 is of the same mind. He sees an attempt to turn the disasters to political advantage.

[60] *De Vir. Ill.* 73.1. Broughton assigns the law to 100 but accepts that it could belong to either year. MRR 1.578.

[61] Marius' legions which he led so successfully against Jugurtha included the new category of volunteer militia whom he enlisted from among the *proletarii* and the *capite censi*. According to Gell. *AN.* 16.10.10–11.14 the *proletarii* were citizens who were recorded on the census as having no more than 1,500 asses and the *capite censi* were those who had nothing or at the most 375 asses.

In light of their parlous financial circumstances they would have been interested in the grain dole. However, those agricultural workers, who continued to serve, would have been particularly attracted by the prospect of land allotments, especially if they had been dispossessed as a result of the *latifundia*. The laws aided the poor but gave Saturninus the prospect of political support from these men. Indeed, Appian *BC.* 1.29 points out that Saturninus, after setting the date for the *comitia* to deliberate on his second agrarian bill, sent messengers to summon from the country those in whom he had most confidence, because they had served in the army under Marius.

Like the agrarian law, the grain bill of 103 was a bold ploy for support.[62] It fixed and reduced the price for subsidised grain, originally introduced by Gaius Gracchus, to the delight of the urban indigent. The agrarian bill and the grain bill met with staunch opposition to which Saturninus responded with equal force, such was his desire to secure the passage of the bills. When the tribune Baebius sought to intercede against Saturninus' agrarian bill, he was driven away from the assembly, where the vote was being taken, by stoning.[63] In the case of the grain bill, Caepio the Younger, as we have observed, protested in an unrestrained and violent manner when Saturninus pressed for its adoption.

In the melee over the grain law and the violence handed out to Baebius, Saturninus, rather like Caepio the Younger, had himself exhibited a contemptuous disregard for Roman legal norms. The conduct of Saturninus in each case was surely a ground for a charge of *perduellio*. And yet in neither case was any action taken against him *apud populum*, no doubt because of the affection of the people for him.[64] The actions of Saturninus may have answered to a prosecution of diminishing the sovereign majesty of the Roman people (*populi Romani maiestas*) under the statute. However, the *equites*, who had discretion to determine the ultimate issue of diminution under the statute, would at this point have hardly been likely to exercise it against Saturninus.

7. The law of C. Servilius Glaucia of 104 and jurors

For the purpose of our argument, our ongoing contention will be that at the time Saturninus took office the jurors in all of the then standing courts were *equites*.

In 106 the consul, Q. Servilius Caepio, introduced his judiciary law.[65] This statute either returned the juries for the standing courts to the Senate exclusively or provided for the duties of adjudication to be shared between senators and *equites*. The latter is

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[62] Accepting 103 rather than 101 as the date for this law is justifiable as Saturninus would in 103 have been especially concerned to secure the vote of the urban tribes as those most likely to benefit from the reduction in the price of grain promised by his law.

[63] *De Vir. Ill.* 73.1. The importance of the passage of the law to Saturninus' ambitions was manifest. The costs associated with the implementation of the law may have been the basis for Baebius' veto.

[64] Violating the rights of tribunes and ignoring a decree of the Senate were examples of conduct amounting to *perduellio*. But the advice to chafing senators must have been that a prosecution of Saturninus before the people would be unlikely to succeed given the fact of his popularity.

[65] Cic. *Invent.* 1.92.

the preferable view.[66] Yet Caepio's law had only a brief existence. The *lex Servilia Glaucia* of the tribune C. Servius Glaucia subsumed it.

The subject matter and the date of Glaucia's statute is the subject of scholarly debate. The statute reinstated the monopoly of the *equites* in judging cases. Gruen, citing Asconius, contends that the statute of Glaucia was "simply a lex repetundarum".[67] For Asconius notes that M. Aemilius Scaurus was prosecuted by Caepio the Younger under the law of Glaucia which was a *lex repetundarum*.[68]

The prosecution of Scaurus took place in 92 or 91.[69] It is significant that Asconius asserts that all the courts were then in the control of the *equites*.[70] Further, Cicero can assure us that when the senators and their acolytes, including the *equites*, moved against the forces of Saturninus and Glaucia in 100 under the cloak of a *senatus consultum ultimum* the *equites* were the sole jurors in all the standing courts.[71] The whole might of the standing courts was vested exclusively in the *equites* in 100.

And there is more. Cicero describes how M. Antonius boasted of his inflaming the prejudices of the jurors — they were *equites* — in his defence in 95[72] of Norbanus who was prosecuted for *maiestas* [73] From this we deduce that the *equites* were the

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[66] Cassiodorus. *Chron.*106 and Obseq. 41 indicate that the juries were mixed. Tacitus records that while the bill of Gracchus put the standing courts into the hands of the *equites*, the Sempronian law restored the courts to the Senate again. Tac. *Ann*. 12.60. Gruen (1968) 158 note 9 is most persuasive in resolving this conundrum. He notes that the number of senators at this time stood at 300. Under the *lex Acilia*, CIL I2.583 the presiding praetor each year was obliged to empanel 450 *equites* for jury service in the *quaestio repetundarum*. There were at least four standing courts in place in 106 on our reckoning. It is possible, as well, for there to have been more than one siting of each of these courts occurring at the same time. In these circumstances, a senate of only 300 could not possibly have met all the jury panel requirements.

[67] Gruen (1968) 166 and note 51.

[68]Asc. *Scaur*. 21: "*Reus est factus a Q. Servilio Caepione lege Servilia, cum iudicia penes equestrem ordinem essent et P. Rutilio damnato nemo tam innocens videretur ut non timeret illa.*

Q. Servilius Caepio Scaurum ob legationis Asiaticae invidiam et adversus leges pecuniarum captarum reum fecit repetundarum lege quam tulit Servilius Glaucia."

[69] As M. Drusus' tribunate, in which he sought to restore the courts to the senators, was in 91 the trial probably occurred in 92. Marshall (1985) 134. The use of the expression "*pecuniae captarum*" ("acceptance of bribes") in the second passage suggests that by the beginning of the first century the *res repetundae* law extended to cover the acceptance of bribes as well as the extortion of property.

[70] Asc. *Scaur*. 21.

[71] Cic. *Rab. Perd*. 20: "*cum equester ordo—at quorum equitum, di immortales! patrum nostrorum atque eius aetatis, qui tum magnam partem rei publicae atque omnem dignitatem iudiciorum tenebant*".

[72] Badian (1964) 35: "95 is the most likely date".

[73] Cic. *De Or*. 2.199: "*et animos equitum Romanorum, apud quos tum iudices causa agebatur, ad Q. Caepionis odium, a quo erant ipsi propter iudicia abalienati, renovabam*".

jurors in a standing court for *maiestas* in 95. It is therefore reasonable to assume that they were the jurors in the other standing courts in 95.

There is good evidence that from 100 to 92 the *equites* were in charge of the standing courts. Unless there was further judiciary legislation *(lex iudicaria)* between 104 and 100,[74] how do we then deal with Asconius' confident assertion in light of the evidence above that the *equites* regained full possession of all of the standing courts certainly by 100? Were Glaucia's law a *lex repetundarum* and nothing more, it could not have effected changes in the jurors except in the extortion court.[75]

We may surmise that Glaucia's law contained provisions whereby the sole power of judgement was restored to the *equite*s, not only in the extortion court but also in the other permanent courts then existing. Glaucia's law was not limited to the *quaestio de pecuniis repetundis*.

A further reason for arguing that the law of Glaucia was not so limited is this. The *equites* would hardly have been prepared to suffer the continuation of mixed juries, or juries comprised solely of senators, in the other standing courts when Glaucia gave them the limited right to regain their judicial prestige but only in the extortion court. If Glaucia could succeed in securing the passage before the people of a law, contrary to the interests of the Senate, which restored the juries in the extortion court to the *equites*, why would the *equites*, who were still resentful in 92, have been happy with only this partial return of their previous jurisdiction?

Again, in reconstituting the jurors in the standing courts, Caepio's law in 106 would inevitably have made major amendments to the structure of the statutes modelled on the *lex Acilia*. Whether the result of Caepio's law was to create only senatorial jurors or mixed jurors for the courts, Glaucia's law, if only applicable to a *de repetundis* court, would have inevitably created anomalies, unless it contained provisions to harmonise the procedures between the standing courts.

So, for example, if the *quaestio de ambitu* was after Caepio's law manned by mixed jurors or senatorial jurors its composition could not have been changed by a Glaucian

[74] Were there to have been such legislation its importance would surely have merited mention in our sources. It would certainly have been worthy of record.

[75] Against this study, Griffin (1973) 114 appears to conclude that Glaucia's law was an extortion statute. Strachan-Davidson (1912) 81–82 notes Mommsen's view (*Juristische Schriften*, Vol.1, p. 19, and Vol. 3, p. 349) that the law of Caepio could not have been reversed by Glaucia's law because the latter was undoubtedly a *lex repetundarum* and that the make-up of the jurors could not have been changed by such a law but required *a lex iudicaria*.

law *de repetundis*. The mixed or senatorial jury would have continued in this standing court although the *equites* would have manned the extortion court.

Glaucia's law also allowed for procedural refinements in the standing court system. It introduced the *comperendinatio* process, the bifurcation of the trial between the *actio prima* and the *actio secunda*,[76] and repealed the provision enshrined in the *lex Acilia* that a case be adjourned if more than one third of the jury could not decide. Such important changes were intended to apply across the board. It is surely facile to contend that provisions such as these were to apply only in the extortion court. This statute may have conferred other procedural rights.[77]

8. The consequences of the law of Glaucia

The effect of the law was that as from its passing the *equites* had regained the sole control of all of the permanent courts. It reflected a restoration of the *status quo*.

The passage of the judiciary bill of Caepio the Elder in 106 can only be seen as anomalous and as a temporary experiment. It was the fiery speech of L. Licinius Crassus in a densely packed *contio*,[78] lambasting the alleged ferocity of equestrian judges in condemning "innocent" senatorial governors, which did much to sway the votes in the ensuing assembly in favour of the bill.[79] Perhaps some of the treasure from Tolosa had been siphoned off by the proconsul and used to influence the voters in their assembly. But then the voting public, though increasingly conscious of the ineptitudes of Roman generals, was yet to experience the effect of the disaster at Arausio.

When it eventuated in 105, Glaucia could take advantage of the popular ire towards the senatorial class (whose ranks spawned the incompetents), stemming from the catastrophe, and use it in 104 to support his law. The removal of the senators from

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[76] Cic. *Verr*. 2.26.

[77] Lintott (1994*)* 94 suggests that the law made provision for an investigation into third parties who had received converted property from the original wrongdoer, and that a prosecutor was given time to search for evidence in the area where the offences were alleged to have been committed. *Divinatio* may perhaps have been introduced or retained from Caepio's 106 law.

[78] Cic. *De Or*. 225: "*in maxima concione tuorum civium*".

[79] Fantham (2004) 33–34 describes Crassus' highly theatrical appeal to the Roman people for restoring a share of the jury panel to the senate in the major political courts and notes his skill in creating a bogey out of the equestrian jury panels.

the judicial benches would surely have found favour with the people. Significantly, the silver tongue of Licinius was not apparent.

We have Cicero's well-known approbation in the Verrines of the equestrian judicial performance. Further, in the light of the miserable reputation of the senatorial commanders, even before the looming disaster at Arausio, it is incongruous that the 106 bills should have passed the assembly. This explains why it was that Glaucia was able to succeed with his bill. The catastrophes in 105 had brought home to the people the error of its ways in 106.

The *equites* now reigned supreme in all of the standing courts, which were sitting when Saturninus took office. This made their appointment to the new court the obvious choice for the smarting tribune. A further implication was the chagrin the senators would experience at losing their judicial function overall. It consigned the senators to a further 20 or so years in the wilderness until Sulla restored their judicial fortunes.

Importantly, if the *lex Glaucia* had only dealt with the extortion court then Saturninus would have had a dilemma. Should he have then established his new court with its constitution based on the *lex Acilia*, but manned by a mixed jury, or should he have taken the more politically charged course in those circumstances.[80] This would have been to appoint the *equites* alone to his court.

The result of Glaucia's law relieved him of this dilemma. Saturninus could adopt this second course and to his advantage. The appointment of the *equites* would add significantly to the political support base of Saturninus. Glaucia restored the prestige the *equites* lost with Caepio's law of 106 but the creation of the new court was the cream on the cake. Saturninus could and did rely on the powerful judicial and legislative backing of the *equites* who now owed him a considerable favour as they manned both the existing courts and the new court. Saturninus was thus able to embark on conduct in pursuit of his interests without fear that his transgressions of

[80] The Senate would have been in a much stronger position to resist Saturninus had the extortion court been the only court which did not have a mixed jury. Arguments by tame tribunes could be made that the enabling law for the court would result in a position where, perhaps, two courts had *equites* as jurors and the other three *ambitus*, *sicariis* and *peculatu* had mixed juries which would result in disruptions particularly in relation to the available jurors for panels.

traditional norms in the forum would expose him to the possibility of prosecution in his new court.[81]

The *equites* could now see before them a future in which some members of their order would enjoy judicial control over important aspects of the political lives of the senators. In addition to what was already vested in them, they would under the *lex Appuleia* sit in judgement on cases involving allegations of military incompetence or provincial maladministration. The new jurisdiction also conferred on these jurors the power to determine at their discretion the ultimate question of liability, namely, did the conduct of the accused diminish the sovereign majesty of the Roman people.

Procedurally, the law of Glaucia must have eased the major issue that arose from mixed juries or sole senatorial juries. This was the need to empanel the number required under the *lex Acilia*, which we have argued was the constituent procedure for the court. As Gruen notes, with a senate of only 300, the requirement imposed an unresolvable strain.[82] The population of *equites* not being so limited did not present this problem.

A further practical consequence of the law allowing Saturninus to opt for an all equestrian jury meant that the enabling laws of each of the standing courts would now have similar procedures based on the *lex Acilia*, *mutatis mutandis*, such as the description of the offence and penalties and damages. This would have made for a more orderly development of jurisprudence.

The *equites* in the second century were not a homogenous class; many remained landowners[83] with little interest in the electoral and political power struggles in Rome.[84] And they did not show uniformity in their politics.[85] The *equites* did not tend, like the senators, to become steeped in political issues. They were not wont to

[81] His belligerent reaction to Baebius' resistance to his agrarian law and to Caepio the Younger's opposition to his grain law offer good examples.

[82] Gruen (1968) 158 note 9.

[83] Real estate being the permanent source of capital in the Roman society.

[84] Badian (1972) 84.

[85] Gruen (1968) 124 notes that the equestrian order cannot be seen as a closed voting block likely to have a unitarian vote on all matters coming before it and he cites the trial of Marius in 115 as an example. Saturninus and Glaucia were to experience the inconsistencies in the support of the *equites*.

see the courts as forums for gaining political advantage and their judgements were therefore less likely to invoke accusations of bias.[86]

9. The date of the *lex Glaucia*

It is important to resolve upon the possible date for the law of Glaucia. This too has been a matter of considerable debate.[87] Based on the statements from Cicero in the Verrines, the year 104 is a persuasive date. Cicero states that at the time of his writing in 70, the *ordo equester* had been jurors in the law courts for nearly 50 continuous years.[88]

In making this statement, Cicero implies that the period of participation by the senatorial order as jurors in the standing courts, was so brief as not to merit comment.[89] This allows the argument that the tribunate of Glaucia, and accordingly his law, is to be dated closer to 106 than to 100. Cicero could hardly have suggested that the service of the *equites* was continuous if there was a period of some five or six years out of the 50 when either all or many of the jurors were senators. Moreover, Appian relates that Glaucia was a member of the Senate in 102.[90] Glaucia, probably then no later than 103, had held a quaestorship (whereby he would have become a senator) and a possible tribunate and thus 104 presents itself as a plausible year for the tribuneship and the law.[91]

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[86] Apart from those to be alleged against the jurors in the notorious trial in 92 of P. Rutilius Rufus. Under and with Q. Mucius Scaevola (cos. 95), Rutilius had been responsible for the reform of the provincial administration in Asia at the expense of the *publicani* who were drawn from the equestrian classes. The commercially bruised traders brought about a baseless prosecution of Rutilius for extortion. Refusing to rely on advice or to throw himself on the mercy of the court, Rutilius was convicted by a vengeful equestrian jury and went into exile.

[87] Gruen (1968) 166–167 reports that the ancient sources provide no date for the law of Glaucia nor do they offer any date for a tribuneship in which Glaucia might have proposed the law. Stockton (1991) 82 states that: "Among modern scholars there is an acknowledgement that the year…. cannot be ascertained with any real assurance." He favours 104 or 101 but opts for 104 "but with no great confidence". Cloud (1994) 94 suggests that the law belongs either to 104 or 101. Balsdon (1938) 113 dates Glaucia's tribunate and his law "probably to 104, possibly to 101". Other scholars, again with little certainty, suggest 101. Jones (1972) 55 and 126; Broughton (1952) 571; Siani-Davies (2001) 90. The year 100 is proposed by Badian (1962) 205.

[88] Cic. *Verr.*1.38. Balsdon (1938) 101 contends that the passage excludes the possibility of a complete interruption of equestrian tenure.

[89] Strachan Davidson (1912) 81 states that the law of Caepio was repealed shortly after Caepio was lauded with the title "patron of the senate", and so shortly after, that Cicero did not think it necessary to take notice of this gap in counting up the years of the dominance of the *equites* in the permanent courts.

[90] App. *BC*. 1.28.

[91] Balsdon (1938) 107.

10. Popular support

We have argued that Saturninus promulgated the *lex Appuleia de Maiestate* before the grain bill and the agrarian law.[92] It was therefore a statute of some importance. Its passing was influenced by the fear which gripped Rome and on which Saturninus could rely — a fear that harked back to the terrible days of the Gallic invasions at the beginning of the fourth century. The incompetence of senatorial generals in the field had led, over the previous decade, to marauding tribes of Gauls and Germans inflicting brutal defeats on Roman armies. The major issue, which was of concern to the superstitious Roman people in 103, was the threat to its security presented by the hordes of the Cimbri, the Teutones and the other wandering barbarians from the north. The disastrous performance of Roman generals contributed to the boldness of the northern peril.[93] In addition, the corrupt actions of the senatorial generals or diplomats who had compromised their integrity in the service of Jugurtha or had failed to deal forcefully with the Numidian enraged the people.

The last straw was the destruction by the Cimbri at Arausio in 105 of Roman armies under the proconsul Q. Servilius Caepio and the consul Cn. Mallius Maximus. Caepio bridled at the superior command of Mallius and refused to cooperate in the field. The results were catastrophic. Anger and resentment bulked large among the Roman people and particularly among the plebs and the families of peasant farmers whose members as conscripts formed a large compliment of those lost in this and the earlier calamitous campaigns.[94]

The promulgation of the *lex Appuleia de Maiestate*, which provided an effective mechanism for identifying and punishing incompetent or negligent senatorial generals, would have been a godsend for the fearful populace. For Saturninus it was a certain vote winner with the people and would have established his reputation as a man ready to press the political interests of classes other than his own.

Saturninus' sought to assuage the extreme disenchantment of the Roman people with the handling by the senate Senate of Rome's recent military campaigns. To do this he provided a means to hold generals and administrators to account. Saturninus could

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[92] See Section 3 above.

[93] The barbarians looked greedily to Italy to the south for land on which to settle their vast numbers. The fate of Rome and her citizens hung in the balance and was very much in the hands of C. Marius. It was only to be with his victories in 102 and 101 that Romans could breathe easily.

[94] Cic. *De Or.* 2.124: "*ex luctu civium*".

see the issue that transfixed the Romans at the moment he took office and he sagaciously addressed it. Whilst bringing in the permanent court with its more sophisticated and reliable procedure based on the *lex Acilia*,[95] Saturninus allowed the *perduellio* process to continue unabated. The creation of the more stable form of court modelled on the procedures and adjudication process adumbrated in the *lex Acilia* had the great advantage of importing the support of the *equites*.[96] Saturninus thereby renewed the self-respect and self-worth of the *equites*, which had been seriously dented by the law of Caepio the Elder, and expanded the clout the *ordo* already enjoyed in the existing standing courts.[97]

Saturninus would have taken account of the operations of the Mamilian Commission in 109. This was but a *quaestio extraordinaria* although the charge against those of the senatorial order who, suborned by Jugurtha, had betrayed the state and the Senate was most likely *maiestas*.[98] Its establishment was prompted by the ignominious peace imposed on A. Postumius Albinius, legate of the consul Sp. Postumius Albinius, during the latter's absence in Rome.[99] Moreover, of interest to Saturninus, it was staffed by *equites*, by *Gracchani iudices*, as we have noted. The prosecutions

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[95] Badian (1962) 208.

[96] The question arises as to why Saturninus did not simply strengthen the *perduellio* process in the *iudicia populi*. The same question about preferring not to utilise the popular courts would have arisen for consideration by the promulgators of the earlier standing courts. Logically, buttressing the judicial assembly would have entailed making it a court the jurisdiction and procedure of which resembled the permanent court which Saturninus in fact set up. Accordingly, Saturninus would have had to consider refining the procedure in the *iudicia populi* to reflect the principles enshrined in the *lex Acilia*.

Moreover, the Romans, we may suggest, were quite comfortable with the continuation of earlier laws which covered the same ground as a new statute. The continuation of the *lex Calpurnia* and the *lex Iunia* after the introduction of the *lex Acilia* bears witness to this and there seems no reason for there to have been any difference in the case of a non-statutory offence justiceable in a judicial assembly. The fact that the people in the *concilium plebis* passed the *lex Appulaeia de Maiestate*, after debate in *contiones*, must surely mean that the issue of reinforcing the judicial assemblies was debated and rejected. This result would have been reached by accepting the benefits of the new court but with the sweetener of the continuation of the non-statutory jurisdiction.

[97] The antipathy of the *equites* towards Caepio the Elder prevailed for many years. Marcus Antonius was to use it to good effect in his defence of Norbanus in 94. Cic. *De Or*. 2.197.

[98]

(1965) 41–42:

> "The terms of reference of the commission (Sall. *Iug*. 40.1) do not use the words perduellio or maiestas'; but in this respect Sallust's attestation of the lex Mamilia is on all fours with the language used to record the provisions of the lex Varia, which is known to have been a lex maiestatis."

Gruen (1965(b)) 59–60 also notes the similarity in the language between the *lex Varia* and the Mamilian Commission as to those who were the prospective defendants. The fact that the *lex Varia* was a *maiestas* court, probably subsuming on a tralatitious basis the provisions of the *lex Appuleia de maiestate*, founds an argument that the charge in the Mamilian Commission was *maiestas*.

[99] Bauman (1965) 40.

therein before the *equites* had been remarkably successful for the accusing tribunes pressing for conviction of the senatorial miscreants — harsh, violent, with reliance on hearsay. But the hearings were expeditious (there were three divisions) and effective.

A subsidiary benefit of the appointment of the *equites* would also have been wounded senatorial pride. The prestige of the Senate would have been elevated in part by the brief conferral of adjudication under the law of Caepio the Elder but dashed by the law of Glaucia and then by that of Saturninus. The personal factor cannot be overlooked. Saturninus could quietly enjoy the discomfort his statute might occasion generals and members of the *nobilitas* at actual or potential risk under the statute as an antidote for the *dolor* he had suffered over his dismissal. However, we should regard this as a consequence rather than a purpose of the *maiestas* statute.

In summary, to the extent the statute represented a potential deterrent to incompetent command or an expansion of the judicial powers of the *equites* it would give solace to the concerns of the populace and delight those of the equestrian order who enjoyed adjudication. Flushed with success in regaining control of the standing courts, the order would happily back Saturninus.[100] He could for a short time combine the satisfaction of the grievances of the people with the aspirations of these *equites.*[101] The support necessary to his continued political advancement would have been enhanced by them, *but* subsequent events indicate that the commitment was to be short lived.[102]

11. Perduellio, Caepio the Elder and Mallius

Saturninus appreciated the infinitely better procedure and remedies available for a standing court modelled on the *lex Acilia* when compared to the cumbersome, time consuming and erratic nature of proceedings *apud populum*.[103] Nevertheless, Saturninus' intention in introducing the statute was not to erode the procedure in

[100] Weinrib's remark (1970) 437 in discussing Drusus' reforms in 91 that the *equites* "wanted to serve on juries not only for palpable reasons of material self-interest but also to bolster and parade their own dignitas" is pertinent to the position with the 103 law.

[101] Gruen (1968) 168.

[102] Beness (1991) 39.

[103] The position is well illustrated by Livy's description of the trial of C. Fulvius Flaccus in 211. Livy 26.2.7; 3.

perduellio available before the people. The prosecutions there of Caepio the Elder and Cn. Mallius illustrate this.[104]

It is a fair question as to why Saturninus, who had promulgated the *lex de Appuleia* in 103, instituted or allowed the proceedings against Caepio the Elder and Mallius for *perduellio* to be heard *apud populum*, even though they were heard after the passage of the statute.[105]

Saturninus surely saw merit in granting the people, who had suffered so much at the hands of the senatorial generals, the opportunity to vent their spleen in the *contiones* and in their court. He had much to gain by letting the prosecutions proceed *apud populum*. Cicero refers to the public mourning and indignation which broke out over the loss of Caepio's army. The people's anger which Saturninus could turn to his advantage was palpable.

However, as the cases involved the loss of an army, the penalty would have been capital. The proceedings would have been heard in the *comitia centuriata*. The prosecution in 211 of C. Fulvius Flaccus[106] and in 249 of P Claudius Pulcher[107] so indicate. The obligatory trial in the *comitia centuriata* meant that the accused, despised as they were, would be judged by an assembly the voting power in which was dominated by members of the higher orders, the senators and the *equites*. Saturninus did the best he could to serve the interests of all the citizenry. In personally appearing as the prosecutor of Mallius, his tribunician office indicated he was representing and not abandoning the plebeians and the lower classes before the *comitia centuriata*. By appointing his colleague Norbanus, whom he presumably especially selected or who had his imprimatur, to prosecute Caepio the Elder, the same point was made. Little harm was done to the Saturninus' cause by trial in the *comitia centuriata* since the circumstances were such that it was unlikely that either of the accused would escape conviction and, indeed, both fled into exile.

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[104] Again in 100 he was to prosecute into exile Q. Caecilius Metellus Numidicus, his inveterate enemy, *apud populum*, sensibly, because by this time he had lost the sympathy of the *equites*. Caecilius had refused to swear the oath to observe the provisions of the second agrarian statute.

[105] Gruen (1968) 167. The enabling statute defining the offence would need to have been passed before there could be prosecutions. See Section 3 supra.

[106] Livy 26.3.

[107] Cic. *ND.2.7*.

Saturninus would in any case have had a long-term view about the new court. He could allow himself the luxury of the two judicial assemblies,[108] continuing to deal with *perduellio*, with its obvious advantage to him — the retention of the support of the adjudicators. He would have had some confidence that the superior procedures in the standing court would gradually supersede the histrionics and uncertainties prevailing in the popular courts. Saturninus was to have recourse to the people in 100 when he prosecuted Caecilius Metellus (discussed above). This was essentially due to his apprehension that the *equites* in their court no longer favoured his cause.

12. Foreign affairs

We have argued in relation to earlier standing courts that they were created in the main to serve the interests of Roman foreign policy. Did the *maiestas* law of Saturninus play a similar role?

Is it plausible that a principal, though not the major objective of the *lex Appuleia*, was to provide a forum in which Romans, at least, could prosecute misconduct which did harm to *peregrini* in the interests of maintaining diplomatic policy. In a thought provoking essay, Seager[109] has raised issues which allow us to draw inferences useful to our line of enquiry.

In his essay Seager asks two significant questions. Did the *lex Appuleia* catalogue specific offences and secondly was it possible to bring a prosecution in respect of facts falling outside those specific categories.[110] The second question is discussed in Ch.7.14.

Seager provides an attractive hypothesis in response to each of his questions. He carries, seemingly lightly, the burden of speculating from a scintilla of evidence to his hypothesis by reasoned deduction from the circumstances and by drawing on analogy. Much assistance in mounting a thesis for the possible relationship of the law to Roman foreign policy derives from Seager's work. Whilst Seager does not necessarily offer us certainty, reasonable speculation, if identified as such, surely advances scholarship.

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[108] The penalty sought by the prosecutors dictated the appropriate tribunal.

[109] Seager (2001) 143-153 at 144-148.

[110] Seager (2001) at 144-148.

Dealing first with the question of whether the law, in fact, catalogued specific offences, Seager[111] adverts to the oft-cited passage from the *Oratio In Pisonem*, where Cicero comments on the actions in 55 of Aurelius Gabinius as governor of the province of Syria:

"I say nothing now of his leaving his province, of his leading his army out of it, of his waging war on his own account, of his entering a king's realm without the orders of the Roman people or senate, conduct expressly forbidden by **numerous ancient statutes,** and in particular by the law of Cornelius against treason and that of Julius against malpractices" (*quae cum plurimae leges veteres tum lex Cornelia maiestatis, Iulia de pecuniis repetundis planissime vetat*).[112]

The issue for consideration is the meaning of *plurimae leges veteres.* Does this encompass the first *maiestas* statute, the *lex Appuleia* of Saturninus? Cicero is indicating that the conduct described in the passage was forbidden also by many ancient laws other than the Cornelian *maiestas* law and the Julian *repetundae* law. The examples he notes constituted both *maiestas* and *repetundae*, and the same applied to the many unidentified ancient laws. The conduct exemplified was also forbidden. The Cornelian *maiestas* law may have superseded the *lex Appuleia* but this does not necessarily exclude the provisions of the latter from the description.

As to the *lex Acilia*, its specific terms itemising the ingredients of the offence which were apparently not changed, as far as we know, by the amendments of the *lex Glaucia*, do not seem to fall within the descriptions and rule against its being one of the ancient laws.

Seager's first submission is that the only general law of *maiestas* before the *lex Cornelia* was *the lex Appuleia*, so it is "highly likely"[113] that the *lex Appuleia* was one of the numerous ancient laws and therefore its prohibitions would have included the conduct which Cicero describes.[114] Further we note that the word *lex* indicated a statute passed by the people and not a law of the people passed in the *concilium*

[111] Seager (2001) 145.

[112] Cic. *Pis*. 50. My format and emphasis.

[113] Seager (2001) 144.

[114] So Seager (2001) 144.

plebis.[115] Seager is of course speculating. There is no direct evidence to say the *lex Appuleia* was one of the old laws. But he does provide a plausible argument in support of his thesis. He contends that the conduct described by Cicero would sit well with the background against which Saturninus was legislating in 103 - the incompetence or avarice of generals from the Roman nobility which had led in the preceding decade to major military disasters.

Seager is not content to hold that the conduct defined by Cicero in the *Oratio In Pisonem* constituted the offences catalogued in the *lex Appuleia*. He refers to the writings of Scaevola, the jurist, who records that anyone, was guilty of *maiestas* under the *lex Julia*:

> "by whose malicious intent a person is induced to take an oath to act against the State; or by whose malicious intent an army of the Roman people is led into an ambush or betrayed to the enemy; or whose malicious action is alleged to have prevented enemies from falling into the power of the Roman people; or by whose agency with malicious intent the enemies of the Roman people have been assisted with provisions, arms, weapons, horses, money, or anything else; or who so acts that allies of the Roman people become their enemies; or by whose malicious intent it is brought about that the king of a foreign nation fails to make submission to the Roman people; or by whose agency with malicious intent it is brought about that hostages, money, or cattle are handed over to the enemies of the Roman people against the interests of the state; also the man who lets go someone charged and found guilty in a (treason) trial and for this reason cast into prison." [116]

Seager argues that the *lex Appuleia* may have catalogued these offences listed by Scaevola from the Julian Law as well. He further justifies his argument by noting that three of the events noted by Scaevola were similar to the charges stated by

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[115]The reference to *veteres leges* would not include decisions of the people's assemblies since *leges* meant an enactment. Cic. *Top*. 28. Arguably this implies that it was more likely that the *lex Appuleia* would have been included as Cicero is making the statement about ancient laws in the context of major statutes, the *lex Cornelia* and the *lex Iulia*.

[116] *Dig*. 48.4.4 (*Scaevola libro quarto regularum*). Translation of Watson 1985.

Sallust as being levelled against the defendants in the Mamilian Commission.[117] The *lex Mamilia* did not mention *maiestas minuta* but Seager concludes that, had it not preceded the law of Saturninus, it would surely have been regarded as a *maiestas* law.[118] Based on these analogous provisions, Seager believes that the description by Scaevola of acts constituting *maiestas* under the *lex Iulia* might sensibly have formed part of the statute of Saturninus.[119] He then returns to his initial proposition, namely, that these categories of wrongdoing, had they formed part of the law, would have assisted Saturninus in his aim of suppressing and stamping out military inefficiency and corruption among Roman generals. It would make good sense if they were there, in the *lex Appuleia*. Interestingly, he also notes[120] that M. Antonius in his defence of Norbanus in 95 [121] contended that *maiestas* was diminished by a man (such as Caepio the Elder) who delivered up an army to the enemies of the Roman people. There is a distinct similarity between Antonius' contention and the second of the charges described by Scaevola.

It is possible that if these charges were stipulated in the *lex Iulia*, they, or at least some of them, may have been tralatitious from the *lex Appuleia*. Again, as some were similar to those in the earlier Mamilian Commission, we have some basis for contending that they formed part of the 103 law, which was the likely pre-cursor to the *lex Appuleia*.

Seager argues further that the conduct, which another jurist, Ulpian, in the *Digest*, attributes to the *lex Iulia*, could not have formed part of the *lex Appuleia* as *maiestas minuta*.[122] These acts in the *lex Iulia* included bans on congregation in the city, *adversum rem publicam*, of men, armed with weapons or stones and bans on the

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[117] Sall. *Iug*. 40:

> "Meanwhile, at Rome, the plebeian tribune Gaius Mamilius Limetanus proposed to the people a bill authorizing legal proceedings against those who had counseled Jugurtha to disregard decrees of the senate and those who had accepted money from him while serving as envoys or commanders, those who had handed back elephants and deserters, likewise those who had colluded with the enemy concerning peace or war."

Presumably, the 103 law would have used a more generic term than elephants, as did Scaevola.

[118] Seager (2001) 145.

[119] Seager (2001) 145.

[120] Seager (2001) 147.

[121] Cic. *De Orat.* 2.164)

[122] *Digest* 48.4.1(1): *libro septimo de officio proconsulis*".

holding of meetings and the assembly of men *adversum rem publicam.* Seager makes the convincing point that had they formed part of the *lex Appuleia*, he surely would not have imperilled his client Norbanus by the defence he advanced. This was an admission of the factual charges against the accused but a denial that these facts constituted *maiestas minuta* under the statute.[123]

Might we now suggest that the passage from *Oratio in Pisonem* and Scaevola's listing of charges from the *lex Iulia,* were they to have been catalogued as offences in the *lex Appuleia*, would indicate an interest on the part of Saturninus in regulating the activities of Roman governors in the provinces through the agency of a plebiscite. Admittedly the passages would have been invoked for the primary purpose to which we have referred, namely the suppression of military incompetence. However, in relation to their dealings with *peregrini*, governors could readily offend the conduct specified in the *Oratio in Pisonem* passage and at least two of the offences under the *lex Iulia*, appear to relate to conduct which might adversely affect allies. Governors would need to be aware that conduct which had the potential to injure allies but had not previously exposed them to the prospect of prosecution might now be the subject of statutory charges. On the hypothesis, then, that the texts noted above, did form part of the behaviour proscribed by the law,, a cogent reason for the statute may have been indirectly to protect Roman diplomatic interests.. *Peregrini* would gain assurance from the knowledge that the Romans had legislated for governors, who overreached the terms of the statute to the detriment of local people, to be open to prosecution This interest for which we have argued may tie in with the probable involvement of Saturninus with the piracy law in 101. This statute (to be discussed at Ch.7.13) evinced an enthusiasm on the part of the promulgators in using popular legislation to forge new initiatives in provincial administration.

Where it is convenient we shall hereafter use the expression "Relevant Passages". to describe the passage from the *Oratio in Pisonem* and Scaevola's listing of the charges from the *lex Iulia,* quoted earlier.

Overall the hypothesis of Seager merits our consideration as a conceivable justification for the view that Saturninus had the interests of injured peregrines in mind as at least as a secondary objective of his law.

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[123] Seager (2001) 146-147.

We have touched several times on the view that the permanent courts after 123 did adopt a practice and procedure which accorded with that of the *lex Acilia*. Assuming that Saturninus adopted this precedent for his court, his law would probably have catalogued specific offences.

It is significant that Seager's first question is whether the *lex Appuleia* actually catalogued specific offences. This might suggest that Seager did not believe that, absent the Relevant Passages for which he was about to argue, any specific offences were laid down in the law. We might then be driven to accept that Saturninus may not have followed the detailed description of subject offences for which the *lex Acilia* called.

But is it realistic to conclude from Seager's arguments, that Saturninus limited the jurisdiction of the lex Appuleia to what we have described as the Relevant Passages, albeit expanded by the discretionary jurisdiction. To reconcile the position we should probably accept Seager's question as designed to establish that the Relevant Passages were additional to any offences which were based on the *lex Acilia* precedent and not as intended to imply that Saturninus ignored this precedent.

13. The Piracy Laws

In the period between his tribunates, Saturninus displayed a tendency to intervene in foreign affairs. Diodorus tells us that ambassadors from Mithridates came to Rome in 102 to bribe the Senate.[124] Saturninus, seeing an opportunity to attack the Senate, insulted the ambassadors, presumably accusing them of bribery. The Senate encouraged the ambassadors to prosecute Saturninus.[125] His action, therefore, may be seen as a blatant attempt to challenge the autocratic supervision of diplomacy enjoyed by the Senate,[126] while his theatrical appeals to his urban constituent

[124] Diod. 36.15.1.

[125] Diod. 36.15.1–3 asserts that a capital trial of Saturninus was held before the Senate with senatorial prosecutors as the Romans regarded the inviolability of ambassadors as of the utmost import. The account is unreliable in this respect, since, as the Senate was not a court of law, it could not have sat as such or punished Saturninus. The Senate may simply have sought in a meeting a serious explanation for the conduct and to remind the uncompromising and recalcitrant Saturninus of what was expected of him as a senator. Gruen (1968) 169 note 59 suggests that an attempt may have been made to set up a special court.

[126] We know well from Polybius 6.13 that the people could have had nothing to do with the receipt of ambassadors and the response to be given to their enquiries, as this was a matter exclusively for the Senate.

audience ensured his release.[127] Saturninus exposed the potential for corruption of members of the senatorial order in their dealings in a traditional area of responsibility. His actions reveal that he retained a keen interest in Roman provincial diplomacy. He was prepared to risk prosecution to make his point about the failings of some senators, at least, who without statutory basis of any kind to justify their conduct were prepared to sacrifice Roman interests to their avarice. Saturninus would surely have seen parallels with the defendants in the Mamilian Commission. He may have contented himself with the idea that the time was becoming nigh for intervention by the people in foreign affairs, to be effected by tribunician initiated popular legislation. He would thus be eager for further office.

Further evidence of Saturninus' likely interest in foreign affairs may be gleaned by considering a possible nexus between Saturninus and the fragmentary inscriptional laws found at Delphi (the so called "pirate law"[128]) and Cnidos. In this respect we must look ahead to Saturninus' second agrarian bill introduced in 100. The bill was passed by violence and against the auspices.[129]

According to Plutarch, the senators were required by the agrarian bill to swear an oath that they would abide by whatever the people might vote and make no opposition.[130] Appian records that the oath had to be made within five days on pain of a fine of 20 talents and banishment from the Senate.[131] The terms of the law would surely have given rise to bitter debate in the *contiones* before Saturninus carried the law with the support of the rural tribes, many of whose members were veterans

[127] Diod.36.15.3. He also implies that thereafter the support of the people arising from these incidents carried him to a second tribuneship. But Appian *BC*. 1.28 says that it was the adherents of Glaucia, before the people in general had met in the *concilium plebis*, who pushed through the re-election of Saturninus.

[128] Stuart-Jones (1926) 158: "undoubtedly a law"

[129] App. *BC*. 1.30.

[130] Plut. *Mar*. 29.1–2.

[131] App. *BC*. 1.29. A failure to observe the law may have been a ground for prosecution under the *maiestas* statute introduced in 103. However, in 100 Saturninus prosecuted Caecilius *apud populum* possibly through apprehension that the *equites* now inimical to Saturninus would not in their discretion condemn the consular. Gruen (1965(a)) 578.

bustled into Rome.[132] He was ruthlessly imposing a clear limitation on the political freedom and will of a senator to oppose matters the subject of the law.[133]

Turning now to the pirate law itself and the law from Cnidos, a case can be made for regarding the plebiscites, preserved in the inscriptions, as identical versions of the one law[134] and for dating the law to 100 and for attributing it to Saturninus, then a tribune.[135]

The inscriptional laws smack of government by the people.[136] There are in the laws important provisions regulating on foreign affairs. There is, for example, the provision, *inter alia*, that the Roman people are concerned to ensure safe navigation in Mediterranean waters free of piratical threat as well as the requirement that kings in alliance with Rome must take steps to ensure that pirates do not make use as a base any part of their kingdoms.[137] There is also a provision requiring the governor of Macedonia to govern in such manner as to allow those responsible to collect the tax revenues.[138] He and the Governor of Asia must take steps to ensure that those having friendship and alliance with the Roman people are protected from being expelled from their lands.

The attribution to Saturninus derives from the fact that the inscriptional laws, like the second agrarian law, required certain magistrates and officials to swear to enforce and not impede the law on pain of a penalty. The inscriptional laws stipulate a penalty of 200,000 sesterces. They refer to a procedure for prosecution for breach and for recovery of fines imposed. The praetor, in the absence of payment of the fine, was to preside over proceedings for the recovery of the fine as a debt due to the people.

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[132] App. *BC*. 1.30–31. He led them to fear they would lose their allotments unless they supported the bill.

[133] Marius, with tongue in cheek, claimed it was an insult to the Senate that it should be required to act under such compulsion instead of being able to be persuaded and act of its own free will. Plut. *Mar*. 29.1–2. His was the stance of a hypocrite yet his words aptly described the predicament of the Senate.

[134] Hassall, Crawford and Reynolds (1974) 197.

[135] Stuart-Jones (1926) 160; 172. Hassall, Crawford and Reynolds (1974) 218.

[136] Hassall, Crawford and Reynolds (1974) 219: "The whole is redolent of government by the people in the tradition of the Gracchi".

[137] Cnidos text. A. Col 3; B. Col 1.8. The protection is demanded for Roman citizens, Latin allies and friends and allies outside Italy. The kings of Cyprus, Egypt and Syria are named as obligors. The text references are those used by Hassall, Crawford and Reynolds.

[138] Cnidos text. B. Col 4.1.5: "there is perhaps a suggestion that *publicani* are to be entrusted with the collection of taxes". Hassall, Crawford and Reynolds (1974) 213.

Assuming that the inscriptional laws are properly attributable to Saturninus, then we see that he was concerned, in 100, with Rome's approach to its provinces, particularly Macedonia and Asia and to the manner in which they were being administered. He also was concerned implicitly with the rights of the *publicani* to exercise their tax farming contracts and with securing commitment from Asian allies to refrain from assisting piracy in the interests of Roman maritime trade.

Further, scholars have suggested that there is a strong resemblance between the *lex Acilia* and the provisions of the inscriptional laws.[139] If the *maiestas* statute had adopted the procedural provisions of the *lex Acilia*, would the resemblance be enough to suggest that a failure to observe the provisions of the inscriptional laws could be regarded as *maiestas minuta* and actionable under the 103 law?

Unfortunately, this argument is not open to us because the draftsman of the inscriptional laws has seen fit to make particular provision for a separate praetorian tribunal and the mulcting of fines for failure to comply with the undertakings required by the laws.[140] Nevertheless, assuming the inscriptional laws are attributable to Saturninus, we can posit that he created two courts, the jurisdiction of each of which concerned itself with matters relevant ultimately to the welfare of *peregrini*.[141] The very tantalising issue arises as to whether we have in the court established under the inscriptional laws a permanent court, because it is likely that its procedures aped those of the *lex Acilia*. The detailed procedures as to trial and penalty, which we have noted, and the similarities with the *lex Acila* are enough to suggest that this was a real possibility.

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[139] Hassall, Crawford and Reynolds (1974) 217:

> "It emerges that there is little of the substance of the Lex repetundarum which relates to trial procedure that does not occur (in a much more summary form) in our law; the order is also broadly the same, except for the displacement of the section relating to witnesses."

[140] There are some other contra indications. Thus, either the law of Caepio of 106 or that of Glaucia of 104 introduced *divinatio*. Lintott (1994) 93–94. This can be seen as inconsistent with the procedure under the inscriptional laws pursuant to which *any* freeborn citizen could bring proceedings. As well the fragments of the inscriptional laws dealing with the selection of jurors are numerical inferior to those of the l*ex Acilia*.

[141] For example, as we have argued, the proscription of waging war in a province without the imprimatur of the Senate (*lex Appuleia*) or the prevention of friends and allies from being driven off their lands (inscriptional laws).

14. The *lex Appuleia de Maiestate* and the political aims of Saturninus

To this point, we have contended that Saturninus introduced the *lex Appuleia de Maiestate* as a means of providing some assurance to an indignant populace that incompetent or irresponsible military campaigning would in future expose generals to the rigours of prosecution in a formal court which could be readily convened. We have also postulated in Ch.7.12 that another concern of Saturninus, assuming, following Seager,[142] that the Relevant Passages were included in the law, was the potential for abuses of power by provincial governors,[143] Saturninus was seeking to protect the interests of *peregrini* who might suffer by such abuses and to serve that very Roman foreign policy for which we have argued in earlier chapters.

Sherwin-White and Seager have attributed far-reaching political ideals to Saturninus. In particular, stress has been placed on his desire to bring about a greater role for the people in the administration of the state and in the control of the magistracies through a more forceful application of the people's legislature powers and a more aggressive approach by the people's magistracy the tribunate. More recently, Harries has postulated Saturninus' objectives:

> "the *maiestas* law was borne out of a desire to control the behavior of the military and political elite by making them legally accountable for damage to the 'greatness' of the Roman People."[144]

In 101 Saturninus was elected to a second tribunate. The *lex Appuleia* had been promulgated well in advance of the implementation of any presumed objectives for subjecting the elite to the control of the people. His legislation in 103 was designed to establish a backing which he might later call upon to progress his political career and to support a programme of reform in which the people and not just the Senate had a say. Saturninus' ideas manifested themselves in 100 with a second agrarian

[142] Seager (2012) at 144-148.

[143] This argument is posited on the basis that the Relevant Passages constituted conduct which could injure provincials.

[144] Harries (2007) 72.

plebiscite[145] requiring an oath from senators to observe the law.[146] The purpose of the oath, both under the agrarian law of 100 and the inscriptional laws, was to compel senators to comply with and observe the plebiscites rather than ignore them if they did not accord with their personal thinking. The law also conferred upon Marius, whose veterans would benefit, discretion to enfranchise a number of persons in each colony.[147]

These laws disclose a very real desire on the part of Saturninus to hobble the freedom of political action of the Senate in respect of matters, such as the assignment of land to veterans, which were of special concern to his supporters in the Marian troops.[148] In addition, they reveal intent to use the lobbying power of the tribunate and the principal legislative power of the *concilium plebis* to interfere with a traditional domain of the Senate, namely, the supervision of foreign and diplomatic affairs.[149]

The second agrarian law was carried by force and against unfavourable auspices.[150] The haughty Metellus, the archenemy of Saturninus,[151] refused to take the oath. No doubt he also took the view that a law passed as it had been was beneath contempt. But then to reinforce his moves to sublimate the authority of the Senate, Saturninus procured with the help of his rural supporters a bill for the banishment of Numidicus and a consular direction that Numidicus be indicted from fire and water.[152]

We cannot be sure that in 103 Saturninus had any plans for a second tribunate or that he had developed in his mind any detailed reform programme. We face difficulties

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[145] It provided for the assignment of land in Gaul previously seized by the Cimbri, but regained following Marius' successful campaign. App. *BC.* 1.29.

[146] Failure to do so within five days would lead to a fine of 20 talents and loss of their senatorial status. App. *BC.* 1.29. Page 205 supra.

[147] Sources collected in MRR. See 1 576–577.

[148] Sherwin-White (1956) 4.

[149] We have noted Saturninus insulting approach to the envoys from Mithridates. See Section 13 above.

[150]Appian records (*BC.* 1.29–30) the disconcert. The perception of an unhappy urban proletariat was that Italian allies were benefitting more from the proposed land allotments than they. In the assembly the urban mob took up the offensive with clubs to enforce the illegality of the proceedings. The rustic soldiers, brought in by Saturninus to support the law, obviously with greater military capabilities resisted, beat off the city people and, significantly, secured the passage of the law. Presumably, scattered over the rural tribes, they had the greater voting power.

[151] As censor in 102 Numidicus had sought to have Saturninus and Glaucia expelled from the Senate but was thwarted by his brother and fellow censor Caprarius.

[152] Saturninus and Glaucia intimidated the rural voters into promoting the bill by suggesting that unless Numidicus was banished the country people would never get their allotments. This was even though the bill had been passed. Presumably Saturninus feared that the *boni* lead by Numidicus might with the aid of a pliant tribune and the city plebs effect the repeal of the law.

therefore in connecting the *lex Appuleia* with the objectivities described by the scholars mentioned above.

Now we have acceded to Seager's hypothesis that there were two jurisdictional feature of the law,[153] the first of which was discussed in Ch.7.12. This was whether the *lex Appuleia* did categorise the Relevant Passages as specific offences. We now consider the second where Seager asks whether prosecutions could be instituted on facts which fell outside of the categories of offending conduct. It might well be described as a discretionary jurisdiction, since presumably it involved a determination by the equestrian jurors as to whether they would accept a set of facts as founding a prosecution for *maiestas minuta* on which they would then hear argument from opposing advocates.

In discussing the cases in 95 of Norbanus and Caepio the Younger, Seager states:

"In both cases we must surely conclude that for facts of this kind the lex Appuleia gave no help but that *from the first* it was possible to bring prosecutions on facts that were not listed in the law as instances of *maiestas minuta*."[154]

The support for Seager's second jurisdictional feature would seem to be the submissions made by M. Antonius in his defence of Norbanus which Cicero records in the *De Oratore*[155] and the comments on the " rhetorical potential of the imprecise abstract definition of *maiestas*" propounded by the *Auctor ad Herennium.*[156] The cases are discussed later in this chapter but we may note here that the outcome depended essentially on a definition of what constituted *maiestas minuta* under the law and competing definitions were ventilated. Jurisdiction appears to have depended on determining whether a particular definition was persuasive rather than fitting a series of facts into a statutory definition. If this legal by- play was still being pursued in the first decade of the first century and if the concept of *maiestas minuta* was not burdened by precedent in 103, we can readily see that, in initial cases under the law, there would have been considerable room for debate. As we later note the manner in which Antonius conducted his defence of Norbanus suggests that he was not

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[153] Seager (2001) 144.

[154] Seager (2001) 148. My italics in the first quotation..

[155] Seager (2001) 146; Cic. *De Or*. 2.107-13,124,164,167,197-204..

[156] Seager (2001) 147; *Rhet.Her*.1.21;2.17;4.35.

introducing a novel procedure but that his methods represented those which rhetoricians had been following for some time and perhaps from the commencement of the statute. This is Seager's view, as we have seen, and we have Gruen's opinion which is supportive.[157] Initially, then the concept of *maiesta minuta* would have been short of definition and therefore elastic and a tool for the ingenuity of rhetoricians.

If this jurisdiction was available from 103 its opportunities must have been in Saturninus' mind when he promulgated it. Possibly the flexibility of the discretionary jurisdiction was not designed just to widen the net for apprehending and bringing to account incompetent generals. It is hardly realistic to suggest that the *lex Appuleia* was passed in anticipation of what Saturninus might have had in mind for ensuing years (which we cannot know). Yet, the presence of this discretionary jurisdiction, possibly provided for by some mechanism in the statute, may suggest that Saturninus did foresee, at least, that the existence of this jurisdiction could be of service to him,

As we note in Ch.7.17 there was little likelihood that at least initially he himself would be in danger of prosecution under the law.

The initial elasticity of *maiestas minuta*, could have been seen by Saturninus and his supporters as providing scope for them to use the law in order to pursue objectives of the kind described by the scholars mentioned and to make use of it to resist or thwart those who sought to oppose them.

If Saturninus was aware of the potential discretionary jurisdiction from 103, we can only speculate, in the absence of evidence, that he would have seen it as a tool which could be used in another sphere where he might promote his political influence. This might be the prosecution of cases against provincial governors on behalf of *peregrini* where the facts fell outside what we have describes as the Relevant Passages. If *peregrini* complained of ill treatment which was analogous to but not on all fours with what was covered therein, Saturninus would have had scope for looking to the interests of the provincials.

Let us proceed to some cases which shed light on how the discretionary jurisdiction was implemented.

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[157] Gruen (1965(a))578: "'*maiestas minuere*,'— at no time unambiguous, would have been particularly ill- defined in a period shortly after it was made a criminal offence".

In 95 Norbanus and Caepio the Younger were prosecuted for *maiestas* under the *lex Appuleia*.[158] Each had behaved as a *seditiosus*.[159] However, description of a man as *seditiosus* did not make him, per se, liable to prosecution for *maiestas*.[160] Proof of *maiestas minuta* was necessary and this was a matter of definiion.

It is not apparent that any of the accusations in these prosecutions fell within the Relevant Passages in the statute, yet a claim of *maiestas minuta* was asserted. We surmise that the Roman forensic orators used their rhetorical skill to expand the reach of the statute by invoking what we have referred to as the discretionary jurisdiction. In the absence of any legislative amendment to the statute, which may not have been forthcoming, *patroni* prosecuting a case must have taken what was an obvious and expeditious course. This was to argue that conduct falling outside the Relevant Passages might still be caught as *maiestas minuta*.

We divine from our sources that the jurisprudential approach would have been for each side to present a definition (*verborum definitio*)[161] of what it regarded as the pith of the offence of *maiestas minuta*, designed in such a way as to advance the particular prosecution or defence case. The author of the *Rhetorica ad Herrenium* records that there was a procedure in cases where the issue of definition arose. In effect, a definition helpful to a party's cause was proposed. Then the conduct impugned was related to the definition proposed. Finally, the principle underlying the contrary definition was refuted as being false, inexpedient, disgraceful, or harmful.[162] This would confer on the jurors a wide discretion in determining whether particular conduct constituted *maiestas minuta*.

The procedure described in the *Rhetorica ad Herrenium* is largely borne out by the cases. In the prosecutions of Norbanus and Caepio the Younger there are statements to the effect that the question involved a definition when the terms in which particular conduct should be described are disputed.[163] In these cases each side

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[158] In the case of Norbanus, Cic. *De Or.* 2.107: 2.199; *Off.* 2.42: "*seditiosum et inutilem civem*".
In the case of Caepio the Younger, *Auct. Her.* 1.12. 21: "*Arcessitur Caepio maiestatis*".

[159] Of Norbanus, Cic. *De Or.* 2.124 "*cum hominem seditiosum furiosumque defenderet*"*;* 2.198: "*seditiosum civem*". In view of the degree of similarity in the level of violent conduct perpetrated by each man we may conclude that Caepio too could be regarded as *seditiosus*.

[160] Cicero *Part. O*r. 105 uses the example of Norbanus: "His somewhat disorderly procedure in respect of Caepio involved no treason.

[161] Cic. *De Or*. 2.108.

[162] Auct. *Ad Her*. 2.12.17.

[163] Cic. *De Or*. 107:

proposed a definition of *maiestas minuta* to the equestrian jurors.[164] In Norbanus' case his counsel, the renowned orator, Marcus Antonius, argued that Norbanus was not guilty of *maiestas minuta* because the whole case hung on the construction of this expression (*verbum*)[165] under the *lex Appuleia*.

An irksome difficulty presented by Antonius' argument does, however, arise. Having claimed that the whole case hinged on the interpretation of the expression *maiestas minuta,* Antonius paradoxically asserts that he regards as childish those orators who argue that each side should define the debatable term.[166] He further claims that neither he nor his opponent Sulpicius did this, but each to the best of his ability expatiated (*dilitavit*) on the meaning of *maiestas minuta*.[167] Unfortunately we do not possess details of the meanings of the expression which emanated from these learned exchanges.

Antonius had to defend under the statute the violent conduct Norbanus had exhibited at the trial of Caepio the Elder, where Norbanus was the prosecutor. The proceedings, Antonius accepted, were lamentable.[168] He clearly saw Norbanus' actions as seditious,[169] Antonius' argument before the standing court involved

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> "Again the question is one of definition, when the terms in which an act should be described are in dispute, as in the main contention between myself and our friend Sulpicius at the trial of Norbanus. For, while admitting most of our friend's indictment, I still maintained that the defendant was not guilty of 'treason', since the whole case depended on the construction of this word, by virtue of the Statute of Appuleius."

Auct. *Ad Her*. 1. 12. 21:

> "Caepio is brought to trial for treason. The Issue is Legal, and is established from Definition, for we are defining the actual term when we investigate what constitutes treason."

[164] Bauman (1967) 51 guides us as to the definitions Cicero describes in the *De Partitione Oratione* proposed by each of the protagonists. Sulpicius Rufus, the prosecutor claimed as his definition: "Majesty resides in the dignity of high office and of the name of the Roman people, which was impaired by one who employed mob violence to promote sedition." Cic. *Part. Or*. 105. In reply, Antonius asserted of Nobanus:

> "His somewhat disorderly procedure in respect of Caepio involved no treason; the violence in question was aroused by the just indignation of the public and not by the action of the tribune; whereas the majesty of the Roman people, inasmuch as that means their greatness, was increased rather than diminished in the maintenance of its power and right." Cic. *Part. Or*. 105.

[165] Cic. *De Or*. 107.

[166] Cic. *De Or*. 107.

[167] Cic. *De Or*. 109. Fantham (2004) 125 note 52 contends that the reason why the opposing orators did not see fit to advance definitions was that this would be seen as childish and would not "penetrate the minds of the jury". This seemingly does not explain Antonius' earlier statement that the question before the court was one of definition.

[168] Cic. *De Or*.197: "*in Caepionis gravi miserabilique casu*".

[169] Cic. *De Or*. 2.199*; Part. Or*. 105.

confession and avoidance.[170] He admitted the factual content of the charges alleged by the prosecutor, Sulpicius but denied, in his response to the "definition" of Sulpicius that Norbanus' conduct amounted to *maiestas minuta*. As Seager points out,[171] this must mean that Antonius was confident that the facts in question fell outside the terms of the *lex Appuleia*. However, this may not have been enough to exculpate Norbanus.[172] In defence, Antonius thus argued that many desirable reforms had been achieved by force and against *nobilium dissensione*.[173] Civil discords could be disruptive but often were justifiable and unavoidable. He cited famous examples where seditious conduct had been beneficial to the Roman people.[174] He claimed that there had never been a more just cause for inciting the Roman people to sedition than the prosecution of Caepio the Elder.[175] Sulpicius as well did not simply rest on his definition but pleaded the substance of Norbanus' riotous conduct.[176]

We conclude from Antonius' defence that the mere fact of his client being a factious citizen *(seditiosus*), as he conceded, did not make condemnation inevitable. Evidence of *maiestas minuta* was still required.. The allegations therein had to be backed by evidence as was done by both Antonius and Sulpicius. We may also observe that the arguments about how civil discord had often been beneficial to the Roman people was a response as well to the definition of Sulpicius, in that it met the allegation that mob violence lead to civil discord.

The manner in which Antonius describes how he conducted the defence of Norbanus suggests that he was following techniques which forensic rhetoricians were

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[170] From what Cicero outlines in the *De Partitione Oratoria* as to the principles of forensic oratory, a question could be raised in the early stage of proceedings as to whether action was open under a cited law. *Part Or*. 98. A defendant could admit that the impugned conduct took place but deny that it had the effect alleged. *Part Or*. 101.This was Antonius' ploy in the trial of Norbanus.

[171] Seager (2001) 146–147.

[172] It appears there were two features of the defence. First the use of a definition which, in challenging that presented by the prosecution, might win judicial support. Then a listing of reasons why the conduct at issue was justified and could not be regarded as *maiestas minuta*.

[173] Cic. *De Or*. 2.199. He makes a connection here with the definition proposed of *maiestas minuta*. He suggests that the just indignation of the people incited the violence. This indignation was due to the aggregated military incompetence of the senatorial generals.

[174] Cic. *De Or*. 2.199. Antonius referred to the expulsion of the kings, the establishment of the people's tribunes, the restriction of consular powers by plebiscites and the development of *provocatio*.

[175] Antonius was possibly adverting to the importance of Norbanus ensuring that Caepio paid the price of his calamitous follies, given that he had previously escaped a charge of *perduellio* in connection with the theft of the Tolosan treasure.

[176] Cic. *De Or*. 2.197.

accustomed to use and was not breaking new ground.[177] The approach adopted by Antonius and his opponent in presenting competing definitions[178] was thus not novel and had been in use, arguably, from the time of introduction of the statute. It would therefore have been open to Saturninus to adopt.

In the case of Caepio the Younger, the author of the *Rhetorica ad Herrenium* asserts that: "A cause rests on Definition when the name by which an act should be called is in controversy." [179] The author notes that Caepio was arraigned for *maiestas minuta.*[180]As in the case of Norbanus, the prosecutor and the defence each provided a definition but without mention of the inutility or futility of furnishing a definition which Antonius emphasised.

Caepio was prosecuted for his intemperate behaviour in seeking to forestall the passing of Saturninus' grain law. The account in the *Rhetorica ad Herrenium* shows that the prosecution argued that Caepio had impaired the sovereign majesty of the state. He had destroyed the elements constituting its dignity (*amplitudio*). These elements were said to be the voting of the people and the counsel of the magistracy. A definition of *maiestas minuta* [181] was thus proposed which suited the prosecution.[182]

The same account records the definition in defence of Caepio's counsel.[183] The definition was strikingly similar but Caepio argued that he had not inflicted damage. Rather he had prevented damage. He had saved the Treasury, resisted the license of wicked men, and kept the majesty of the state from being completely exhausted.

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[177] The terms in which he repudiates the practice of some advocates who insist on defining the debatable expression imply that this was a practice which had been in place for some time. Cic. *De Or*. 2.108.

[178] Or in waxing lyrical about the meaning of *maiestas minuta*. Cic. *De Or.* 109.

[179] Auct. *ad Her*. 2.12.

[180] Auct. *ad Her*. 2.12.

[181] We find the definition in the Auct. *ad Her*. 2.12. The prosecution asserted:

> "When we deal with the Issue of Definition, we shall first briefly define the term in question, as follows:
>
> > 'He impairs the sovereign majesty of the state who destroys the elements constituting its dignity. What are these, Quintus Caepio? The suffrage of the people and the counsel of the magistracy. No doubt, then, in demolishing the bridges of the Comitium, you have deprived the people of their suffrage and the magistracy of their counseling'."

[182] Auct. *ad Her*. 2.12.

[183] Auct *ad Herr. 2.12* explains:

> "He impairs the sovereign majesty of the state who inflicts damage upon its dignity. I have not inflicted, but rather prevented, damage, for I have saved the Treasury, resisted the license of wicked men, and kept the majesty of the state from perishing utterly."

The important point in relation to both cases is that the facts of neither case would have fallen within the categories in the Relevant Passages. The jurors had to determine at their discretion which definition was to be preferred and thereby to expand or qualify the reach of the offence.

The decision of Saturninus in 101 not to prosecute Metellus Numidicus in the *maiestas* court is attributed to his reservations about the loyalties of the *equites.* The grounds for the prosecution were not within the Relevant Passages. However, the fact that Saturninus contemplated it implies that the discretionary jurisdiction was available for use then. The statute could be used to impugn conduct inimical to Saturninus' interests and the trial of those responsible would entail the offering of competing definitions intended to determine the issue following what we have contended was the established rhetorical procedure.

15. Discretionary powers of the *equites*

In summary, in proceedings before the *quaestio de maiestas,* the equestrian jurors had the duty to determine whether particular conduct detracted from the sovereign majesty of the Roman people (*maiestas populi Romani*). If, in their judgement, conduct fell within the Relevant Passages,[184] it still required a finding by the jurors that that conduct amounted to *maiestas minuta*[185]. The question then arose of defining what was *maiestas minuta* in the light of the different definitions which would be put by the parties.

The judgement of the equestrian jurors would in effect expand or qualify the reach of the offence of *maiestas minuta*, depending on whether a definition proposed was accepted. The fact that the jurisdiction was not limited to the Relevant Passages but a discretionary jurisdiction was available, would have been of advantage as we have argued for Saturninus from 103. As the proponent of the law he must have seen its upsides and been confident that he was unlikely to be prosecuted under its provisions. No action was taken for the truculent and probably illegal conduct

[184] Obvious cases would have been military and senatorial incompetence in the field and provincial maladministration.

[185] It is arguable that Seager's enquiry " *Did the Lex Appuleia maestatis* catalogue specific offences?' (2001) 144 carries the implication that what was cataloged without more was an offence. It did not require an investigation as to whether it amounted to *maiestas minuta*. The accused would be able then to run a defence such as *maiestatem auxi*".

displayed in the cases of Baebius and Caepio the Younger. [186] Further he would not initially have been concerned about his personal security. He would, at least when and for some little time after the statute was passed, have been very confident in the support of the *equites*.

16. *Maiestas populi Romani*

Central to the purpose of the *lex Appuleia* was the meaning and reach of this expression. But whose *maiestas* was in issue in this determination? Saturninus, as we have argued, was, with the introduction of his *maiestas* law in 103, creating the means whereby he might challenge any opposition to his legislative measures to come and particularly his intended use of the popular assembly to implement them.

Arguably, it was the confederation of interest groups he formed in 103, which he had in mind as the *populi Romani* with his *maiestas* law. In framing the law as he did Saturninus intended that it was for the jurors to assess whether the conduct impugned diminished the greatness of this alliance. His view in 103 would have probably been that a programme which benefited the lower orders was unlikely to be the subject of attack as a diminution of *maiestas populi Romani*.

By the time of Saturninus' evanescent third tribuneship, the events of the ensuing tempestuous three years disclose a gradual, then final, rupture in the terms of the alliance. His propensity for violent action to resolve impediments to his perceived progress had brought him and his coalition undone.

The Roman people were ceasing to be "a single target group".[187] The volatility of sectional elements in Rome meant that Saturninus could not take the loyalty of any interest group for granted. Not only did the *equites* become disenchanted with Saturninus capricious and unrestrained public conduct,[188] but the *plebs urbana* who

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[186] There was little to distinguish in terms of blatant and rancorous disregard for the proper promulgation procedure between the conduct of Caepio the Younger and that of Saturninus over the grain bill.

[187] Beness (1991) 39 suggests that there may have begun the division in the urban plebs mentioned by Tacitus at Hist. 1.4 — between those attached to the nobility and the *plebs sordida*, the independent proletariat.

[188] Beness (1991) 39. His violent treatment of Metellus Numidicus in 102 appears to have lost him the support of the *equites*. Gruen (1965(a)) 578 note 8 alludes to Orosius 5.17.3 who states that Saturninus dragged Numidicus from his home. Metellus fled to the Capitol where he was protected by a group of *equites* and a melee ensued. This attack was probably in response to the attempt by Numidicus as censor in 102 (which was defeated by the opposition of his brother Metellus Caprarius) to remove Saturninus and Glaucia from the senatorial order. The disapproval of the *equites* would have been

had benefitted from the grain law began to sever their ties with the tribune. In 101 Saturninus preferred to rely on a meeting of Glaucia's ruffians, responsible for the murder of Saturninus' rival candidate, C. Nonius, to secure his election to a second tribuneship. Tellingly, this was convened before the normal meeting of the *tribal assembly*. It is possible that that the frightful circumstances of the murder disconcerted the urban plebs and Saturninus' confidence in them was thereby on the wane.[189] His decision to bring in rural voters to support his agrarian bill, which largely favoured countrymen over city people, reveals both the diminution in his urban following and a recognition of where his real strength now lay.[190]

The opposition of the *plebs urbana* in 100 to this law put them at odds with Saturninus whose commitment to agrarian laws had existed from the outset. Significantly, Saturninus himself engineered an attack on the urban people when they resisted the bill and later rallied the rural voters to renew their assault and defeat of the urban opposition.[191] Saturninus also relied on the rural voters to secure the passage of a law to outlaw Numidicus for failing to take the oath under the agrarian law. Saturninus continued to exhaust what little capital he had by associating himself with violent acts. Following the murder by Saturninus, Glaucia and their acolytes[192] of Memmius,[193] a rival to Glaucia, for the consulship in 100, in the *comitia centuriata* whilst the elections were in progress, [194] the city folk threatened Saturninus but he marshalled a force of rural men to protect him.[195]

Encouraged by the rifts in the alliance and alarmed by the violent melee which followed the murder, the Senate passed a *senatus consultum* to meet the crisis and restore order. Cicero says that it directed the consuls to see to it that the *maiestas* of

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heightened by Saturninus' prosecution of Numidicus in 100 for failing to take the oath to uphold the second agrarian law. The *equites* would have observed that Saturninus brought the proceedings *apud populum* and not in the new standing court where they presided. By this stage the sense of mutual mistrust must have been palpable.

[189] App. *BC*. 1.28.

[190] These laws were of importance to rural voters who formed the major part of the Roman armies. Vell. Pat, 2.15.2. They needed land as they were demobbed after military service.

[191] App. *BC*. 1.30.

[192] Cic. *Rab.Perd*. 7.20.

[193] The very man who as tribune in 111 had brought Jugurtha to Rome in an effort to secure testimony about the bribery of senators during the early days of the war with the Numidian prince.

[194] App. *BC*.1.32–33.

[195] App. *BC*. 1.32.

the Roman people as well as its *imperium* suffered no harm.[196] Importantly, it was modified from the previous format. Bauman has suggested that the inclusion of *maiestas* in the decree was designed to provide immunity to those who acted in accordance with its dictates.[197] Indeed, as the action required meant an assault on Roman magistrates and their office — Saturninus and Glaucia and Equitius — there was a real possibility that the offence of *maiestas* might be committed. Immunising the senatorial forces was prudent, but probably unnecessary. It is unlikely that the demagogues would ever have prosecuted for *maiestas*. Nevertheless, *maiestas* was a perilously flexible concept and the circumstances in 100 show how it could redound to the detriment of its creators. The crucial issue was to determine who were the Roman people whose greatness was being diminished.

The decree required those interested in the safety of the state to take up arms. All obeyed.[198] Caius Marius, as consul, supervised the distribution of arms sourced from arsenals and public buildings and their distribution to the Roman people.[199] This suggests that citizens were not allowed to have a private cache of weapons[200] and in turn implies that the body of Roman citizens supported and implemented the decree. Cicero presses the point. Not only did the *equites* whom he extols as playing such an important role in the state take up arms but also so did all other men who believed their well-being was consonant with that of the state [201] and desired to protect the public freedom.[202]

Arguably, from Cicero's remarks the *populus Romanus,* the diminution of whose "greatness" (*maiestas*) was a matter for determination by the equestrian jurors, had as a result of the cohesion of the various groups in opposing Saturninus and Glaucia,

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[196] Cic. *Rab. Perd.* 7.20: "*fit senatus consultum ut C. Marius L. Valerius consules adhiberent tribunos pl. et praetores, quos eis videretur, operamque darent ut imperium populi Romani maiestasque conservaretur. adhibent omnis tribunos pl. praeter Saturninum, praetores praeter Glauciam*".

[197] Bauman (1967) 52.

[198]Cic. *Rab. Perd.* 7.20: "*qui rem publicam salvam esse vellent, arma capere et se sequi iubent. Parent omnes*".

[199] Cic. *Rab. Perd.* 7.20.

[200] This point is made by H. Grose Hodge the Translator of the Loeb Edition of the *Pro Rabirio Perduellionis Oratio* at note (a) on page 472.

[201] Cic. *Rab. Perd.* 7.20: "*cum omnes omnium ordinum homines qui in salute rei publicae salutem suam repositam esse arbitrabantur arma cepissent*".

[202] Cic. *Rab. Perd.* 7.26.

become all of the Roman people under the aegis of the Senate and its magistrates.[203] It was no longer just the coalition previously discussed which Saturninus would have regarded as the Roman people. To Saturninus' present enemies the *populus* "was the whole community directed by the Senate".[204]

The *boni* did not seek to repeal the *lex Appuleia* after Saturninus. This was due to their confidence that they could manipulate the application of the statute to their advantage. The *boni* would claim that the *populus Romanus* for the purpose of determining *maiestas minuta* was the whole of the Roman community under their benevolent influence. Thus, the statute itself had an inbuilt ambiguity in the expression *maiestas populi Romani* which was readily exploitable.[205] What constituted the sovereign majesty of the Roman people was from the start "a glorious playground for the great orators of the Republic".[206]

17. Summation

Saturninus had every reason to entertain a "Tiberian" like resentment [207] towards his own order. He had been unceremoniously dismissed from his office as *quaestor Ostiensis* in 104 and replaced by the *princeps senatus* M. Aemilius Scaurus. Driven by *dolor*, Saturninus stood for the people's office and was duly elected.

His political advancement was dependent on his courting of the urban proletariat, the *equites*, the furloughed soldiers of Caius Marius and later the rural voters. To his credit he was apparently able for a reasonable time to maintain the amalgam of these

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[203] It is likely that the Marian veterans who had supported Saturninus' second agrarian bill shifted their allegiance when they observed that their general was seeking to be reconciled with the senatorial order as his actions in enforcing the *scu* of 100 indicates.

[204] Cloud (1994) 519.

[205] It can be suggested that *ambitus* presented the same sort of definitional problems. But Cicero in a letter to Appius Claudius (*Fam*. 3.11.2–3), in which he congratulates Claudius on beating a charge of *maiestas*, refers to the offence of *ambitus* as being *apertus*:

> "You may ask what difference it makes — corruption or lèse-majesté. None at all, as to the substance…. Still there is something indeterminate (*ambigua*) about a lèse-majesté charge, in spite of Sulla's ordinance penalizing random declamation against individuals, whereas corruption is clearly defined (*ambitus vero ita apertam vim habet*) — there must be rascality on one side of the case or on the other. For obviously the fact, whether improper disbursements have or have not taken place, cannot be unknown."

Seager cites the passage and states: "Unlike *ambitus* where the issues were cut and dried, *maiestas* gave occasion for malicious prosecutions and sophistical defence."

[206] Seager (2001) 153

[207] Maranon (1956).

groups. This allowed him to promote his legislative programme which followed that of the Gracchi whom he greatly respected.

The *lex Appuleia de Maiestate* was, in 103, his first statute. Patently an essential purpose of the statute was to restrain repetition of the irresponsible and incompetent campaigning of Roman generals by making them accountable to the Roman people. Saturninus recognised that the Roman people were transfixed by the fear of an invasion from the barbarians in the north and were enraged by the catastrophic campaigns of Caepio and Mallius in Gaul, resulting in the destruction of the Roman armies at Arausio.

Another important reason, we have suggested, for the promulgation of the statute was Saturninus' interest in regulating foreign affairs through the use of the people's legislative power. The *maiestas* statute and the piracy law exemplified this. A statute which provided for the charging of Roman administrators under the provisions we have described as the Relevant Passages would be significant to the *peregrini*. They may well have thought that Roman concern to bring its administrators into line would bode well for the security of their provinces. Proscribed action now went beyond mere restitution of property stolen by governors. Further, as it was possible for facts which fell outside the categories in the Relevant Passages to give rise to a claim of *maiestas*, *peregrini* might accept that this potential for the expansion of the offence would be of advantage. The capacity of the jurors to deal with new facts and determine whether they constituted misconduct inevitably opened up a new basis for provincial complaints and for errant generals to be punished. Having regard to Saturninus' interest in foreign relations we may surmise that the *maiestas* jurisdiction with its potential for expansion was designed, *inter alia*, to promote Rome's image and maintain relationships with Rome's allies and friends.[208]

Subsidiary reasons also came with the statute. The *equites*, now restored to the control of all of the standing courts would be well disposed towards the tribune and could be expected to support his legislative and judicial measures. Saturninus would

[208] There may even be an argument that the *peregrini* themselves could sue under the 103 statute. This argument would be based on the oft-cited view of Badian that the enabling laws of the standing courts after 123 embodied a constitution similar to that of the *lex Acilia*. Moreover, Cicero in the Verrines 2.4.84 perhaps implies that he (as advocate for the Sicilian *peregrini*) could have sued Verres for *nostrae, gloriae, rerum gestarum monumenta evertere atque asportare ausus est.*

also have enjoyed the discomfort of the senators at the prospect of their conduct being subject to the discretionary judgement of the *equites*.

What this study argues was an important feature and perhaps an innovation was that Saturninus either provided for in his statute or encouraged or allowed to develop a discretionary jurisdiction whereby prosecution might be brought under the statute on facts that were not included therein. The trials of Norbanus and Caepio the Younger in 95 reveal the existence of the jurisdiction and Seager has contended that this jurisdiction was available from the commencement of the law. The practice was effected by each side positing a definition of *maiestas minuta*. Thus, even though the impugned conduct fell outside the statute, this did not impede a prosecution. *Patroni* pleaded a definition and it was for the *equites* in their discretionary judgement to determine which of the definitions was persuasive and accordingly who succeeded.

Saturninus, arguably, proceeded on the basis that he could repress inimical behaviour towards his programmes or policies by prosecuting a definition in the court which encompassed the behaviour and by seeking to persuade the *equites* that the definition should be punished as *maiestas minuta*.

Chapter 8. Sulla and the Standing Courts

1. Preamble

In the previous chapter we argued that the tribune, L. Appuleius Saturninus, had effected the establishment of the *quaestio de maiestate* in order to repress repetition by senatorial generals of the irresponsible conduct of foreign wars. We also suggested that Saturninus had an interest in Roman foreign policy. His court and enabling law would signify to *peregrini* that the Romans were serious about prosecuting their Roman administrators for military incompetence. We posited that *peregrini* might take some comfort from this and that their own grievances about provincial rapine would be more favourably treated. Our final chapter addresses the attitude of the dictator Lucius Cornelius Sulla to the *quaestiones perpetuae* and the reasons for the adjustments he made to this system of criminal justice. How did he go about this task? Were these adjustments part of a consolidated plan or was his approach piecemeal?

To Sulla there was an essential requirement for the restoration of some semblance of sound government after more than a decade of war with its debilitating impact on Roman manpower and the economy. Ostensibly this was a strong Senate with effective control over the other instruments of state[1] — an oligarchic form of administration with the Senate as its centrepiece.[2] His objective was to restore the authority and powers of the Senate, which since 133 had been "subject to intermittent challenges and gradual erosion".[3]

Sulla made clear from the start his intentions. The dictatorship was only to be a temporary measure to allow him to stabilise Rome and Italy. He sought to re-establish and enhance the powers of the Senate which had been convulsed by civil strife.[4] Sulla intended to confer on it greater authority as the cornerstone of

[1] Keaveney (2005) 140; 145.
[2] Gabba (1976) 137.
[3] Seager.*CAH*. Second Edition. 1994. Vol 9. p.200.
[4] App *BC.* 1.98.

Roman government. His political credentials were patent: "He stood as champion of the 'causa nobilium', and he restored the government of the Optimates." [5]

Sulla saw the permanent courts as an integral part of achieving his objectives. The issue of the manning of the juries in the standing courts had been an irritant for forty-odd years. He wanted the Senate to have control of these institutions as well as the other apparatus of government. Sulla's objectives necessitated that senators should now be restored to the exclusive occupation of the jury benches. It would not have been in keeping with his view that the Senate should be the dominant force in the republic if, in 81, the juries which sat in judgement in the permanent courts on the conduct of senators were not manned exclusively by senators.

Nevertheless, it is important that we recognise that there would have been differing shades of opinion in the *Curia* about Sulla and his objectives. Measures providing for the establishment or restoration of the *equites* as exclusive jurors in the permanent courts, hardly beneficial to senators, would had been carried in the past in the *concilium plebis*, where plebeian senators would have voted. These measures would also have been promoted by senators as magistrates. Senators had a diversity of views, and none more so than those who had survived Sulla's proscriptions. The *Curia* housed diverse views.

In 81, Sulla instituted two significant procedural moves. The first was the transfer of the permanent courts to the Senate:

> "The right to sit in judgement in the courts which C. Gracchus had taken away from the Senate and given to the knights, Sulla gave back to the Senate."[6]

Despite Velleius' language, the transfer of the courts was to the Senate from the mixed juries under the *lex Plautia* of 89, and not from the *equites*.

Tacitus also records this and another change:

> "By a law of Sulla's twenty quaestors were appointed to keep up the numbers of the Senate, to whose members Sulla had transferred the courts."[7]

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[5] Syme (1962) 125.
[6] Vel. Pat. 2.32.
[7] Tac. *Ann.* 11.22.

To regularise conduct of proceedings in the standing courts in pursuance of his objective, Sulla increased the number of praetors to eight so that a praetor would preside in each court.

Secondly, he increased to 20 the number of *quaestors*, as Tacitus notes. These men would be admitted to participate in the Senate on their appointment even though they would not formally become members until registered by the censors. In this way Sulla introduced a change to the senatorial *lectio*, which had previously been effected by the censors. At the rate of 20 appointments a year there would be some delay in replenishing the numbers of senators lost in the appalling events of the previous decades.

The quaestorship was in the gift of the *concilium plebis*. We might therefore expect that, on occasion, men elected to the quaestorship would entertain views at odds with those of the dictator. We should not see this as a concession to the prospect of a more representative Senate. Sulla was master of all he surveyed. He could readily by subtle force or insinuation ensure that those elected did not have the potential to be thorns in his side.[8]

Our overarching question requires that we enquire as to whether Sulla continued the process of establishing permanent courts on a piecemeal basis (as we have argued had been the Roman approach) and of relying on them. We will therefore investigate the reasons for such new courts as Sulla established and for any modifications to the jurisdiction of the existing permanent courts.

The people elected Sulla as dictator for the enactment of such laws as he himself might deem best and for the regulation of the commonwealth. (App.*BC*. 1.99.) Sulla therefore had *carte blanche* for making whatever changes to the institutions of government he saw fit. Above all Sulla had absolute control resulting from his position as dictator and the backing of his army:

> "But Sulla, like a reigning sovereign, was dictator over the consuls. Twenty-four axes were borne in front of him as dictator, the same number that were borne before the ancient

[8] Steel (2014) 661.

> kings, and he had a large body-guard also. He repealed laws and enacted others."[9]

The proscriptions as well must have removed any significant opposition in the Senate, but mute resentment must have festered. His judiciary law of 81 was part of his purpose to invigorate the moral authority and political status of the Senate.

2. *Lex Plautia* of 89

When Sulla introduced his judiciary law in 81 he was confronted with at least six standing courts whose jurors were of mixed origin.[10] The procedure for the selection of the jurors for these courts would have been changed in 89 from that mandated by the *lex Acilia*, as scholars accept, to that established by the *lex Plautia*.[11] Under this law each tribe was required to appoint each year 15 of its own members to serve as *iudices*. The 525 men thus elected each year pursuant to the *lex* represented the *album* from which jurors were drawn for all of the six standing courts.[12] The effect was that the jurors were no longer to be selected *wholly* from the *equites*, who at that time had been preponderant in the courts.[13] The statute made no provision for any increase in the number of senators. No doubt the reason why the *nobilitas* assisted the passage of the law was that it broke the control of the *equites*.[14]

The weight of scholarship and analysis suggests that the *lex Plautia* was a *lex iudicaria* intended to apply to all of the standing courts,[15] and that as a *lex*

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[9] App.*BC*.1.100.

[10] These comprised the *quaestiones*, respectively, *de pecuniis repetundis*, *de ambitu* (electoral bribery), *de maiestate* (treason), *de peculatu* (embezzlement) *de sicariis*, *de veneficiis* and possibly *de iniuriis* (assault and battery, defamation and personal harm).

[11] Prior to the *lex Plautia* the courts had been manned by *equites* exclusively in accordance with the *lex Acilia.*

[12] Cic.*Corn*. and Ascon.79C.

[13] Cic.*Corn*. and Ascon.79C: "*cum equester ordo in iudiciis dominaretur*".

[14] Cic.*Corn*. and Ascon.79C.

[15] Balsdon *PBSR* (1938) 98 and Griffin (1973) 110 represent the opposing positions. Each refers to Cic. *Verr*.1.1.38. Balsdon contends that the passage does not exclude the possible existence of mixed juries of senators and *equites*.

Griffin (1973) 120 argues that the passage excludes mixed juries.

Arguably rhetoric was involved. Cicero was contrasting what he painted as the halcyon days of control by the *equites* with the potential venality of the senatorial jurors open to being bribed by Verres. The aborted attempts of Q. Servilius Caepio (105) and M. Livius Drusus (91) to restore the standing courts to the Senate could be taken as mere inconsequential blips, which did not present difficulties for his rhetoric. If there were mixed juries under the *lex Plautia* and these stood for

iudicaria the procedures in the *lex Plautia* laid down in 89 would have replaced those stipulated by the enabling statutes of the standing courts.[16] How long did the new judicial selection last? Despite a problem of sorts presented by the language of Asconius in describing the law,[17] it would appear that the *lex Plautia* continued in force from 89 up to 81.[18]

3. The laws of 88

In 81 Sulla introduced his senatorial adlection law whereby 300 *equites* were admitted to the Senate. This 81 judiciary law was in part a revival of one of three earlier measures, which Sulla and his colleague, Q. Pompeius Rufus, had promulgated as consuls in 88. Appian records this adlection law of 88:

> "They enrolled 300 of the best citizens at once in the list of senators *(κατέλεξανὲς τὸ βουλευτήριον… ἐκ τῶν ἀρίστων ἀνδρῶν τριακοσίους)*, who had been reduced at that time to a very small number and had fallen into contempt for that reason."[19]

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eight years, it is hard to accept that Cicero did not turn his mind to it to it. Arguably, in his enthusiasm to make his rhetorical argument, Cicero was not prepared to let this *lacuna* in the equestrian control of the courts, which was more substantial than the 106 gap, stand in the way of his anti-senatorial judicial attack.

Interestingly, Richardson (1998) 51, too, acknowledges the possibility that Cicero conveniently forgot, for the purposes of his rhetorical effect, the struggle which led to the passing of the 106 law. We might note Cicero's language — "*annos prope quinquaginta continuos*". This is not a statement that the *equites* were commanding the standing courts for absolutely the whole time.

[16] We have had occasion, several times in this dissertation to refer to Badian (1962) 208. He claims that each of the permanent courts when created probably received the same kind of constitution as the extortion court crated by the *lex Acilia*.

[17] Cic. *Corn*. and Ascon.79C records: "*nam ex ea lege tribus singulae ex suo numero quinos denos suffragio creabant qui eo anno iudicarent*". Little attention appears to have been given to *eo anno*. Squires (1990) 121 renders these words as "for that year". Such a rendition could well suggest that the exercise of tribal appointment was only to occur *in the first year* and not in subsequent years. The problem can be resolved by simply translating the words as 'from that year". Moreover, the use of the imperfect tenses suggests the idea of continuity of the action rather than a once and for all appointment in 89.

[18] Gruen (1968) 236: "the conjecture that Cinna repealed the lex Plautia and transferred the courts entirely to the *equites* is without foundation and superfluous". See also Gruen (1968) 256.

[19] The aorist *κατέλεξαν* indicates that the action of enrolling the new senators was a fait accompli and that the new senators did take up office. Santangelo (2006) 8 note 3 argues that the Sullan arrangements were never enforced. However, he provides no evidence to support this conclusion. The time which elapsed between the passing of the law in 88 when Sulla and Pompeius were consuls and its violent annulment by the Marians in 87 must have been sufficient to permit their enrolment. Sulla remained in control, backed by his army, and did not leave for Asia until 87 (App. *BC*. 1.63; 64). Marius did not return to Rome until well into Cinna's consulship in 87 (App.

The reference to the "best citizens" must have been to the *equites* because there were insufficient remaining men who were senators to fill the complement.[20] Otherwise they would have been adlected. Appian also describes the other two measures thus:

> "They proposed that no question should ever again be brought before the people which had not been previously considered by the Senate, an ancient practice which had been abandoned long ago; also that the voting should not be by tribes, but by centuries, as King Servius Tullius had ordained. They thought that by these two measures — namely, that no law should be brought before the people unless it had been previously before the Senate, and that the voting should be controlled by the well-to-do and sober-minded rather than by the pauper and reckless classes — there would no longer be left any starting-point for civil discord."[21]

Sulla did not interfere with the personnel who could be selected as jurors under the *lex Plautia*. What Sulla did do, by the first measure mentioned by Appian, was to expand the pool of senatorial candidates available for appointment as jurors by adlecting *equites*. Importantly, these members of the equestrian order were selected by the consulars.

What he did by the third measure was to alter the method of appointment of jurors in the standing courts. The popular vote for this appointment was conferred on the centuries in the *comitia centuriata*. The voters in *comitia centuriata*, rather than the *consilium plebis*, now selected the 15 voters required to be appointed under the *lex Plautia*. Sulla anticipated that these voters would favour persons of similar

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BC. 1.67). Further, the fact that the law was promoted by the consuls suggests that that its passage was well supervised and expedited.

[20] App. *BC*. 1.35. Appian employs the compound form *προσκαταλεγῆναι*to to describe the enrolment of *equites* in the Senate by Sulla in 81 and the same compound to note Drusus enrolling an equal number of *equites* in the Senate. Therefore when we find Appian using *κατέλεξαν* to describe the enrolment of the "best men" in the Senate by Sulla and Pompeius in 88, we may suggest that, having regard to the similarity in usage and context with the other laws mentioned, it was the *equites* who formed the best men admitted to replenish the Senate. The *inopia senatorum* made the *equites* the next best choice in terms of class to the "*boni*. (*allecti dicebantur apud Romanos, qui propter inopiam ex equestri ordine in senatorum sunt numero adsumpti*". (Sexti Pompei Festi De verborum significatione quae supersunt: cum Pauli epitome. Liber 1).

[21] App. *BC*. 1.59.

station and that this would be reflected in those men appointed to the permanent courts. As against our thesis, Asconius claims that both senators and plebeians were elected under the law as jurors.[22] These plebeians of course may well have been members of the upper orders. Moreover, Asconius may be offering a sweeping view which does not take account of the fact that it was only for a year or so that the voters in the *comitia centuriata* replaced those in the *concilium plebis*.

It is likely that these equestrians did take up the senatorial office, albeit temporarily, under the 88 statute. Sulla would have appreciated the benefit of introducing members of the equestrian order into the Senate, bearing in mind that many of them would have accumulated considerable judicial experience in the permanent courts. The *equites adlecti* as "new" senators would have outnumbered the "old" senators. However, considering the similarity for the most part of their occupations, more than likely as great landowners, Sulla might have expected that the formidable *auctoritas* of the latter would have a favourable impact on the new senators. This influence would feed into their decision making if, and when, they were appointed by the timocratic voters as jurors. No doubt Sulla gave great thought to this issue when selecting them.

In 88 Sulla legislated for the Senate to have control over the promulgation of laws and for the voters in the *comitia centuriata* to have the exclusive suffrage. He wanted voting on legislation to be carried out by those he saw as responsible men who he believed had similar objectives to his own. Sulla positioned the legislative procedure firmly under the aegis of the upper orders. It would have required a split in their ranks of the centuries of the upper orders before the lower ranks would have enjoyed any voting opportunity.

Sulla thus showed that he was concerned to ensure that the jurors in the permanent courts comprised men with upper class leanings and he achieved this by tampering with the legislative voting procedure. Sulla had no plans to modify the jurisdiction of the permanent courts and was content with their operations. However, by introducing the measure, the effect of which was that the mixed jurors, who then manned the courts as a result of the *lex Plautia*, be appointed by the centuries, Sulla showed his colours. He wanted men as permanent court jurors,

[22] Cic. *Corn*. and Ascon.79C.

whom the higher orders, who controlled the voting in the timocratic assembly, would favour. Sulla clearly envisaged that these elected jurors would be sympathetic to the cause of senators who were arraigned before the permanent courts. Decisions which went the way of the elite might be expected. In this he anticipated his stance in 81.

Sulla's expectations were to be short lived.

In 87 Caius Marius extirpated the laws introduced in 88 by Sulla. Seeking awful vengeance against his inveterate enemy, Marius procured the rescission of the adlection law and the other laws of Sulla and Pompeius.[23] On the rescinding law being passed, the provisions of the *lex Plautia* dealing with appointment of mixed juries by the tribes would have been revived. The rescinding law must have brought about the return of the voting power to the *concilium plebis*. It would also have dissolved the restriction on laws being presented to the people without prior senatorial approval.[24] Among other things, the rescission undid Sulla's preferred option for the adjudication in the permanent courts and also reduced the pool of senators to an undesirable level.

Finally, since Marius was bent on the destruction of his rival's laws, we can reasonably surmise that he would not have been content to allow those who took their seats in the Senate on the strength of those laws to stay put. The rescinding law of Marius probably stipulated for the dismissal or removal of the *equites* appointed under the 88 judiciary law.[25]

4. The judicial law of 81

Understandably, with his plans from 88 having been soon derailed, Sulla showed in 81 that he was not interested in the mixed juries for permanent courts under the *lex Plautia* continuing. Our sources record his decision in terms of a law

[23] App. *BC.* 1.73.

[24] Would the rescinding law provide for the reinstatement of the earlier laws.? Or was it taken that the earlier laws were only suspended and were revived by the repeal of Sulla's laws by Marius' measure without the need to specify this in the latter law?

[25] In the case of the judiciary law, there was no prior law which would automatically be reinstated Arguably, in preparing the formalities required for the annulment law the draftsman would have addressed the need to clarify and provide law what was to from the repeal of the judiciary law. Otherwise confusion would have reigned

transferring the courts from the *equites* to the Senate.[26] This law effected the repeal of the *lex Plautia*.[27] The manner in which the authorities speak of the transfer is puzzling if the mixed juries in fact had continued for most of the time since 89 under the *lex Plautia*., as we have noted above. The true position should surely be that Sulla transferred the courts from the mixed juries to the Senate and that the reference to the *equites* is slippage.[28]

We proceed on the basis that, after the repeal of the *lex Plautia*, the procedural provisions of the *lex Acilia*, particularly in relation to jurors, adopted by in the enabling laws of each of the standing courts, were fully reinstated.[29] Sulla, however, was now transferring the permanent courts to a Senate grievously diminished by the savagery of the civil wars and his own proscriptions. A major problem for his permanent court policies was the size of the Senate. Scholars estimate that in 81 the Senate would have comprised about 150 men,[30] a tragic reduction in the traditional figure of 300 souls.[31]

Sulla addressed the deficiency for which he was largely responsible by a law adlecting about 300 members from the best of the knights to the Senate, on the basis, however, that the tribes would determine the identity of these favoured individuals.[32] Appian records its terms:

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[26] Cic. *Verr*.1.37–38; 47–49; 2.2.27; *Pro Cluent*.55. Vell. Pat. 2.32. Tac. *Ann*. 11.22.

[27] Gruen (1968) 255.

[28] It is possible that there may have been some legislation in the period between 87 and 82 providing for the restoration of the courts to the *equites* But it is highly unlikely that such a significant measure would have escaped recordal in the sources. It is, of course, possible that after repealing Sulla's early legislation, particularly the judicial law of 88, Marius and Cinna also repealed the *lex Plautia*. This might then have led to the pre-*Plautia* situation where the *equites* were the sole jurors. Either suggestion would help to explain why the sources refer to Sulla effecting the transfer of the courts from the *equites* to the Senate.

[29] Any argument that the constituent features of the *lex Acilia* in the enabling laws of the standing courts would have been repealed by these judicial laws of Sulla would seem untenable. The provisions for jurors, which were altered from the Gracchan law by the 106 law of Caepio, were reinstated with the introduction of Glaucia's law. We are singularly bereft of information about the repeal of Roman laws and whether their reinstatement necessitated specific provisions. It does, however, seem that obsolete or ancient laws may have remained on the statute books or rather tablets. Richardson (1998).

[30] Santangelo (2006) 8;15. Gabba (1970) 142.

[31] App. *BC.* 1.35. Syme (1938) 10 declares: "Three hundred is the conventional total of the Senate before Sulla." Gabba (1976) 143 castigates what he regards as Appian's error in saying that the Senate was reduced to 300 members. This was the *normal* number at the time. Weinrib (1970) 416 note 10 agrees with Gabba.

[32] App. *BC.* 1.100. Appointment by the tribes of the personnel for the juries was a feature of the *lex Plautia*. Gruen (1968) 258 argues that this indicates that the statute was still probably in force in 81.

> "To the Senate itself, which had been much thinned by the seditions and wars, he added about 300 members from the best of the knights, taking the vote of the tribes for each one."[33]

Gabba concludes that this judicial law was dictated by the necessity to supply "an appropriate number of jurors for the quaestiones".[34] With this adlection the number would then arguably have stood at around 450 senators.

Sulla had recourse to other methods as well to populate his new Senate. As noted, he increased the number of quaestors to 20 and provided that they would become senators on their appointment. Sulla also augmented the numbers by introducing men from the ranks and commoners to the Senate. Sallust attributes to Sulla the importation of common soldiers (*gregariis militibus*) into the Senate.[35] Dionysius of Halicarnassus goes further. Sulla, he asserts, introduced ordinary or commonplace men (*ἐπιτυχόντων ἀνθρώπων*) into the Senate.[36] These sources give no information as to the numbers involved and are patently hostile to Sulla. Despite the sneers of the sources, it is probable that these recruits represented men who had given loyal service to Sulla and experienced with him the vicissitudes of a decade of internecine strife. He thereby broadened the base for the Senate for the future.[37] This must have been a deliberate decision since Sulla could have added more men from the *equites*.[38]

In the aggregate, our sources imply that more than 300 men would have been appointed. The number of senators thereafter would have been more than 450, perhaps as many as 600.[39]

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[33] App. *BC.*1.100.

[34] Gabba (1976) 147.

[35] Sallust *Bel.Cat*. 37.6: "*Deinde multi memores Sullanae victoriae, quod ex gregariis militibus alios senatores videbant*".

[36] Dion. Hal.77.5: *βουλήν τε γὰρ ἐκ τῶν ἐπιτυχόντων ἀνθρώπων συνέστησε.*

[37] Sulla may have taken his cue from Q.Fabius Buteo, the dictator, who in 216 had entered in the roll of senators, depleted by the Punic Wars, commoners. These included men who had plunder of the enemy affixed to their houses or who had received the civic wreath. This was the reward granted to a soldier who had saved the life of a fellow citizen. Livy 23.22; Gabba (1976) 144.

[38] Badian (1972) 59 has argued that Sulla sought: "to emasculate the 'politically conscious' equestrian class by converting the most ambitious men into harmless backbenchers in the Senate". This statement sits ill with his earlier statement that the equites were essentially non-political preferring *otium* and their profits. Badian (1964) 224.

[39] Gabba (1970) 142 suggests the numbers may have been as high as 600.

Sulla wanted the permanent courts to operate effectively. However, the then compliment of the Senate could not possibly have provided the numbers required to man the jury panels dictated by the *lex Acilia*, which had been the paradigm for the five existing permanent courts and for the two which Sulla added. If the provisions of the *lex Acilia* applied to the enabling laws for the seven courts, the praetors in accordance with the statutory dictates would have had to enrol 450 men for each of the courts as its album. Arithmetically some 3,150 men would have been required to provide the panels for the seven courts. Around 600 senators would not have been enough for seven courts.

The proposition that such an album was required is patently unarguable and leads us to suppose that Sulla took a different course. It is plausible that he resolved the problem thus. He fixed the album from which the jury panels for each of the standing courts were to be drawn at 450 men or such other number, as was in his view appropriate having regard to the size of the Senate and the commitments of its members. He then reduced the number of men who would finally form the jury panel after challenge at a much lower figure than 50[40] perhaps 20. These provisions he would have included in the 81 law and introduced it as a *lex iudicaria* applying to all the permanent courts.

Of course, no difficulty arose whilst the standing courts remained the sole province of the *ordo equester* before 89. Lintott suggests the available complement may have amounted to 21,000 *equites*.[41]

Sulla achieved his aim of procuring a Senate which was loyal to him and his objectives by these adlections. The new senators owed a debt of gratitude for their elevation. Again, by making membership of the Senate the qualification for the enjoyment of the right to adjudicate in the courts, Sulla no doubt sought to assuage the resentments of the old senators. They formed but a small rump in 81. Regaining control of the juries would have renewed their prestige. His own authority was conceivably sufficient to ensure that old senators did not rail against

[40] The size of panels under the *lex Acilia*.

[41] Lintott identifies some 21,000 men who may have been competent to serve in the standing courts as cavalrymen although he acknowledges that some may have been disqualified by being related to senators in the proscribed manner under the *lex Acilia*. Lintott (1992) 20.

the newcomers. In any case, the new senators would have out-numbered the old.[42] At the same time he did not lose the judicial experience of the *equites* for the courts.[43]

The only area of doubt may have been the men who entered the Senate as quaestors having been appointed to this office by the *concilium plebis*. Having thus been favoured by the people, they may have entertained sympathies contrary to those of Sulla. However, Sulla's power and the gratia of the Senate they entered would surely have been instrumental in overcoming any anti-Sullan attitudes they entertained.

5. Method of appointment of Senators

Sulla wanted the cream of the *equites* for the Senate and professedly employed the services of the tribes to select these 300 worthies. The *equites* had lost their sole adjudication rights in the courts as a result of the *lex Plautia a*. Sulla sought to restore the dignity of the order by providing for the exclusive participation of the three hundred when they became senators as jurors in the courts. These men regained the opportunity to become involved in the administration of the state and the empire. From Appian's account it appears that Sulla retained control of the selection, as indeed he well could:

> "To the Senate itself, which had been much thinned by the seditions and wars, he added about 300 members from the best of the knights, taking the vote of the tribes on each one."[44]

It is possible that Appian is referring to the passage of a law in the *concilium plebis* for the appointment of Sulla's slate of preferred candidates and not to any submission to, and approval by, the tribes of Sulla's nominees on an extra-legislative basis. Although he was omnipotent, Sulla, in the interests of certainty for posterity for a most important part of his objectives, namely the settling of the jurors for the permanent courts, would have wanted the legal position to be

[42] App. *BC*. 1.55 makes clear that the in 87 they outnumbered the old citizens and Sulpicius promised them redistribution over all of the 35 tribes. He did this in part to secure their support for the reallocation of the province of Asia to Marius.

[43] Badian (1962) 232 note 124.

[44] App. *BC*. 1.100.

beyond challenge.[45] The *concilium plebis*, the legislature, and not the timocratic assembly was the right body to ensure this outcome. This was not an impartial move with an ongoing entitlement to replenish the ranks of the Senate. It was a once and for all action limited to the single appointment. The new initiative for this purpose was to be the recurrent admission of the 20 quaestors each year to the Senate.

Any suggestion that the tribes had independence or freedom of action to select whom preferred must be taken with a grain of salt. The threat was ever present that Sulla could surround the assembly with a bevy of his veterans, or of some of his *Cornelii*,[46] who would not be too shy to indicate those whom their master wanted for his senate. Thus, Strachan-Davidson maintains that the people would have been restricted to voting yes or no to Sulla's slate of nominees.[47] Either way the consequence would surely have been 300 *equites* who would have favoured the oligarchic ideals professedly attributed to Sulla. The people, in electing the quaestors and indeed quaestors themselves, were exposed to the same potential menace.

Marius and Cinna had annulled all of the laws of Sulla in 87 but the dictator did not seek to renew them now. He declined to reinstate the centuriate vote for legislation, preferring instead to resort to the *concilium plebis*. Nor did he reinstate his other 88 law which ordained that bills had first to pass muster with the Senate before being presented to the *contiones*.[48] The emasculation of the right of tribunes to bring legislation before the people and the barring of tribunes from further office which Sulla effected was enough to make any legislative role of the people of little force or importance. With the legislative function of the people so

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[45] Sulla would have been fully conscious of Marius success in rescinding in 87 Sulla's laws.

[46] App. *BC*.1.100.

[47] Strachan-Davidson (1902) 105.

[48] App. *BC*. 1.59. Appian notes (1.97) that all of Sulla's actions and deeds as consul, or as proconsul, were confirmed and ratified. But Keaveney (1983) 198–199 argues that it was never seriously intended that these laws should ever be put into effect. Although declared a *hostis*, and his laws repealed, Sulla refused to accept, during his successful campaigns against Mithridates, that he was other than consul and proconsul. Cinna and his accolytes were the real *hostes*. When he emerged victorious, it followed that his claims should be recognised and that all that he had done in the previous six or so years should be officially acknowledged although on the basis that it was never intended that the laws of 88 should without more (presumably re-enactment) be enforceable.

hamstrung, the failure to make its deliberations subject to prior vetting by the Senate would have been of no consequence.

6. The new *quaestiones perpetuae*

Sulla established two standing courts. The first was designed to deal with the forging of wills and the debasing of the coinage (*quaestio de falsis (testamentaria/ nummaria*). [49] The second was intended to combine the functions of the earlier poisoning and assassination courts (*quaestio de sicariis et veneficiis*).[50] The other five standing courts comprised the *quaestiones*, respectively, *de pecuniis repetundis*, *de ambitu* (electoral bribery), *de maiestate* (treason), *de peculatu* (embezzlement) and possibly *de iniuriis*.

Sulla clearly was content to maintain the standing courts principle since he both created the first two mentioned above as such and reviewed the procedure of the other five. The two courts he established continue the use, which had begun with the *lex de sicariis*, of the standing courts to deal with offences which were "common"[51] crimes, in that they might be committed by any citizen and not just the members of the senatorial or equestrian order.

It is most unlikely that Sulla would have contemplated vesting jurisdiction over these two new subject matters in a popular court. As an experienced politician, Sulla would have been well aware of the notorious fickleness of the people's judicial tribunals and the uncertainties emanating from their process. Sulla, in any case, would have been conscious of the fact that he had won few friends among the people. This was because he had reduced popular political participation to a low ebb with his attacks on their privileges and those of their representatives, the tribunes of the plebs. Permanence, consistency and reliability of judgement from a source sympathetic to Sulla's objectives were what counted.

Sulla could have some confidence in the structure and machinery of the standing courts established in accordance with the precedent of the *lex Acilia*. He could

[49] Cic. *Verr*. 2.1. 108: *Cornelia testamentaria, nummaria…*

[50] Acceptance of a bribe by a judicial officer to bring about an illegal condemnation was also caught under the law consolidating this *quaestio*. Cic. *Pro Cluent*.148. Gruen (1968) 262.

[51] Botsford (1909) 419.

accept that the *modus operandi*,[52] as originally established by the *lex Acilia*, meant that the standing courts had a stable framework. However, by seeking the selection of the best of the *equites* as senators, Sulla introduced a pool of new senatorial experience from which jurors would be selected. The selection process by the tribes, dictated by Sulla would have favoured those of the equestrian order who had had judicial experience. Sulla no doubt hoped, that, by coming into close proximity with members of the senatorial "old guard", the new senators would eventually conduct their judicial task with the *auctoritas* which Sulla believed was a characteristic of the members of the Senate.

Sulla's attitude to the standing courts was governed by his overall objective of reviving and raising to their former height the authority and powers of the Senate. He approached each court or the establishment of the new courts with this in mind. There was a consistent approach in determining what, if any, changes to the jurisdiction were required.

7. The *quaestio de testamentaria/nummaria*

We have no details of the provisions of the enabling law for this court, to which Cicero alludes,[53] except what we know from the remarks of the jurists. The court dealt with two discrete areas, counterfeiting and forgery. Before the creation of Sulla's enabling law for this court, such conduct had only been regarded as morally reprehensible as Cicero explains:

> "The Cornelian laws against forgery of wills, for instance, and coining, and a number of others, in which no new legal principle is set up for the community, but it is provided that what has always in fact been an immoral action shall become subject to criminal proceedings before the community after a fixed date." [54]

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[52] In particular, the control of the praetor over the running of the proceedings, the availability of means for the collection of evidence, the methods of voting using the marked tablets and the pressure on the jurors to reach a decision, the procedure for the assessment of damages and the imposition of fines and their collection, and the rewards available to successful prosecutors.

[53] Cic.*N.D.* 3.74.

[54] Cic.*Verr*.2.1.108. The prosecution and punishment of the Bacchanalian conspirators in 186 suggests that the Romans did regard forgery of wills as a criminal offence, indeed a capital one. Livy 39.18: "*qui falsis testimoniis, signis adulterinis, subiectione testamentorum, fraudibus aliis*

The passage of the Cornelian law indicates that the mischiefs of counterfeiting and testamentary forgery had been prevalent for some time.[55] Let us deal with the two offences separately.

7.1. *De Nummaria*

In 81 Sulla undoubtedly saw the need to act against counterfeiting. For him it was a distinct threat to the stability of his regime. The *lex Cornelia testamentaria nummaria*[56] proscribed the falsification of silver coins and the distribution of tin or lead coins as silver coins.[57] The offending conduct went to the covering of base metal coins with a veneer of silver or the debasing otherwise of coins of genuine weight, for example by the practice of clipping.[58] The jurists make clear that the law dealt with the counterfeiting of coins.[59]

Debasing of the currency, which began with the proposal of M. Livius Drusus in 91,[60] allowed the counterfeiters to draw their profits.[61] Sulla knew that over the previous decade there had been serious deficiencies in the Roman money supply, which provided significant opportunities for counterfeiters to engage in practices which were damaging to the economy and the stability of the state. These shortages arose mainly from Rome's military commitments in that decade. The armies provisioned for the Social War, from 90 to 88, undoubtedly weighed heavily on the resources of Rome.[62] Hoarding of coinage and the lack of money resulted from the economic exigencies of the war.[63] There was a requirement for

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contaminati, eos capitali poena adficiebant". However, this may be regarded as a special case since an extraordinary court had been set up to deal with the Bacchanalians and their conduct and their convictions are not necessarily evidence that the forgery of wills had become a "standing" offence thereafter.

[55] Barlow (1980) 218.

[56] Cic.*Verr*.2.1.108.

[57] Sary (2004) 132 and sources collected at p.132 note 73.

[58] This entailed shaving off the edges of a genuine silver coin, thereby reducing its weight, and using the clippings or shavings to produce illegal silver coins.

[59] *Digest* (Ulpian) 48.8–9. The shaving, washing or casting of counterfeit silver coins was prohibited under the law, as was the purchase of or sale of base coins of tin or lead.

[60] Drusus carried a law providing for the adulteration of the coinage by the addition of one eighth of bronze to the silver coinage. Pliny *NH*.33.46.

[61] Barlow (1980) 217.

[62] Brunt estimates that Rome put 19 legions into the field in 90, 32 in 89 and 17, as hostilities reduced, in 88. Brunt (1971) 435–440. Rapid mobilisation as well was probably costly. Barlow (1980) 204.

[63] Roman landowners whose properties were situated in Italy lost to the Italian partisans the income and profits thereof and lenders lost their securities. As a result, loans were called in.

money to meet debts. This inevitably encouraged the nefarious skills of counterfeiters. Legal measures adopted at the end of the Social War to ease the debt burden may have afforded temporary relief and stymied counterfeiting.[64] These are likely to have resulted in the restoration of land values and currency beginning again to flow.[65] However, economic stability could go awry, as the murder of the urban praetor, Aulus Sempronius Asellio in 89 shows.[66]

With the outbreak of the Mithridatic War in 88 the credit structure of Roman was undermined again. The monetary deficiencies exposed by the Social War must surely have reoccurred. Inability to service debt and shortage of currency resulting from hoarding would have led to foreclosures and a pronounced slump. Sulla himself experienced the parlous state of the Roman economy when the financing of his command against Mithridates necessitated the sale of antique treasures.[67] Years later Cicero reminded his countrymen, in the starkest terms, of the disastrous impact the declaration of war on Mithridates had had on the delicate balance of credit and finance in Rome, which was heavily reliant on Asian investment.[68]

Again, the time was ripe for the counterfeiters to practice their corrupting arts. Official attempts to ease the economic troubles continued to be made. In 86 the consul, L. Valerius Flaccus, promulgated a law allowing debtors to settle their debts for one fourth of the principal. In 85 the praetor M. Marius Gratidianus, a man of popular sympathies,[69] published an edict which may have checked the

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Financial uncertainty lead to the hoarding of money. Shortage of money, in turn, meant that there was a lack of funds with which to discharge debts and the value of property dropped. Barlow (1980) 204; 213.

[64] In 88 we know from Festus (516.l) that Sulla and Pompeius passed a law providing for the limitation of interest rates to eight and a half percent and the reduction of loans by ten per centum. Barlow (1980) 214.

[65] Barlow (1980) 215.

[66] Appian *BC.* 1.54 records that there was an old law which forbade lending money at interest. However, time had gradually sanctioned the practice of charging interest. The debtors sought to defer payment because of the adverse economic conditions resulting from the Social War. The usurers demanded payment. Livy *Per*. 74 asserts that Asellio sought to resolve the dispute in his court but was slain in the forum by the usurers because he was deciding the cases in favour of debtors. Gruen (1968) 221 suggests that the usurers were *equites.*

[67] App. *Mith*. 22:

[68] Cic.*Pro lege Manila* 19.

[69] Cic. *Brut*. 223: "…Marcus Marius…I recognize not as worthy of the ears of a select audience, but well fitted for the turbulence of popular assemblies."

counterfeiters by providing a means for assaying the denarius.[70] Pliny connects the existence of counterfeiting with the praetorian edict.[71] The edict set a standard of value for the coinage (*ut res nummaria de communi sententia constitueretur*) [72] because the value was so fluctuating that no one knew what he was worth.[73] The edict may also have defined a forensic procedure since Cicero also notes that the edict stated the penalty and the methods of procedure in cases of violation of its terms.[74] The possible prosecution of those who did not observe the agreed rate would have restored faith in the currency.[75]

The edict enhanced Gratidianus's prestige with the people who showed their affection by erecting statues[76] His success with the coinage edict clearly infuriated Sulla who tore down the effigies.[77] Despite this, given the Roman penchant for tralatitious measures, some provisions of this edict, particularly those dealing with the prosecution and penalties may have found their way into the *lex Cornelia*. It is likely that this edict of Gratidianus was the catalyst for Sulla's effort. Sulla saw the advantage of the criminal procedure and penalty inherent in Gratidianus' law.

We must also recognise that throughout the decade the demands for non-military funding, such as the grain doles and civil works, would have taken their toll on public monetary resources.

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[70] Cic. *De Off*. 3.80.

[71] Pliny *NH*. 33.46:

> "In spurious coin there is an alloy of copper employed. Some, again, curtail the proper weight of our denarii, the legitimate proportion being 84 denarii to a pound of silver. It was in consequence of these frauds that a method was devised of assaying the denarius."

[72] Cic. *De Off*. 3.80.

[73] Cic. *De Off*. 3.80.

[74] Cic. *De Off*. 3.80.

[75] Barlow (1980) 219.

[76] Cic. De Off. 3.80:

> "This action brought him vast honour; in every street statues of him were erected; before these incense and candles burned. In a word, no one ever enjoyed greater popularity with the masse."

Pliny *NH*. 33.46: "the law … was so much to the taste of the plebeians, that in every quarter of the City there was a full-length statue erected in honour of Marius Gratidianus."

[77] Pliny *NH*. 34.12:

> "The reason of the statues being raised on columns, was, that the persons represented might be elevated above other mortals… The different tribes erected statues, in all the quarters of Rome, in honour of Marius Gratidianus, as already stated; but they were all thrown down by Sylla, when he entered Rome."

Marius was brutally executed by L. Catalina after Sulla's triumphant return in 82 and the Marian statutes are unlikely to have survived. Grierson (1956) 242.

Sulla may also have regarded counterfeiting as deleterious and requiring suppression for another reason. It undermined the economic prestige of the Senate, which as Polybius notes [78] controlled the lawful money flow through the state. Its practice was to authorise the striking of only so much money as was necessary to meet the demands of the economy.[79] The actions of counterfeiters in entering the market would emphasise the inadequacies of the senatorial policy when shortages of money encouraged the introduction of illicit funds. Any perceived diminution of this role of the Senate would have been of major concern to Sulla.

Grierson, has argued that since coining is the responsibility of government and counterfeiting devalues the currency, interference with this responsibility was ultimately tantamount to treason.[80] Accepting that the effects which flowed from counterfeiting in Rome would have had a similar impact to those described by Grierson, we can understand why Sulla chose to make counterfeiting a criminal offence. It was an absolute threat to the economic security of his new regime. Sulla marked this by appointing *interdictio aquae et ignis* as the punishment for *damnati*.[81]

7.2. *De Testamentaria*

Sulla conferred on the same *quaestio* jurisdiction over forgery. Whilst the title of the law suggests it was concerned with wills, the jurists record that the jurisdiction was broader. Most of the relevant chapter of the *Digest*[82] describes numerous fact situations which relate to wills. But from the opening provisions we learn that the statute also proscribed false witness in its various guises.[83] Justinian is succinct

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[78] Polyb. 6.13.

[79] Barlow (1980) 212.

[80] Grierson (1956) 240. He argues, with application to the system under the Republic, that a person who is given false coin in return for goods or services is defrauded by having been given something he cannot legally pass on and which is of less value in its composition. He next argues that the state is defrauded because coinage is a source of profit. In short, false or adulterated coins satisfy the demand for genuine coins which might otherwise be required to be minted. They also upset the faith of the public in genuine coinage and thereby diminish its value. As counterfeiting affects the value of coins which have been issued by the state it offends against public order since coining is a function of government. It may therefore be construed as treason.

[81] Keaveaney (2005) 147. He cites the sources at note 25 p. 215. Sarel (2004) 133 note 78.

[82] Chapter 48.10 headed *Lex Cornelia de Falsis et de Senatus Consulto Liboniano*.

[83] *Dig*.48.10.1. Marcian is the source. He asserts that the penalty of the *lex Cornelia* was imposed on those maliciously conspiring to give false evidence or to deliver it. The acceptance of money to furnish evidence or making an agreement to ensnare the innocent was punishable. Taking money

about what the *lex Cornelia falsis* or *Cornelia testamentaria* covered.[84] If this subject matter formed part of the 81 law then Sulla was clearly concerned, about forensic corruption and sought to address it. Proscribing the receipt or offering of bribes in the expectation of thereby altering the course of criminal proceedings was crucial. It went to the heart of ensuring the integrity of the senatorial jurors. Sulla wanted these reinstated jurors to magnify in their decisions the prestige of their order rather than detract from it. The measures the jurists suggest were included in the statute against judicial corruption were directed to enhancing this end. The measures did, however, represent a piecemeal approach aimed at introducing a significant prohibition but tacked on to a law which dealt with an entirely different subject matter.

The other thrust of the law establishing the court was the prohibition on forging testamentary instruments. Scholars have suggested that some *cause celebre* at the time may account for Sulla deciding to criminalise forgery of wills.[85] However, we may regard this move as one which Sulla also designed to protect the interests of the senatorial order in accordance with his avowed policy. In a Rome where universal literacy was not to the fore it could be expected that testamentary disposition would have been restricted to the well to do. The expression of wishes for the distribution of property after death would surely have been the concern of the privileged few. They would be desirous of obtaining legal protection for their dispositions and Sulla could secure it with the threat of criminal prosecution for those who threatened this right of property.

With a decade of economic turmoil, let alone stasis, behind them, well to do Romans, and indeed Italians, whose property had been adversely affected by these catastrophes may well have welcomed a law which gave them stability for their bequests. The practice of dictating wills to an amanuensis was one obvious opportunity for abuse.

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for renouncing or withdrawing evidence was caught. Importantly, corrupting a judge fell within the statute. Marcian notes that the penalty for forgery or its equivalent was deportation and confiscation of all property and that for a slave it was the extreme penalty. *Dig*. 48.1.13.

[84] Iust. *Inst.* 4.18.7 states that the law punished anyone who had written, sealed, read or substituted a false testament or other instrument or had made out or impressed a false seal, knowingly and willfully. *Mens rea* was therefore required. The penalty for a freeman was deportation. For a slave it was the supreme punishment.

[85] Cloud (1994) 525.

Combining the two jurisdictions in the one court meant that only one and not two praetors were required. And the underlying features of each offence, namely fraud, made for the progress of a body of jurisprudence of assistance to the development of the law.

8. The *quaestio de sicariis et veneficiis*

8.1. *De sicariis*

We argued in Chapter 3, Section 4 that there was persuasive evidence that a *quaestio de sicariis* had been established by 142 — that a standing court dealing with murder was operating in the latter half of the second century. We also suggested that before 123 a *quaestio de veneficiis* had also been created. There are other references to a pre-Sullan *quaestio de sicarios* which Cloud notes.[86] It was also argued that on the basis that a court then existed its jurisdiction depended on the meaning of the word *sicarius*. We concluded that it extended to murderers and to men who went abroad with a deadly weapon with a view to murder or theft. It was the unruly and unstable nature of the times following the fall of Carthage that dictated the need for the court.

Our construction is, of course, made more difficult by the fact that the accepted view was that it was Sulla who in 81 passed a law which created the two permanent courts [87] which assumed the jurisdiction of the *iudicia populi* in respect of homicide and poisoning. It follows that most of the reasons for the creation of and procedure under the courts are attributed to Sulla. We postulated that the provisions of Sulla's law for the establishment of these courts as recorded in our sources were tralatitious to the 142 law. However, taking up our position, how did Sulla proceed?

Sulla adopted the practice of tagging on to the jurisdiction of existing permanent courts charges which had a fundamental similarity to the main subject matter.[88] In passing a *lex Cornelia de sicariis at veneficiis* Sulla combined the jurisdictions of the two courts into a compound court with the result that the major means of murder, assault with a deadly weapon and poisoning, were logically associated in

[86] Cloud (2005) 127.
[87] Cloud (1994) 520.
[88] Cloud (1994) 514.

the one court as all being forms of homicide.[89] To the same purpose, he extended the jurisdiction to cover parricide[90] and to the giving of false testimony in order to effect the condemnation of a person in a standing court — the so called "judicial murder" provision.[91] This meant that senators who sat in his standing courts, including the adlected *equites*, were liable to be prosecuted on this count. Sulla also brought arson within the reach of the court.[92]

This practice of attaching new offences to existing courts indicates that Sulla was not concerned with the establishment of a code of laws for Rome. Otherwise it would have been easy for him to set up separate courts to deal individually with the conduct he wished to punish. In this he displayed a predilection for a piecemeal approach to the criminalising of conduct, preferring to lumber the existing courts with a miscellany of proposed offences.

Riggsby argues that we should regard the expression *sicariis* as having evolved by 81 from how Cloud conceived it (presumably as a weapon wielder or gangster, in modern parlance) to "something much more like our murderer". He accepts Kunkel who argues "the law *de sicariis* had already… become reconceptualised as a simple murder law".[93] Further support for this view comes from provisions of the Sullan law directed at slaves who murder their masters.[94] But, on the position we have argued, the court in 142 was concerned with the *sicarius* as a murderer and not just a gangster. The *lex Cornelia* was tralatitious and reflected the meaning attributed to this expression in the 142 law..

It is plausible that Sulla was not interested in strengthening or adding to the law in relation to homicide. There was an effective measure in existence. On the other hand, Sulla personally had let loose and encouraged the scum of the earth to perpetrate atrocities, legitimised by his proscription lists and the licenses to kill and to appropriate the property of those murdered. Added to this was the social dislocation resulting from almost a decade of savage conflicts. This must have led to the presence in Rome of dispossessed Italians and former soldiers, ruthless and

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[89] Riggsby (2010) ch.3.1.
[90] Cic. *Div*.2.58
[91] Cic. *Clu*. 154.
[92] Sary (2004) 126.
[93] Riggsby (2010) ch.3.1. 54–55.
[94] Gaius, *Dig*.29.5.25

desperate men, cutthroats and assassins, prepared to take advantage of spoils the proscriptions offered at any cost.[95]

For Sulla, to have taken further legislative steps, in addition to what was already available according to our arguments, would have been an acknowledgement of his responsibility for the murderous clime prevailing in Rome after the end of the proscriptions. Cicero, in 80, in his defence of Sextus Roscius of Amerio, describes how men could be murdered as an ordinary occurrence by reason of the multitude of *sicarii* (*propter multitudinem sicariorum*).[96] Armed men were roaming the city plundering and murdering.[97] Probatively for us, Cicero associates *sicarius* with murder. If Sulla had to pass laws to address this problem it would have brought home the fact that his ruthless and vengeful behaviour had effected a situation which he felt the existing law was inadequate to contain. It would have been an acknowledgement to the Roman people that he was concerned about his reputation, the consequences of his iniquities and his liability therefor. Publicising the recent terrors by a statute intended to punish those, many of whom had been his creatures, would have revealed him as a man fully aware of the brutal steps by which he had recently attained primacy. Such a result would have besmirched the propaganda and the image he was seeking to publicise. On our construction the 142 statute remained and was available to those who sought retribution.

As we have noted, it was Sulla's initiative to combine the jurisdiction for dealing with the two offences in the one court. An obvious reason, as with the *lex de nummaria/testamentaria*, would have been that only one praetor would have been required to preside and this made for economies of scale. Moreover, the pressure of business may well have required more than one division of the court to be sitting at the same time.[98] Those prosecuted in this jurisdiction included men who

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[95] Keaveney (2005) 146; Cic. *Rosc.Amer*. 80.

[96] Cic. *Rosc.Amer*. 80. Cic. *Pro Sex. Rosc.Amer*. 81: *multitudinem sicariorum;* Cic. *Rosc.Amer*. 150 : *quos sectores ac sicarii iugulare non potuissent?*

[97] Cic. *Rosc.Amer*. 81.

[98] Maintaining the separate jurisdictions in two courts and with two praetors would have tied up a quarter of the senior judicial officers and the position would have been exacerbated if more than one division was sitting.

formed the dregs of society and whose crimes were heinous. Justice and society demanded speedy resolution and thus the availability of the court.[99]

8.2. *De veneficiis*

We have argued as to the reasons for the creation of this court and its date in Chapter 3, Section 5.2. Death by poisoning was something that greatly disturbed Roman sentiments and was written into the folklore. Livy recounts an early story of matronly poisonings.[100] He has several later reports of widespread disease in Rome and its surroundings being attributed in 180 to the action of poisoners. The Epitimator records the execution by their families of two matrons who had poisoned their husbands for material gain.[101]

As we have noted, Sulla did not persist with the two courts but rather combined their jurisdictions so that all homicides were now heard in the one court. Apart from the practicalities of economies of scale to which we have adverted, the mischief and importance of the crime would have been emphasised by the association. We do not know whether the change was made because Sulla did not regard the single court as being effective. He undoubtedly saw his decision as a logical step and not one which would detract from the clout of the court. The doings of poisoners and those dealing in *venenum* (the two principle activities which we identified in the earlier chapter as being the subject of the jurisdiction) were as significant for the maintenance of stability in the Roman state as the suppression of the conduct of other types of murders and of thugs. We saw in the earlier chapter how outbreaks of illnesses which took their toll would be attributed to poisoners by an overwrought population with consequent harm to the state stability. Sulla, by his composition, was seeking to put this potential threat on the same basis as the others. He did not seek to change the substance of the law but rather the procedure.

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[99] Cloud (1969) 283 notes that Cicero provides evidence of several trials in this court being held at the same time in the mid 70's and 60's.

[100] Livy 8.18.

[101] In 180 credulous Romans looked to poisoning as the reason for a pestilence spreading through Rome and its environs and a praetorian investigation under C. Maenius was established. Three thousand persons were condemned and the praetor had to surrender the investigation in order to proceed to his province. These numbers suggest widespread panic and may reflect the same superstitious awe as had gripped Rome in 186 with the Bacchanalian conspiracy. Quarta Hostilia the wife of the consul, C. Calpurnius Piso, was convicted on suspicion of poisoning her husband to allow her son, his stepson to become consul. Livy 38.3; 40.37, 43.2.

9. The *quaestio de ambitu*

We should accept that Sulla did in fact procure the passing of a law dealing with Our source is the Schol. Bobiensis (Schol. on Cic. Pro Sull.17) where the Scholiast asserts:

"In earlier times superioribus [temporibus], men who were convicted of this crime under the *Lex Cornelia* were punished by a ban on holding magistracies for ten years. Somewhat later (*Aliquanto postea*), the *lex Calpurnia* imposed a stricter punishment, of a fine and life-time ban from holding office; but those who were convicted were still allowed to remain at Rome."

(From the Attalus translation).

We can with some assurance maintain that the reference to the *lex Cornelia* in this passage is to a law of Sulla on *ambitus*

It is unlikely to be a reference to the *lex Cornelia* of 159. Arguably this statute imposed the death penalty Page 133 above) and may have been the basis for Polybius' famous contrast between the sentences for bribery in Rome and in Carthage.. He was writing only thirteen years after the 159 law. Secondly the use of the words *Aliquanto postea* surely does not embrace a law passed some eighty years earlier. These arguments have been previously raised by scholars on the text and are appealing

It is quite possible that Sulla saw the continuation of the principle of a law on *ambitus* as a means of ensuring that governors with massive debts from electoral bribery were not inflicted on *peregrini*. We have argued in Chapter 5 that this was the policy behind the earlier law. Even with the relative peaceful conditions prevailing in 81 the failure to retain any peregrine goodwill emerging from the earlier law would have been reprehensible. Sulla's dilemma would have been to maintain the confidence of the provincials in the permanent courts, which had been the province of the *equites,* when it was his ardent decision to have the Senate take over the adjudication.

The Scholiast comments that the punishment of those convicted under the law was prohibition from holding magistracy for ten years.[102] An analysis of this

[102] Schol. on Cic. *Pro Sull*.17: "*Nam superioribus [temporibus] damnati lege Cornelia hoc genus poenae ferebant, ut magistratuum petitione per decem annos abstinerent*".

comment would indicate that this provision was part of a law and did not comprise the whole law. It was not a provision tacked on to the existing statute.

Polybius, writing around 146, asserts that those who practised bribery suffered the capital penalty.[103] This, of course was subject to the ameliorating right of being able to flee into exile.[104] Sulla thus took steps to mitigate the penalty for electoral bribery by removing the exposure of *damnati* to death and therefore exile, and by substituting the penalty of exclusion from candidature for ten years.

It is accepted that Sulla reaffirmed in legislation the age limits for ascending to the various magistracies laid down in the *lex Villia* of 180.[105] This statute fixed the minimum ages for holding a senior office as well as the period between offices.[106] He also included in his legislation a specific order for ascending the *cursus honorum*,[107] while increasing the number of praetors to eight and the number of quaestors to 20.

For the most part, it was the senatorial class who would be the defendants in prosecutions in the a*mbitus* court. Although senators would also form the jurors. Sulla wanted to stop once and for all the monetary peccadillos of his order in pursuit of office being subject to the judgement of the *equites* and the capital penalty being applied. But he did try to balance matters out by restoring the provisions, which mandated the periods between holding office. This would have some effect on the rigorous competition, which had occurred through failure to enforce the law. In reinstating the provisions Sulla was making it clear that he expected them to be observed. By reducing the opportunities for contentious rivalry, Sulla might have expected that the number of cases before the *quaestio* would be reduced. The one difficulty was the increase in the number of praetors, which would increase competition for the office of consul. But this was inevitable. Sulla needed the eight to preside in the provincial commands. It is

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[103] Polyb. 6.56.4.

[104] Polyb. 6.14.7. Presumably, those found guilty of electoral bribery could take themselves into exile.

[105] Lintott (1999) 145.

[106] The age for a curule aedile was 36, a praetor 39 and a consul 42. Astin (1958) 59 concludes that the *lex Villia* fixed these dates and also that it provided for a period of two years between the holding of any office. Lintott (1999) 145 accepts Astin's conclusions.

[107] A man could not become a praetor unless he had previously held office as a quaestor; he could not become consul without first being a praetor and he could not hold the same office for a second time until after the expiry of ten years. App. *BC.* 1.100.

interesting that Sulla, probably the most powerful Roman of his own and earlier times, gave no thought to increasing the number of consuls in the interests of avoiding contentious electoral competition. It must be that the dual office was regarded by the Romans as inviolable as it dated back to the founding of the republic after the rule of the kings

Sulla was concerned to ensure that senators adjudicated on this offence but he sought, in reinstating the measures which fixed the periods between the holding of offices, to counter aggressive competition for office and therefore the number of cases of *ambitus*. The recession of the capital penalty might be regarded as a sop to the senatorial defendants. However, the penalty he substituted was hardly minimalist and would effectively have stymied any realistic attempts by *damnati* to stand again for office either because of the publication of their corrupt reputation or their age. The balance Sulla had to strike, once he committed the courts to the Senate, was to provide a means whereby the proscribed conduct could be restrained by measures that did not strictly involve the potential bias of the jurors. In this respect, we contend that infliction of the penalty on standing for office arose from the law rather the actions of the jurors. Sulla wanted the senatorial jurors, but he did not want partisan decisions in important cases, which might undermine confidence in the standing courts and threaten the stability of his intended regime.

It is reasonable to conclude that those who were adlected from the equites into the Senate were men who had judicial experience and that that advantage was taken of these men in the selection of the senatorial jurors.[108]

The fact that so large a proportion of the senate now comprised a majority of adlected *equites*, many of whom had judicial experience, would surely have offered some solace to Sulla, if he needed it, that his changes were not entirely biased against the other orders.

10. The *quaestio de pecuniis repetundis*

Cicero refers us to a measure *quo ea pecunia pervenerit*, which he implies was contained in a *lex Cornelia*, and before that, a *lex Glaucia*, from which we may

[108] Gruen (19680 257–258 note 22.

infer that Sulla did pass an extortion law.[109] From Cicero's attack on Verres in 70, scholars deduce that the recovery available under the extortion law was two and a half times the value of the amount extorted. Thus Sherwin-White notes that in the *Divinatio ad Caecilium* Cicero claims 100 million sesterces as the loss of the Sicilian clients while at the conclusion of the *Prima Actio* he sets the sum misappropriated at 40 million sesterces.[110] Elsewhere Cicero refers to the ever-greater penalties imposed in the (standing) courts following Piso's 149 law, so the indication that Sulla effected some increase in the pecuniary damages has foundation.[111]

It appears then that Sulla did pass a statute, but we do not know whether it did anything more than increase the restitution which would have been available under the *lex Acilia*. As to a possible criminal penalty in addition to the restitution, the weight of opinion appears to be that the penalty under the Cornelian law was not capital.[112]

Sulla's decision to increase the amount recoverable by 25 per cent should be regarded as a deterrent to rapacious magistrates from engaging in extortion. It should also be seen as an encouragement to *peregrini* to pursue their claims against these magistrates in Rome. Sulla must have decided that the earlier basis of restitution required a boost, probably because the evil of gubernatorial extortion of provincials was not being adequately restrained. It must be said that Sulla's decision to increase the number of praetors from six to eight, which we must acknowledge as being sensible for his forensic purposes, may not have contributed to restraint on the part of provincial administrators.[113]

We argued in Chapter 4 that the purpose of the extortion laws, which enabled the creation of the extortion courts, was to enhance Rome's existing and potential relationships with friends and allies in the light of its exposure to widespread foreign wars. The purpose was therefore a diplomatic one. There seems no reason why Sulla should not have been ready to maintain this purpose.

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[109] Cic. *Rab.Post*. 4.8.

[110] Sherwin-White (1949) 8–9. Cic. *Div. In Caec*. 19; *Verr*.1.56.

[111] Cic. *Off*. 2.75; Gruen (1968) 259 note 26.

[112] Sherwin-White (1949) 12. Keaveney (1983) 208.

[113] The possibility of eight men of praetorian rank vying for the two consular offices could involve some seeking to extract monies from their unfortunate peregrine subjects to fund campaigns.

Sulla would have been conscious, having regard to his experience with the vicissitudes of the Roman economy and the troughs into which it had plunged over the previous decade, of the need to keep stable the revenues of the state. He would have understood that the provinces were a vital source of income, and Asia above all. Most of the other provinces presented little opportunity for gain, apart from Spain, with its precious metals. But Spain was distant, inhospitable and populated by belligerent tribes hostile to Rome. Asia was thus the crown jewel:

> "For while the revenues of our other provinces, gentlemen, are barely sufficient to make it worth our while to defend them, Asia is so rich and fertile as easily to surpass all other countries in the productiveness of her soil, the variety of her crops, the extent of her pastures and the volume of her exports. This province, gentlemen, if you wish to retain what makes either war possible or peace honourable, it is your duty to defend not only from disaster but from fear of disaster."[114]

Sulla had campaigned extensively in Asia in both of the Mithridatic wars and was in a position to appreciate its significance.

Increasing the rate of restitution could convey to the provincials that Rome was concerned to provide protection against depredation, which, in effect, could interfere with an income source. Admittedly, the tax farming procedures meant that Rome would have the benefit of the fixed sums paid by the Asian and other tax farmers for the right to collect taxes. However, interference by governors with the resources of *peregrini* could deplete their ability to account to the *publicani* for the taxes to be farmed. In turn, such disruption could reduce the amount of the bids the *publicani* might be prepared to make at the censorial auctions at Rome.

The introduction of juries comprised of senators in the *res repetundae* court may have given *publicani* some cause for concern in that such jurors might tend to favour offending senatorial governors who abused the resources of provincials and thereby damaged the ability to collect the taxes. Again, the *publicani* probably accepted that, in light of Sulla's powers, the fact that he had seen fit to induct

[114] Cic. *De Imp. Cn. Pomp*. 6.14.

members of their order into the Senate and probably to serve as jurors having regard to their experience was as reasonable a compromise as they could secure.

It was in the interests of Sulla's ideal administration by the Senate that the provincials should have an effective right to recover extorted property and thereby bring governors to account. Encouragement of this right by substantially extending the amount potentially recoverable would have contributed to provincial goodwill towards Rome and maintained the diplomatic initiative for which we have argued in earlier chapters.

11. The *quaestio de maiestate*

That Sulla introduced a law dealing with *maiestas* is apparent from the well-known passage in the *Oratio in Pisonem*.[115] In Chapter 7, Section12 we argued that, in addition to providing a means of preventing further irresponsible campaigning by Roman generals, *the lex Appuleia de Maiestate* introduced in 103 by Saturninus was one of the *leges veteres* referred to by Cicero in the passage from the *Oratio in Pisonem.* Accordingly, Cicero's statement that the conduct he lists there was forbidden by *leges veteres* means that it was forbidden by the *lex Appuleia*. We also accepted Seager's contention that the description of *maiestas* in the *lex Iulia* of Caesar, given by the jurist Scaevola, might also have formed part of the *lex Appuleia*[116] and suggested that the description may well have been a tralatitious provision.[117] Our argument from these propositions was intended to show that Saturninus had a real interest in regulating foreign affairs through the use of popular legislation. In justification of his argument, Seager contends that the conduct proscribed as *maiestas* by these two measures would have been just the type of offence with which Saturninus would have been concerned.[118]

Cicero's list of the forbidden acts, which we set out again, for convenience, reads as follows:

> "I say nothing now of his leaving his province, of his leading his army out of it, of his waging war on his own account, of

[115] Cic. *Pis.*50.
[116] Seager (2001) 144.
[117] The wording is set out in Chapter 7, Section 12.
[118] Seager (2001) 144.

> his entering a king's realm without the orders of the Roman people or senate, conduct expressly forbidden by numerous ancient statutes, and in particular by the law of Cornelius against treason and that of Julius against malpractices" (*quae cum plurimae leges veteres tum lex Cornelia maiestatis, Iulia de pecuniis repetundis planissime vetat*).[119]

We can see from the wording of the passage that the conduct described was certainly *maiestas*. Yet, still more significant is the fact that this conduct was, according to Cicero, forbidden not only by the *leges veteres* but also by the *lex Cornelia*. The conclusion must surely be that in his *maiestas* statute, Sulla re-enacted the conduct proscribed in the passage and, if Seager is correct, that proscribed by Scaevola.

But the question arises as to why it was necessary for Sulla to effect the re-enactments? Surely for Sulla it was a matter of emphasis. He wished to reiterate that this conduct remained punishable. It is possible that during the tumultuous decade just passed acts were perpetrated which attracted the prohibitions in the 103 law but which were never prosecuted because of rapidly shifting allegiances. Arguably, the Romans had become indifferent to these prohibitions, which, to Sulla, was of great concern. A primary consideration for him would have been to protect his new senatorial administration against threats posed by warlords of whom he, ironically, was a representative. In 87, Sulla had to endure the indignity of having the *imperium* for Asia and the Mithridatic war stripped from him by the people and of seeing it allotted to C. Marius, his enemy.[120] In retaliation, Sulla decided to march on Rome. His soldiers agreed, timorous of the loss of opportunity for plunder the war offered:

> "They were eager for the war against Mithridates because it promised much plunder, and they feared that Marius would enlist other soldiers instead of themselves. Sulla spoke of the indignity put upon him by Sulpicius and Marius, and while he did not openly allude to anything else (for he did not dare

[119] Cic. *Pis.* 50.

[120] The province had been allotted to Sulla by sortition as a consul for 88. It was made over to Marius by a *plebiscitum* carried by the tribune, Publius Sulpicius, a crony of Marius.

> as yet to mention this sort of war), he urged them to be ready to obey his orders. They understood what he meant, and as they feared lest they should miss the campaign they uttered boldly what Sulla had in mind, and told him to be of good courage, and to lead them to Rome."[121]

An implication from the passage is that the soldiers would have been open to offers and that their loyalty to Sulla was purely on the basis that Marius might not have enlisted them. The passage is a significant comment on the emerging military politics of the time and how greed, rather than commitment to the state, was now determining loyalties

By 84 Sulla had conquered Asia. He had a large well-disciplined professional army,[122] even more loyal to him following his success in Asia, and no shortage of ships, money or the equipment for war. In retrospect, this would have made him all the more conscious of the precedent he could be setting for others.[123] Sulla would have been anxious to ensure that the Senate did not face another cynical or imperious consul or consul, at the head of an army loyal to him, with self-serving demands, the satisfaction of which would undermine the influence and authority of the Senate.

The other heads mentioned in the passages from *Oratio in Pisonem* and from Scaevola would also have represented conduct which menaced the security of the state. Sulla hoped to stifle and deter the ambition of any other *imperator* who might have been motivated to adopt the martial template he himself had forged.[124]

We know from Cicero that a governor was required to leave his provincial command within 30 days of the expiration of his term of office [125] and the similarity in tone of this requirement to the passages referred to in the previous paragraph indicates as well that it was an example of *maiestas*.[126]

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[121] App. *BC.* 1.57.

[122] Some 23 legions according to Appian, *BC.* 1.100.

[123] The bond was strengthened by the generous land grants he made to his veterans from public estates and from property appropriated from communities who had opposed him. App. *BC*. 1.100.

[124] Seager (2001) 149.

[125] Cic. *Fam*.3.6.3.

[126] It had been a slippery concept and one easy to impugn because of the vagueness as to what fell within its ambit. M. Antonius, the distinguished advocate, who defended C. Norbanus, a tribune in 103, on a charge of *maiestas* in 93, based the defence on the vagueness of the word.

Further, by the explicit reiteration of the restrictions on the behaviour of *imperatores*, Sulla could be seen to be telegraphing to friends and subject peoples how he expected the *imperatores* in the provinces to conduct themselves as representatives of the new regime. This in itself could have instilled in *peregrini* a more acute awareness of circumstances which might give rise to claims. We have noted in Chapter 2 the behaviour of Cassius in 171 in leaving his province and journeying through peregrine lands, which lead to grievous complaints from friends and allies. The stress on the non-reiteration of this conduct would surely have led to a greater consciousness of the possible actions for despoliation of their property.

The *maiestas* law in entrenching certain limitations on the conduct of *imperatores* and governors can be seen as going to a continuation of the policy, for which we have argued. This was the substantiation of relationships with Rome's friends and allies, which was certainly of importance to a new regime, and not only as a tool to thwart the aspirations of those who sought to emulate Sulla.

Finally, Gruen suggests a reason for the expansion of the categories covered by the offence as a result of Sullan changes to the law. It was designed to complement Sulla's curtailing of the powers of the tribunes.[127] Sulla had, as we have noted, limited the power to bring bills before the people and to interpose the *intercessio*. He was able now to curtail the forensic initiative by reducing the necessity for bringing proceedings, particularly for *perduellio,* before the people's judicial assemblies. He achieved this by broadening the conduct caught by the expanded definition of *maiestas*. There was then little opportunity for the tribunes to initiate proceedings.[128] We have argued that the main thrust was of the Sullan law was the reiteration of the provisions of what had been contained in the 103 law. Nonetheless Gruen's position will still hold. Sulla would have been able, in this reassertion, to seize the opportunity to limit the said tribunician power.

12. The *quaestio de pecalatu*

In Chapter 6 we argued that the purpose behind the enabling law for the *peculatus* court again related to foreign affairs. The Romans wished to bring home to

[127] See Section 5 above.

[128] Gruen (1968) 260.

peregrini the fact that they were concerned to create a right for the people to recover public monies misappropriated by governors. This would create goodwill with *peregrini* who might take confidence that, because of this new and specific involvement by the Romans, their own complaints might receive more effective treatment. We also accepted that the year 103, following the passage of the *lex Appuleia de Maiestate*, was an appropriate date for the law and the court.

It is apparent that a permanent court for *peculatus* was in existence by 81. Plutarch reports that Pompeius Magnus was prosecuted for *peculatus* [129] in 86:

> "As soon as Strabo was dead, Pompey, as his heir, was put on trial for theft of public property."[130]

Plutarch says the case was tried by Antistius a praetor (or *iudex quaestionis*) and that he pronounced the verdict of the judges acquitting Pompey.[131] The court trying Pompey then had hallmarks of a permanent tribunal, a presiding praetor with a consilium of jurors who determined the merits.

In the *De Natura Deorum*, Cicero associates trials for *peculatus* with those of assassination, poisoning, embezzlement and forgery of wills:

> "... then the trials under the new law, the cases of assassination, poisoning, embezzlement and forgery of wills, that are daily occurrences at the present time."[132]

Cloud points out that the dramatic date of the *De Natura Deorum* was 77–75 and that accordingly the reference to *lege nova* must refer to Sullan legislation.[133] The inference is that there were new measures which affected *peculatus*, since the other offences named had been the subject of statutory adjustment by Sulla. Further, Cicero in the *De Officiis* links embezzlers (*peculatores*) with other

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[129] Gruen (1968) 244.

[130] Plut.*Pomp*. 4: "*ἅμα δὲ τῷ τελευτῆσαι τὸν Στράβωνα, δίκην κλοπῆς ἔσχεν ὑπὲρ αὐτοῦ δημοσίων χρημάτων ὁ Πομπήϊος*". Cicero confirms that misappropriation of public money was *peculatus*. *Verr*. 2.3.168. Verres had lent public moneys at interest for his own benefit.

[131] Plut.*Pomp*. 4.

[132] Cic. *ND. 3.74. tum haec cotidiana: sicae, veneni, peculatus, testamentorum etiam lege nova quaestiones*.

[133] Cloud *CAH*. Second Edition. Vol. 9 p. 511 note 115. The editor of the Loeb edition in his Introduction (xv) proposes the years 78–77.

criminals, most of whom would have been potentially the subject of prosecution under Sulla's other laws.[134]

However, we do not possess any evidence of what Sulla might have included in his law.[135] It is possible that some of the provisions of the *lex Iulia peculatus* were tralatitious and taken over from Sulla's law. As we have noted in Chapter 6 the jurists record provisions of the *lex Iulia*. In brief, they indicate that liability arose under the laws where a person who received public monies intended for a specific purpose retained them and did not employ them for that purpose (*Dig*. 48.13.2). (Paulus); 48.13.4 (Modestinus). Ulpian suggests that the element of application for personal benefit was an additional ingredient (*Dig*. 48.13.1). The jurists also confirm that liability also arose under the Julian laws where persons stole sacred articles from a temple[136] or money received from sacred sources.

If so, perhaps Sulla sought to add to the existing statute by clarifying what was encompassed by *peculatus* and these principles were absorbed into *the lex Iulia*. We may suggest that the *peculatus* measure would have supported the extortion law since converting the property of the Roman people as a source of funds may have been an easier manoeuvre. In this case, the relevant property was in the hands or under the control of the provincial administrator.

The further purpose of the *peculatus* statute was to discourage provincial governors and generals on campaign from ransacking sacred sites and purloining treasures belonging to allies or foreign peoples. Interference with the relics of provincials had long been a subject of contention. Sulla may have been seeking to assure them that, with his new administration, matters were in hand.

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[134] Cic. *De Off*. 3.18.73: "*Neque enim de sicariis, veneficis, testamentariis, furibus, peculatoribus hoc loco disserendum est, qui non verbis sunt et disputatione philosophorum, sed vinclis et carcere fatigandi*".

[135] Gruen (1968) 263. Keaveney (2005) 147 speculates that is likely that Sulla created a *peculatus* law as one was operating in Cicero's time.

[136] Ulpian asserts that anyone who perforated the walls of a temple or stole anything by this means committed the offence (*Dig*. 48.13.11 (1)). The entry into, and removal from, a sanctuary of sacred property incurred liability.

13. A *quaestio de iniuriis*?

Venuleius Saturninus, the jurist, suggests that Sulla established a *lex Cornelia de iniuriis*.[137] Other jurists report that the *lex Cornelia* introduced an action of *iniuria*, which was available to a person who claimed that he had been thrashed or beaten,[138] or that a forcible entry had been made to his house. According to Justinian, action under the statute also lay against anyone who wrote, composed, or published a libel or defamatory verses against another, or maliciously procured another to do any of these things:

> "An injuria is committed not only by striking with the fists, or striking with clubs or the lash, but also by shouting until a crowd gathers around any one; by taking possession of anyone's goods pretending that he is a debtor to the inflictor of the injury who knows he has no claim on him; by writing, composing, or publishing a libel or defamatory verses against anyone, or by maliciously contriving that another does any of these things; by following after an honest woman, or a young boy or girl; by attempting the chastity of any one; and in short, by numberless other acts."[139]

The description of the offence in the *Digest* is extensive and concludes with the assertion that the gravity of the offence was affected by the occasion, the place where it occurred, the victim or the extent of the injury:

> "An injuria is said to be of a grave character, either from the nature of the act, as if any one is wounded or beaten with clubs by another, or from the nature of the place, as when an injury is done in a theater, a forum, or in the presence of the praetor; sometimes from the quality of the person, as when it is a magistrate that has received the injuria, or a senator has sustained it at the hands of a person of low condition, or a parent or patron at the hands of a child or freedman. For the

[137] *Dig*. 48.2.12.4.

[138] Thrashing involved an assault, which inflicted pain. Beating involved an assault without pain (*Dig*. 3.10. 5.1). Assault and battery and assault, respectively, would seem similar to the description in modern parlance.

[139] Iust. *Inst*. 4.4.1.

> injuria done to a senator a parent or a patron is estimated differently from an injury done to a person of low condition or to a stranger. Sometimes it is the part of the body injured that gives the character to the injuria as if any one had been struck in the eye. Nor does it make any difference whether such an injuria has been done to a paterfamilias or a filius familius, it being in either case considered of a grave character." [140]

The conduct in its primitive form was recognised in the laws of the Twelve Tables. Remedies representative of the era were provided.[141] Justinian tells us that later the praetors let the parties estimate the amount of compensation and the *iudex* either ordered the estimate or a lesser sum, as he saw fit, to be paid. This became the honorary practice. The estimate depended on the rank of the victim.[142] Justinian also tells us that in every case of *injuria* the party injured could bring either a criminal or a civil *actio*. In a criminal case the punishment was capital. In a civil case a sum estimated, as we have noted, constituted the penalty.[143]

The question that emerges is whether there was a *quaestio* created under this law — a *quaestio de iniuriis*. Cloud argues that *iniuria* did not merit a separate court and that actions under the law would have been heard in the combined court the *quaestio de sicariis et veneficiis*.[144] Gruen, to the contrary, contends that a *quaestio de iniuriis* was set up which brought what had previously been civil claims under the aegis of the criminal law.[145]

The significant issue for us is that Sulla did introduce a *lex Cornelia de iniuriis*:

> "The lex Cornelia also speaks of injuriae, and introduced an actio injuriarum, which may be brought when anyone alleges that he has been struck or beaten, or that his house has been broken into"[146]

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[140] Iust. *Inst*. 4.4.9:
[141] Iust. *Inst*. 4.4.7.
[142] Iust. *Inst*. 4.4.7.
[143] Iust. *Inst*. 4.4.8.
[144] Cloud *CAH*. Vol 9. Second Edition. 525.
[145] Gruen (1968) 263.
[146] Iust. *Inst*. 4.4.7.

and possibly a permanent court. But the question emerges as to why, when he had available the resource of the combined permanent court, he would have found a further court necessary? It may well be that the combined court was reserved for the more serious offences and that the offences under the *de iniuriis* statute were seen to be of a lower order. However, being wounded or beaten with clubs is hardly of less grave import than being murdered or being the subject of attack from a man armed with a deadly weapon. The solution may be that the more serious assaults went to the *de sicariis* court, particularly where the victim was a magistrate or member of the senatorial order. The problem is not ready of resolution.

Sulla's reasons for the *lex de iniuriis* would have been the same as with the combined court — to repress repetition of the chaotic conditions resulting from ten years of internecine strife in Rome and throughout Italy. As we have argued, the offences at which the law was aimed would not have been wholly covered by the combined *lex de sicariis et veneficiis*.

14. Summary

Sulla regarded the restoration of the exclusive right of adjudication in the standing courts to the Senate as fundamental to his main political objective. The loss of this right since 123 had continuously rankled with the Senate and undermined the perceived authority of that august body. Senators took the view that when their fellows were tried in these courts they were being judged not by their peers but rather by their inferiors.

Just as it was important to Sulla that this restoration occur, it was equally important that the standing courts should be reviewed and any lacuna or defects in jurisdiction remedied. The standing courts were now, after all, to be significant organs through which Sulla could demonstrate his belief in the competence of his new regime. Sulla wished to give the new senatorial jurors the chance to display their skills in the administration of justice and this was also one of the reasons for the jurisprudential actions of Sulla, which we have described.

There is little difficulty in explaining the purpose for the changes to the jurisdiction of the *quaestio de iniuriis* and the *quaestio de sicariis et veneficiis.* The combination of the two old courts into one was justified. The poisonous state

of urban life, for which Sulla was largely responsible, persisted. The combined court was mainly concerned with common non-political but serious crimes, particularly relevant to the times. These would have included murder, parricide, carrying deadly weapons abroad, assault and battery and trespass to person, in modern legal terms. However, on our construction, the 142 law remained available for these crimes as did the *questio de veneficiis* for poisoning and Sulla simply tacked on certain additional charges.

Sulla formed the *quaestio de nummaria/ testamentaria* to crack down on counterfeiting and fraudulent practices in relation to testamentary dispositions and the furnishing of evidence. He would have been concerned with the effect of counterfeiting on the economy over the decade. He would also have noted the popularity which M. Marius Gratidianus, the praetor, earned in 85 by his actions to assay and get rid of the debased coinage issued by M. Livius Drusus. Legislating on this issue would have garnered popular support for his "ideal" form of government.

Sulla imposed a restriction of ten years from holding office on a man convicted for electoral bribery in the *quaestio de ambitu*. We have argued that Sulla may have substituted this for the penalty of exile. His reasons were obviously to clamp down on illegal canvassing which might undermine the electoral stability of his new regime. As most of those likely to be prosecuted were from the senators, Sulla sought to protect them from the perils of the supreme penalty. No doubt he thought that the "political death" for a Roman noble involved in ten years' absence from the "hustings" was more than enough of a deterrent.

Whilst Sulla had made the *quastio de pecuniis repetundis* the sole province of the Senate, he did increase by 25 per cent the amount of the restitutory penalty that could be claimed. However, he would have been concerned, bearing in mind the importance of the commercial classes to his new regime, and the experiences in Asia, to ensure that their interests were protected. He probably considered he had achieved this by his reform although there may have been a trade-off over the competing points of view.

Sulla took steps to reinstate the concept of *maiestas* in the terms already laid down in the *lex Appuleia de Maiestate*. He was anxious to ensure that his new regime was not exposed to conduct of the kind described in the passage from

Oratio in Pisonem and from Scaevola, and to the fearful prospect of another imperatorial march on Rome. We also have suggested that his recapitulation was indicative of Sulla's view about the stand which Roman foreign policy should continue to take in his new administration. It could be seen as a supportive reiteration to provincials and allies of their right to claim for damage to property in this *quaestio* as well as the *quaestio repetundarum.*

As to the *quaestio de peculatu*, we are bereft of evidence on an embezzlement court. There is a possibility that what is described by the jurists as being embodied in the *lex Iulia* was taken over from a law of Sulla. If so, we can argue that the provisions, particularly those imposing prohibitions on the plunder of treasure troves and stores in foreign lands were intended by Sulla to be in aid of the jurisdiction of the extortion court which may not in 81 have extended to this conduct.

Sulla, on our analysis, reviewed but did not make major amendments to the courts. His approach was not one of consolidation but rather was piecemeal. Where he believed that conduct required proscription he tacked on the appropriate charge to an existing statute which covered offences of a fundamentally similar nature to the conduct in question.

Chapter 9. Conclusion

1. The previous quarter century

The approach to the overarching question, which has occupied this dissertation, has involved an individual study of each of the *quaestiones perpetuae* created from 149 to the revisions effected by Sulla in 81, and of the respective enabling laws. This has led to the conclusion that the main reason, and there were subsidiary purposes, for the establishment of these courts was to shore up Rome's existing peregrine alliances and provide the opportunity for the founding of new diplomatic relationships. The exceptions to this were the *de sicariis* and the *de veneficiis* courts (later amalgamated by the dictator Lucius Cornelius Sulla into the one tribunal) and Sulla's motives in 81 in refashioning the procedures in the then six standing courts.

The Romans, in introducing the permanent court system, recognised that something other than physical force was required in order to maintain relationships with peregrines. The very notion of permanent courts reflects an awareness on their part that the ties with their allies and friends needed also to be permanent.

The strain of Rome's continual involvement in foreign wars, with the consequence of stretched supply lines and extended frontiers requiring protection, made the maintenance of strategic affiliations with foreign nations of significant importance. For more than a quarter of a century before the *lex Calpurnia*, Rome had been involved in attenuating conflicts with the rebellious native peoples of Hither and Further Spain, Gaul, Istria and Sardinia. The Celtiberians and Lusitanians, in particular, were a constant concern. By 173 the Romans were facing the imminent peril of a war with Perseus, which was to last until 167.

It fell to the Roman Senate, one of whose traditional prerogatives was the administration of diplomatic policy and relations with foreign nations,[1] to develop a means of assuring provincial peoples both allies and, initially, enemies alike that the Roman people were concerned to prevent the abuse of peregrine rights. This

[1] Polyb.6.13.

abuse manifested itself in the brutal and unrelenting mistreatment of allies and friends, as well as vanquished enemies, by Roman *imperatores*. It also manifested itself in the despoliation of the goods of provincial subjects by their Roman governors. Both friend and foe sustained slaughter and the sale of survivors into slavery. Even property in sacred temples was profanely ransacked and carried off.

This study finds that the barbaric treatment visited on *peregrini* stemmed firstly from a cynical disregard by generals for the human rights of the vanquished enemy and secondly from the pressure imposed on the elite canvassing for high office by the *cursus honorum*.

As to the first point, Roman magistrates were originally appointed to *provinciae* or spheres of influence whereby their authority might extend to the conducting of a campaign against and the extirpation of an identified enemy. After a successful tour de force, the general would return to Rome laden with peregrine booty to receive a triumph in celebration of his victories. The *provincia* was then at an end. However, we have shown that some Roman generals in this period retained the mentality which prevailed in earlier times. In 173, the consul M. Popilius Laenas routed the Ligurian Statellates who had surrendered to him. He slaughtered their troops and effected the sale of the survivors of the tribe into slavery — a simple reversion to what he might have regarded as the fortunes of war in accordance with former Roman practices. This triggered a duality of reactions in the Senate. Significantly, the Statellates had pleaded for clemency as *dediticii*, which Popilius chose to overlook. He showed that the question of the application of the *deditio* ritual came down to the discretion of the imperator.

The Senate, rather the majority (excluding the Popilii and their friends), were appalled at Popilius' disregard of the *mos maiorum* in this respect. However, what shines through like a beacon is the apprehension of the Senate that an important feature of Roman foreign policy, namely the encouragement of enemies to surrender, rather than prolong conflict, would be prejudiced by Popilius' decision. It could undermine the trust vital to any decision to capitulate. With Rome then, and later, exposed to far-flung campaigns and with extended frontiers, conservation of relationships with allies and friends and potential relationships were vital. Thus, and significantly, the underlying concern was a diplomatic one. This was the real fear that the brutality manifested by Popilius' actions might

dissuade *peregrini* from capitulating to Roman generals, thereby creating ongoing mistrust and resistance to Roman foreign expansion.

Moreover, we find that, following Popilius, other generals behaved with savage indifference towards *peregrini*. Alarmingly for the Senate, the victims who were murdered or sold were friends and allies of the Roman people, which their outraged envoys to Rome were quick to point out.

As to our second point, the circumstances of provincials were put at risk by the peculiarities of the *cursus honorum* which governed the progression of Romans to high office. Fierce competition existed between the six praetors who competed each year for the two consulships. Unsuccessful candidates from early years who renewed their candidature would have increased their number. Rivalry from multiple candidacies meant that men had often to dig deep into their resources or borrow extensively to fund their candidatures. The expectation was that electoral expenditure and monies to provide a comfortable retirement might be recouped from provincial administration. Further, at the next level there was competition for the six praetorian offices albeit with the unhappy prospect that not all men would in the sortition succeed to a province which promised the prospect of gain from war. This applied, in particular, to peaceful provinces where a praetor's role might verge on that of a mere garrison commander. The provinces where hostilities predominated went usually to the consuls.

In contrast to the expectations of senatorial policy, we find that for the Roman aristocrats, men steeped in the mantra that personal *dignitas* and material wealth were to be derived from military success and the consequent prospect of booty, continuing hostilities were potentially a boon. The appointment of a *nobilis* to a provincial command, as distinct from the conduct of a war as an *imperator*, was also a source of profit and glory. However, the repercussions of Roman administration could do great harm to the peregrines with whom the *imperatores* came into contact in the exercise of their duties, as they understood them.

Some men realised that they had little hope of attaining the ultimate prize. Others were faced with the prospect of a province where want of hostilities gave no prospect of booty or military glory. In these cases, governors were compelled to look to the extraction of the desired funds out of the resources of the wretched peregrines, even to the point of extortion. What we therefore detect is evidence of

allies and friends being exposed to the ruthless ministrations of Roman functionaries in the interests of personal aggrandisement.

There thus existed an attenuating conflict within the walls of the *curia*. The Roman Senate appears in this period as a body riven by animosities. It possessed an august and distinguished membership of men who had proceeded through the *cursus honorum*. These men were able to bring to the deliberations of the *patres* the wealth of their military, administrative and diplomatic experience. Yet, having gained this experience, they were unlikely to be sympathetic to any complaints about the stresses created by the system which we have identified. For it was a system under which they had already profited or stood to profit. The Senate therefore faced the prospect that any proposals propounded for reining in provincial abuses, in the interests of advancing diplomatic initiatives, would face opposition from a rump of its members.

The Senate had to stem and reverse the tide. It had to devise and promulgate the means whereby vanquished enemies could be reassured that surrender to Rome would not be cynically ignored and result in their annihilation, and whereby allies could hope that their cities and temples would not be plundered and their citizens murdered or sold by generals in the interest of their self-aggrandisement.

The evidence for the ensuing years reveals a Senate determined to maintain its resolve but faced by *nobiles* single-mindedly dedicated to the improvement of their personal fortunes to the detriment of provincials and therefore to senatorial diplomatic policy. The Senate was not a court of law. Initially it sought to rely on the *auctoritas* inherent in its decrees. *Senatus consulta* depended on moral authority and had no coercive power. Miscreant magistrates, as members of the Senate without moral compass, knew only too well that the Senate lacked judicial teeth and chose to ignore as abortive its *senatus consulta*.

The Senate continued to cast round for effective means of bringing to heel the arrogant and ruthless *imperatores* and proving genuine concern to *peregrini*. The impuissance of the Senate is shown by its having to call in aid plebeian assistance provided by pliant tribunes and plebiscites. The plebs in support legislated for special tribunals with praetors presiding. The Senate also brought out the antique procedure of assessment by *recuperatores* when the praetorian investigations were defeated by the *gratia* of influential *nobiles*. Senatorial efforts continued to

be frustrated because a significant rump of its members, usually the family and friends of the perpetrators, were able to thwart the proceedings. The failure of the Senate to come up with an effective machinery could not have impressed *peregrini*, particularly as it obviously arose from a want of uniformity in aristocratic politics.

2. The *lex Calpurnia de repetundiis* and the *quaestio de repetundis*

By 149 the Senate was fully aware of the deficiencies in its ability to demonstrate its strength of resolve to oppressed peregrines. At the same time, it had evidence of the willingness of the people and the tribunes to make their peculiar functions available to help in arresting provincial abuses by aristocrats.

Against this background, the *lex Calpurnia* was introduced as a means of providing a remedy of sorts to the aggrieved. The law and the standing court represented a significant milestone in that the Romans had found a way to overcome the growing paralysis which had overcome its diplomatic organ, the Senate. To his very great credit, the perspicacious *nobilis*, L. Calpurnius Piso, recognised that the way ahead was to enlist the services of the people by having a *plebiscitum* passed directed to providing some aid to the peregrines.

In terms of Roman jurisprudence this was a dramatic change. The establishment of a means for allies, friends and surrendering enemies to obtain restitution against imperatorial exactions was effected by a *plebiscitum* and not by senatorial decree. Now the peregrines had a permanent tribunal which could be convened readily to hear their complaints. It was an advance on the previous array of impermanent tribunals and senatorial decrees in which provincials could have had little confidence. Now a journey to Rome might be justified. Yet, there were balancing considerations. Visitors would be conscious that senators with vested interests would be their assessors. On the other hand, based on the tralatitious provisions of the *lex Acilia*, it is apparent that the *locus standi* provisions of the 149 law extended to allies and friends and those within the dominion or power of the Roman people. This might extend to a vanquished enemy as well as to *dediticii.* Representatives of monarchs and communities also had standing. The standing provisions extended to almost all inhabitants of the Roman world.

Indeed, the breadth of the class of potential applicants increased the prospects of the Senate regaining some of the peregrine goodwill exhausted by the failures of senatorial will in the previous quarter century.

Considerable criticism has always been levelled at the failure of the legislators to tackle the heinous acts of savagery and cowardice wreaked upon the peregrines by Roman generals. This study has argued that the 149 law, with its remedy limited to simple restitution, began life as a *rogatio* which possibly contained ambit claims encompassing the interdiction of brutality. However, the *rogatio* would have had to face close scrutiny in the tumultuous debates in the *contiones*, where the vested aristocratic interests would not have been slow to voice their contempt and strong opposition to any provisions in the bill which might interfere with their perceived concepts of the rights of the Roman victor. This may have been the rationale for the disappointing reach of the *lex Calpurnia*. The fact that there is no record of opposition to the law indicates that, in its final form, it was acceptable particularly to the *nobile*s. It was in all probability compromise legislation.

3. The *quaestio de sicariis*

In 142 the Romans took another momentous judicial step. They expanded the boundaries of their criminal justice system by the creation of their first permanent criminal courts. They shifted the format of the 149 permanent court (whose jurisdiction as to procedure and remedy was civil in nature) to the use of two new criminal courts. The laws were directed to Roman society as a whole. The offences were defined in the enabling laws for the courts, so the shift involved the initiation of a statutory criminal justice system Whilst the offenders were more likely to have emanated from the lower classes, it is possible that senators, for example, who employed their services may have been liable as accessories to the crime. The statutes surely addressed this eventuality.

The unsettled conditions prevailing in Rome consequent upon the fall of Carthage, provided the means of employment for murderers and dagger men who went under the name of *sicarii*. Suppression of the baleful conduct of the *sicarii* was the object of the court and this word defined its jurisdiction. The argument

holds that it extended not only to dagger men but also to murderers.[2] In the absence of a police force, the need for an effective tribunal which could deal with these villains was paramount.

It is a compliment to the Roman law givers and the people in the *consilium plebis* that they were able to adjust their thinking to accommodate the fact that the security of the state required that all members of Roman society were to be subject to this law. It is significant that the Senate did not attempt to deprive the people in their judicial assemblies of the right to adjudicate in offences which particularly affected the Senate. Nonetheless, it displayed considerable political acumen in not seeking to promote a statute which captured this jurisdiction. The people had been a major contributor to the successful creation of the 149 law and now they had passed the *plebscita* for the two new courts. Removal of the jurisdiction would assuredly have aroused their resentment. The Senate patently saw a distinct advantage in having the people onside for future legislative activity.

4. *Quaestio de veneficiis*

The reasons for the creation of this court are not immediately discernible. It is probable that it was established before the *lex Acilia* and after the *quaestio de sicariis.* There was a proliferation of cases of poisoning in Rome early in the second century though we have little evidence of prosecutions after 150. These cases were heard before various tribunals. The creation of the court may therefore have been occasioned by the desire to instil uniformity and stability, particularly following the *de sicariis* court precedent. Outbreaks of virulent disease in Rome had often been attributed to the activities of poisoners. The likelihood that there would have been a marked deterioration in the individual health and sanitary conditions in Rome brought about by the influx of foreigners in the period after the destruction of Carthage may have lead superstitious Romans to seek out and find scapegoats, allegedly poisoners. The number of victims involved in poisonings had in the past given the cases importance because they threatened the security of the state. Senators would again have been the jurors. They would have been more amenable to this role since it is likely, having regard to the earlier

[2] Chapter 3, Section 5.1.

cases, that both accused and victims could have been persons of higher social status.

The jurists indicate that the law of Sulla prohibited the preparation, storing, sale and administering of poisons. Similarly, Cicero alludes to Sulla's law as covering the making, sale, possessing, purchase or administering of poisons. The law of Sulla may well have been tralatitious and accordingly these acts may have been prohibited by the *de sicariis* law as well. This suggests that the Romans were apprehensive on the issue of poisoners and that the law was justified.

As we have mentioned above, a nexus between the reasons for the creation of the first two permanent criminal courts and that which is argued for the 149 and subsequent standing courts is not readily seen. However, it is possible that the Romans believed that the steps taken to introduce permanent courts to suppress thuggery and poisoners would have a beneficial effect on the attitude of *peregrini* towards Rome. *Peregrini* might have greater confidence in utilising the procedures in the 149 court when they became aware that its concept and *modus operandi* had been endorsed again and adopted by the Romans as an acceptable method of stabilising the urban environment. The *peregrini*, very much as visitors, with exotic trappings, would perhaps have been happier about an arduous trip to Rome when they knew that the Romans had taken steps to make the city, where they would be seeking to recover their entitlements, a safer place.[3]

5. The *lex Acilia* and the *quaestio de pecuniis repetundis* of Caius Gracchus

This study has argued that the *lex Acilia* was designed to underpin the funding of the economic reforms of Caius.[4] Having introduced this suite of laws, which were directed towards the betterment of economic and social conditions in Rome, Caius needed within a short time to find a source of funds which he could utilise for their implementation. Copious monies flowed into the *aerarium* from various sources.[5] However, Cicero asserts that Caius' grain law exhausted the *aerarium*. Caius therefore had to search elsewhere for his seed capital. His answer was the

[3] As is the case today, visitors to Rome would be an obvious target for criminal attacks.

[4] Chapter 4, Section 2.

[5] Chapter 4, Section 5.

wealth of Asia. Like his brother he had resort to the people to pass the legislation in what was a traditional area of senatorial prerogative.

The *lex Sempronia de provincia Asia* was designed to consolidate and provide a stable flow of revenue for Rome. The law effected this by providing that the right to collect the tithes in Asia was to be auctioned in Rome by the censors openly before the people. Caius thereby sought to eviscerate the sharp practices which might previously have occurred with dishonest governors cutting deals with *publicani* or others for tax gathering with the prospect that Rome might never see the proceeds.

For Caius, the advantage with his law was that from the outset he would have known the amount which was legally due. The *publicani* in turn would be entitled to the proceeds of whatever amount of tithes they could collect from *peregrini*. This auction price procedure for Asian revenues lent certainty to the flow of revenue.

Caius introduced the *lex Acilia* as a vital part of his reform agenda. He had to ensure that there was a relatively stable environment in Asia in which *publicani* might exercise the rights for which they had contracted. However, disruptions in collections from *peregrini* would lead to shortfalls in receipts and inevitably induce *publicani* to seek some compensation or accommodation from Rome for any lost tithes. These disruptions might arise from the theft of peregrine monies or property by governors which could seriously interfere with peregrine capacity to make payments to *publicani*. The pressure on some governors to extract unlawful financial rewards from their office in order to regain electoral expenses would have been in conflict with Caius' purpose as well as the diplomatic policy of the Senate.

With the *lex Acilia* Caius substantially improved the rights of peregrines. They could now recover not only the value of what they had lost but also damages in an amount equal to their loss. The fact that the jurors were no longer senators and the sophisticated procedures introduced for the selection of jurors, investigation and trial of claims must have given great heart to peregrines and acted as a serious deterrent to gubernatorial depredations.

The *lex Acilia* and its court were crucial to the success of Caius' reforms. This study also suggests that the new judicial arrangements would have raised the

expectations of the provincials and disposed them favourably towards Roman provincial and military interests. The main reasons for the *lex Acilia* were the protection of the revenue flow required for Caius reforms and the maintenance of good relations with peregrines which would emerge from the trouble taken to improve the procedure and functions of the new court established under the statute, their "*arx*".

The explanations given by literary sources for the creation of the court are not persuasive. The suggestion that the biased performance of the senatorial jurors influenced Caius fails to take account of the fact that the inscriptional evidence indicates that there had been successful actions and verdicts against defendants under the 149 law and the *lex Iunia*.

6. The *lex de ambitu* and the *quaestio de ambitu*

Ambitus, rendered as electoral bribery, was a problem of the Roman elite. Senators were politicians and most were also legislators (when as plebeians they voted in their tribes in the *concilium plebis* on *rogationes* introduced by tribunes). The potential therefore existed for conflicts of interest in their politics, particularly in the area of bribery.

The issue of electoral bribery was at the core of aristocratic politics. In a multi-candidate election for high office, the competition pitted aristocrat against aristocrat. Hunger for office and the consequent personal prestige drove candidates to solicit the votes of the electors by distributions and displays of largesse. The *lex Gabinia Tabellaria* of 139 did not reduce electoral bribery by making expenditure a bad bargain. Rather it drove candidates to consider increasing their wagers. The electoral vote now had a market value and candidates vied to capture the favour of electors with competitive offers of largesse. Cessation of open voting meant that no longer could a candidate lean on a voter or intimidate him by watching his voting pattern. Candidates now had to meet the market and former electoral loyalties were swept away by the clandestine procedure.

Within the Senate there would be mixed and conflicting feelings. A majority would surely have wished to maintain the approach to the diplomatic policy we have laboured. On the other hand, there was a requirement for members of the

order to be able to improve their prospects of election by offering inducements. There was the ever-present problem that, driven by the exigencies stemming from the secret ballot, successful candidates would seek to recover electoral expenses from their unfortunate subjects when appointed to a *provincia*. The consequent potential for disturbing the peregrines would conflict with the senatorial foreign policy.

The enabling law for the *quaestio de ambitu* was introduced in or about 120, in the long shadow of the *lex Acilia*, and there are good reasons to accept that it was intended to operate in support of the great statute of Caius. It is trite to conclude that the enabling law was merely designed to stop candidates engaging in bribery as a means of obtaining office. However, the underlying intent went further than this. The law would have had an *in terrorem* effect and put a break on candidates who contemplated bribery. The danger to senatorial policy in foreign affairs was reduced accordingly. Each candidate who decided in face of the law to resile from bribery in a multi-candidate election was a man who would not have the need to extort property from *peregrini* in compensation. Thus, the law and its court were devised ultimately to protect the property of peregrines from being plundered by governors and thereby maintain the goodwill and support for Roman interests. The law went in aid of the *lex Acilia* in that it was intended to head off men who might become provincial extortionists.

Coming as it did but three or four years after Caius' statute, the law would surely have attempted a definition of what constituted the offence of *ambitus*. It is possible that the law in this definition allowed senators some leniency in the garnering of votes. Perhaps targeted expenditure, as distinct from indiscriminate distributions of largesse, would not have fallen foul of the definition. The difficulty was that whatever expenditure was authorised by, or fell outside, the definition of *ambitus* might still be the subject of attempted recovery from provincial subjects. To guard against this it is possible that the law prohibited any recovery action as a quid pro quo.

7. The *lex de peculatu* and the *quaestio de peculatu*

No details of the enabling law which established this court have survived. For our analysis we have to rely on the comments of the jurists on two laws attributable to Caesar, embellished by the rhetoric in 70 of Cicero in the Verrines. It is of some

consolation to find a modicum of similarity as to the terms of the offence between these sources.

A major purpose of the enabling law for the *peculatus* court was to provide a further string to Rome's bow for maintaining its relationship with allies and friends in the interests of securing reliable foreign outposts. The law also served an important purpose in filling a hiatus in the *lex Acilia*. It was doubtful as to whether the Roman people had *locus standi* to institute proceedings thereunder. The creation of the *peculatus* court resolved this difficulty. It provided a forum in which proceedings might be brought by the Roman people for the recovery of their public monies or public property, including stolen statues or other artefacts. Its remedies were particularly relevant in circumstances where an official had been provided with money for a specific purpose but had then retained it or applied it for other purposes.

Roman administrators who sought to prosper by provincial abuses would now be exposed to a prosecution for extortion at the behest of the peregrines in respect of their property and for *peculatus* at the instance the Roman people for the defalcation of public property. The close relationship between the two offences is sufficient to suggest that the rationale for the introduction of the permanent *peculatus* court was Rome's self-serving regard for peregrine interests.

This enabling law meshed with the *lex Acilia* to provide comfort to the *peregrini*. They would have observed a real concern on the part of Rome to protect *pecuniae publicae* from being misappropriated by its administrators. Past Roman nonchalance on this score would have discomfited *peregrini* and left them with the feeling that their own petitions for relief against extortion would hardly merit consideration if the Romans showed little concern about protecting their own property. The new court would have instilled some confidence. A step, which had been a long time in the taking, would lead *peregrini* to suppose that Rome was now looking still more closely at provincial maladministration, which could only be of benefit to the provincials, and that Romans would be more conscious of peregrine troubles. Overall, we conclude that there was a continuation of Roman foreign policy objectives in the passage of the statute.

8. The *lex Appuleia de maiestate* and the *quaestio de maiestate*

In 103 L. Appuleius Saturninus introduced the *lex Appuleia*, arguably the first in his suite of laws intended to make inroads into long established senatorial prerogatives by utilising the legislative powers of the people and their plebeian tribunes. It is immediately apparent that a significant purpose of the law was to suppress repetition of the disastrous performance of *imperatores* over the previous decade, culminating in the calamitous defeat by the Cimbri in 103 of the Roman armies under Q. Servilius Caepio and Cn Mallius Maximus at Arausio.

A second, but by no means subsidiary purpose, of the *lex Appuleia* was to support the diplomatic outcome for which we have argued above. *Peregrines* could infer from the conduct described in the statute the benefits which might flow to them. The statute encompassed the conduct described by Cicero in the passages in the *Oratio in Pisonem*[6] and from the jurist Scaevola in his exposition of *maiestas* under the *lex Iulia*.[7] Commission of any of this conduct, much of which was particularly pertinent to the interests of *peregrini*, would constitute *maiestas minuta*. *Peregrini* might have previously suffered as a consequence of the conduct now proscribed. Knowledge that the Romans were prepared to impose penalties on governors who engaged in this kind of injurious behaviour would have been welcomed.

The possibility of prosecution under the *lex Appuleia* for *maiestas* was not limited to the conduct described in the *Oratio in Pisonem* and Scaevola passages. It was open for actions to be instituted on facts not listed in the statute and it was then for the jurors to determine at their discretion whether these facts amounted to a diminution of the greatness of the Roman people. Certainly, the flexibility of definition, which would have been favourably regarded by *peregrini*, would be of concern to provincial magistrates who would have to exercise restraint in making decisions that affected *peregrini*. This discretionary procedure in the jurisdiction of the court would have served the interests of *peregrini* therefore, since governors could never be entirely certain whether fraudulent conduct might deliver them into the hands of the equestrian jurors.

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[6] *Pis*. 50.

[7] Chapter 7, Section 12.

The discretionary procedure, though forming part of a statute passed in 103, was introduced into his statute by Saturninus with the intent that it be used as a means of coercing, by threat of prosecution, those who might oppose his future programmes, even including those which were introduced in 100. What fell within the passages noted above would not have necessarily covered conduct which Saturninus wished to prosecute. The discretionary procedure allowed for this.

9. Sulla and the standing courts

In 81 the dictator, Sulla, with bloody hands turned towards his primary objective, the enhancement of the authority of the Roman Senate and the restoration of its former power and prestige. But it was to be an enhancement of the role of the Senate rather than of its members. Sulla's own murderous actions, with the prescriptions and the internecine strife of the social and civil wars, had brought about "a huge discontinuity in Roman politics"[8] and the destruction of a large portion of the Senate. Sulla therefore found himself with a *Curia* comprising between 150 and 300 men.

A necessary adjunct to the reinstatement of senatorial stature was surely the re-establishment of senators on the judicial benches of the permanent courts from which they had been excluded as sole jurors for more than 40 years. This was fundamental to Sulla's political objective. Therefore, he brought it about that the jurors in the standing courts were to comprise exclusively senators in place of the mixed juries under the *lex Plautia*. . He solved the problem of the reduced numbers in the Senate by adlecting some 300 equestrians into the senatorial order, by enrolling the first 20 quaestors and, if we are to believe our hostile sources, by admitting common place men and ordinary (loyalist) soldiers.[9] Undoubtedly he wanted to gain the judicial experience of the *equites* who were probably handpicked.[10] Thereafter, the Sullan Senate probably comprised between 450 and 600 members, since he needed a body of at least 450 senators for an *album*.

However, whilst it was important to Sulla that this re-establishment occur, it was equally important that the jurisdiction of the standing courts should be reviewed

[8] Flower (2010) 120.
[9] Sallust *Bel.Cat.* 37.6: Dio Hal.77.9.
[10] App. *BC.* 1.100.

and any lacuna or defects in jurisdiction remedied. He would find six courts sitting each with its own enabling statute defining its offence and procedure. These courts had been operating effectively for several decades. Sulla had faith in the standing court system. As evidence of his confidence, Sulla had no hesitation in creating his *quaestio de testamentis/nummaria* and in combining the jurisdiction of the *de sicariis* and the *de benefices* as permanent structures.

Against this background, the issue arises as to the extent to which Sulla consolidated the permanent courts or treated them on a piecemeal basis. In law, consolidation involves the collection and incorporation into one statute of all of the laws on a particular subject matter, sometimes with necessary amendments or drafting changes. Amongst modern scholars there appears to be inconsistency in analysing Sulla's approach.[11] In the first place, his belief in the courts, which we have posited, is inimical to any suggestion that Sulla was concerned to embark on a substantial reform and reconstitution of the standing courts.

The preferable view is that Sulla approached the enabling statutes for the permanent courts stage by degrees and did not consolidate any of his modifications with the existing statutes. He passed laws which added to, or amended, these statutes although there appears little evidence that he then promulgated enactments which consolidated all of the existing laws on a particular offence into the one statute. This is the aim with modern statutory reform, so that the public can find the state of the law in the one enactment. The concept of consolidation, however, does not fit with the Roman perspective. Such evidence as we have would suggest that Romans were happy to allow old statutes to continue in force and not die as Richardson has succinctly argued.[12] Cicero consistently refers to the existence of earlier enabling statutes — to the law of Piso and to the law of Acilius, for example, without suggesting any consolidation of these laws with earlier enactments.

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[11] Alexander (2010) 243: "We know that Sulla's legislation created at least half a dozen such standing courts, although several had probably come into existence between 149 and Sulla's dictatorship." Harries (2007) 17: "Sulla made the first serious attempt to provide a coherent organisation for the *quaestiones* which had hitherto developed piecemeal." Sary (2004) 123; 136: "Sulla wanted to put an end to anarchy and consolidate the republican order by a large reform of Roman criminal law." He later asserts merely that Sulla was concerned with a more formal definition of crimes (2004) 137.

[12] Richardson (1998).

Sulla's approach was unsystematic. Rather than create new courts to deal with conduct which required statutory proscription as a new crime, Sulla preferred to adopt a piecemeal attitude. He was predisposed to having a description of a new crime tacked on to an existing statute whose proscriptions bore a resemblance to the new crime.

As to Sulla's amending laws, he passed a *lex Cornelia* dealing with extortion.[13] It involved an increase in the damages payable from two to two-and-a-half times the value of the stolen property. As to *ambitus*, he passed a law which restricted a defendant condemned for *ambitus* from standing for office for ten years,[14] an intolerable penalty for a Roman aristocrat. It is likely that he thereby removed the threat of the death penalty.[15] In relation to *maiestas* he did not consolidate the law, but rather reiterated the provisions of an earlier statute this time the *lex Appuleia de maiestat*e.

The enabling law for the *quaestio de testamentaria/numaria* was a new law and certainly not a consolidation. We know little of its provisions. Sulla was clearly concerned to prevent forgery of testamentary instruments by members of his own class, in whom literacy rested. The prominence given to forgery by its codification suggests it may have become a problem. It is likely that Sulla wished to clean the Augean stables of the senatorial order in this respect, as the misconduct would do damage to his concept of blameless senatorial government. It is likely that the *numaria* provisions were enacted to provide some means of combatting repetition of the economic crises which had bedevilled Rome in the previous decade.

The combined *de sicariis et veneficiis* court was an amalgam of the earlier tribunals apparently designed to bring within the jurisdiction of the single standing court the different cases of homicide, which had previously been tried in the separate courts. He tacked on to this court jurisdiction over arson, the acceptance of bribes by a judicial officer and the giving of false evidence. Again, consolidation was not involved, and if Sulla did in fact establish a *quaestio de iniuriis*, the same position would obtain.

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[13] Cic. *Rab.Post*.9.

[14] Schol. Bob on Cic. *Pro Sull.*17.

[15] Sulla reaffirmed the provisions of the *lex Villia* which fixed the minimum age for ascending to office and the period between holding office. However, this clearly a separate provision and not consolidated with the *lex Cornelia*.

Sulla did not make substantial changes to the enabling statutes with his amending *leges Corneliae*. He believed in the permanent courts system with a praetor presiding, a jury immediately available and a punctilious procedure based on the *lex Acilia*. His confidence in the permanent courts implies that he accepted the rationale for the creation of the enabling statutes, which we have argued, namely the cementing of old and the creation of new relationships with friends and allies

The pre-eminence of the Senate in foreign relations, traditionally its bailiwick, had been seriously challenged by the incursions of Saturninus. Sulla put an end to this threat by extirpating the power of the tribunes to initiate legislation and their *concessio*. Thus, he also intimated that moves for the creation of further standing courts would depend on legislatives initiatives from senior magistrates in order to advance his objective of senatorial dominance.

Maintenance of good relations with peregrines through the maintenance of an effective court system to right directly or indirectly[16] their complaints might reinstate senatorial prestige in foreign affairs.

Were the provincials better off after Sulla's intervention? Surely yes. In the courts which largely concerned them, the damages for *res repetundae* had been substantially increased, in the *ambitus* court the aspiring candidate faced the risk of political annihilation if he elected for bribery, and in the case of *maiestas*, Sulla, in restating what we have been argued to be the provisions of the *lex Appuleia*, disclosed a belief that this discretionary nature of this offence and its prosecution was in the interests of peregrines.

In the "new" Rome, which Sulla envisaged and sought to bring about, the authority and prestige of the Senate was to be restored to its former glory — to be re-established as the controlling force in the State.[17] Sulla's attitude to the permanent courts indicates that he saw them in their modified state as contributors to this objective.

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[16] The *peculatus* court, for example, gave no remedy to the peregrines but it might operate, if Romans utilised its jurisdiction, to boost their confidence in pursuing their own remedies.

[17] Seager (2001) 149.

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