Law and Religion in the Roman Republic

Edited by
OLGA TELLEGEN-COUPERUS

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INTRODUCTION

Olga Tellegen-Couperus

Roman law is generally regarded as basically differing from other legal systems in Antiquity in that it reached, at an early stage in its development, a very high level of secularisation. However, as late as the first century BC, the Romans were regarded (and regarded themselves) as the most religious people in the world.[1] Is this a paradox or is the commonly held view really at variance with the sources? The easy way out is to opt for the paradox and to reduce the relevance of religion for law by stressing the fact that Roman religion had no theology and did not prescribe conduct. It is true that the state religion did not give rise to an ethical system of behaviour as did for instance the Torah. Such a system was provided first by the *mos maiorum* and, from the second century BC onwards, by the Hellenistic philosophies that conquered Rome. However, there are reasons to assume that, during the Republic, Roman law was not secularised at all, on the contrary, that its connections with religion were never really severed.

First, it was the pontiffs who developed sacred law as well as civil law; only in the first century BC, did civil law become the domain of legal experts who were not necessarily pontiffs. Second, it is striking that well into the second century AD religious rules about, for instance, death and burial were still as much alive as they had been in the early days of the Republic; legal problems would arise, and so sacred law met civil law. Moreover, recent research has shown that, during the Republic, the major priesthoods and the magistracies were closely connected in matters of government as well as law.

Research into these questions seems to have suffered from one-sidedness: legal historians tend to marginalise religion, whereas scholars of Roman religion tend to narrow down law. An interesting example of the latter category is a fairly recent volume on law and religion in classical and Christian Rome; the contributions written by historians deal with religion and public law, whereas the bulk of Roman law concerns private

[1] Cicero, *De haruspicum responsis*, 9.19; *De natura deorum*, 2.8.

law.[2] As to the former category: so far, Alan Watson has been the only legal historian to dedicate a monograph to the subject.[3] He explains the important role of the pontiffs in Roman private law in the context of the struggle between the patricians and plebeians. Until 300 BC, only patricians could be pontiffs. According to Watson, they developed the *ius civile* from the interpretation of the Law of the Twelve Tables. By giving advice to the magistrate who operated the court system they and their successors, the jurists, created an autonomous system of law that was different from anywhere else in the world. It seems that Watson's views on the relationship between law and religion are—indirectly—inspired by Mommsen and the Historical School. However, the idea that Roman law had developed into an autonomous legal system is no longer generally supported. It is time to look at Roman law and religion from both sides.

In December 2008, an expert meeting was held at Tilburg University (the Netherlands) to discuss the relationship between law and religion in the time of the Republic. It was the first time that both scholars of Roman religion and of Roman law came together. Admittedly, historians of Roman religion were more willing and able to participate in this project than the legal historians. Since then, contacts between the various disciplines have become more easy and frequent. The results have been put together in this volume.

Of course, several approaches to the interaction of law and religion are possible. Here, three aspects are prominent, and the book is accordingly divided into three parts. The first part focuses on the shared basis of law and religion as means to deal with the future. In the second part of the book, the relationship between law, religion, and the state is explored, by highlighting the religious basis of the magistracies and the legal duties of the various priests. The third part of the book deals with the interaction between religion and private law, by means of a discussion of subjects ranging from the concept of *noxae deditio* to the building of funerary monuments.

How should we deal with the uncertainties of life? In modern times as well as in early Rome, that question has triggered all sorts of activities by individuals and communities. On a societal level, it may lead to the development of common rules that, if properly kept, would ward off danger. This is what happened at Rome. Leon ter Beek states that, in

[2] *Religion and Law in Classical and Christian Rome*, eds. Clifford Ando and Jörg Rüpke (Stuttgart, 2006).

[3] Alan Watson, *The State, Law and Religion: Pagan Rome* (Athens, Georgia-London, 1992).

early Rome, religion permeated all aspects of society including law. At the same time, Roman law was of a secular and casuistic nature, just like the legislation of almost all the peoples in the Ancient Near East. This ambivalence can very well be illustrated by the penalty of *sacer esto*, 'he must be cursed'. These words occur in a religious as well as a secular context. An example of the former is the inscription on the *stele* underneath the famous *lapis niger*. On the basis of a thorough discussion of the extant 16 lines of the inscription, Ter Beek suggests that the *lapis niger* marked a sacred spot, maybe the grave of Romulus or of his foster father Faustulus, and that the inscription warned the people to keep this place clean so as to avoid a bad omen. The penalty of *sacer esto* was also used in a secular context, i.e., in the *leges regiae* and the Laws of the Twelve Tables. The clauses mentioning this penalty all deal with wrongs against other human beings involving a breach of trust. Ter Beek suggests that such wrongs were regarded as a threat to Roman society that could only be warded off by means of a religious penalty.

Since divine law was, in early Rome, one means by which the future could be controlled, it is but a small step to another way of dealing with the future, *divinatio*. Federico Santangelo studies the connection between law and divination in the later Roman Republic, making ample use of Cicero's *De divinatione* and *De legibus*. The verb *divinare* and, later, the noun *divinatio* were used in different ways, varying from the general (making a divinely inspired guess) to the specific (the speech by a prospective prosecutor before the jury in a criminal trial). According to Santangelo, there may have been some line of contact between divination and *prudentia*. The translation of *prudentia* may be problematical, but it clearly derives from *pro-videre*, seeing before, seeing ahead. In this connection, the adjective *prudens* is also interesting: it could be accompanied by a genitive to refer to a kind of knowledge, for instance *iuris prudens*, 'a legal expert, a jurist', or it could be used as a noun; in legal jargon, the noun *prudens* came to mean 'legal expert'. Santangelo draws a parallel between the *responsa* of the jurists and those of the *haruspices*, the priests who in the second and first centuries BC acquired a prominent role in Roman public divination: in both contexts, the *responsa* were used as precedents that laid the basis of a 'jurisprudence', but, most importantly, they both originated in a typically divinatory practice. According to Santangelo, the boundaries between *divinatio* and *prudentia* are more porous than it has often been thought.

The close connection between law and religion had a considerable impact on the functioning of the state, and particularly on the magistrates

and the priests. Roman religion was an integral part of the state and there was no incompatibility between holding political and religious offices simultaneously. Religion chiefly focused on keeping man in proper contact with the gods. Since any disturbance of those relations could lead to disasters and diseases, religion was a constituent part of public life. Meetings of the senate or assemblies of the people could not begin without the proper ceremonies and rituals being performed. However, the performance of these rituals was not the monopoly of priests but was often assigned to magistrates. Moreover, the latter were responsible for dedicating new temples and for making vows for the senate. The priests, on the other hand, could be involved in performing public duties of a legal nature, such as determining the calendar, supervising legal proceedings, and declaring war and making peace. Priests, unlike the annual magistrates held office for life.

Michel Humm focuses on the magistrates. He uses the enigmatic *lex curiata* to show how, during the time of the Republic, the Roman magistrates derived their powers from the gods of the city, and particularly from Jupiter. In modern literature, the curiate law has been associated with the concept of *imperium* and, therefore, with the higher magistrates; so far, the nature of this connection has remained controversial. However, according to Humm, the curiate law is not only used for higher magistrates with *imperium*, but for all magistrates elected by one of the electoral assemblies of the *populus*. It served to define the magistrate's field of competence (*potestas* and, for greater magistrates, *imperium*) and, consequently, to confer on him the right to take the auspices. There were several situations in which magistrates had to take the auspices, the first being the moment they came into office: these auspices of investiture were important, because it was only when a magistrate had thus obtained Jupiter's assent that his full power of command (*imperium*) as well as his *iuris dictio* were conferred on him. There were also 'departure auspices' that were to be taken by the higher magistrates on whom the senate or the *populus* had conferred the command of an army: they enabled the magistrate to be directly entrusted with *imperium militiae* and war auspices by Jupiter. Humm concludes that the magistrates did not receive their civil, legal, or military powers from the people that had elected them or from the *lex curiata* that enabled them to go and take the auspices, but from Jupiter himself.

Jörg Rüpke turns to the pontiffs. One of their duties was to supervise the calendar, determining the days on which markets and popular assemblies could be held and legal cases could be heard. Rüpke explains that,

around 300 BC, the Roman calendar changed from a lunar to a solar system. In the Mediterranean world, the calendar used to be determined by observation of the moon. Shifting to a solar calendar was attractive for reasons of agriculture, sailing, and—last but not least—for going to war. However, a solar calendar requires significantly greater observational efforts, an institutionalised memory, and specialists. Because the results are less obvious, it also requires power of enforcement. In Rome, these conditions were fulfilled at the end of the fourth century BC. The change of the calendar triggered another innovation in that, for the first time, the calendar including all the days of the year was written down and published. Almost every day was categorised as either *Nefas* or *Fas*, indicating which days were market days, assembly days, and / or days to initiate legal proceedings. According to Rüpke, this change also affected the ritual elements of Roman law. Until then, the pontiffs had decided on which *formulae* had to be pronounced to start legal proceedings. Now, the *formulae* were summarized in the form of a table and published. This publication was part of the logic of the calendar reform. Rüpke argues that these innovations cannot be described as secularization nor as sacralisation but rather as rationalization of religious practices.

It could be expected that the publication of the *dies fasti* and the legal *formulae* would affect the position of the pontiffs in their capacity as supervisors of civil procedure. Indeed, many historians think it did. Jan Hendrik Valgaeren argues that it did not. On the contrary, it may have led to an increase in the number of lawsuits. The fourth century BC had seen the expansion of Roman territory and the ensuing growth of the Roman economy. Moreover, the publication was not meant to weaken the pontiffs' position but was part of the logic of the calendar reform as described by Rüpke. The *lex Ogulnia* of 300 BC, which doubled the number of pontiffs, may have been introduced in order to help the pontiffs cope with the increase in their legal duties.

Of old, the Fetial priests had been charged with declaring war and making peace but they ceased to function after 200 BC. That, at least, is the commonly held view, and the college is supposed to have been revived only by Augustus in 32 BC. Linda Zolschann, however, takes a stand against this view. In her contribution, she shows that between 200 and 32 BC the Fetial priests continued to perform most of their traditional duties. These duties involved first and foremost the conclusion of treaties (*foedera*). Such treaties were sealed with mutual oaths. Ten treaty inscriptions discovered in the last two centuries furnish evidence that, in the second and first centuries BC, it was a Fetial priest who

swore the oath on behalf of the Roman people. In this period, the Fetials also performed other traditional duties including the annual renewal of treaties, the organisation of annual games for Jupiter Feretrius, and the guarding of Fetial law. The fact that the names of Fetial priests begin to be recorded only in the first half of the first century AD does not support the argument that Augustus revived this ancient priestly college, nor does their disappearance around AD 240 show that the Fetials ceased to exist. According to Zollschan, it only mirrors the rise and fall of the 'epigraphic habit'. She concludes that the Fetial priesthood continued to function in the middle and late Republic and that we must await further discoveries in order to know when they really died out.

The third part of the book deals with the interaction between religion and civil law. The persons dealing with legal problems between citizens were traditionally the same as the persons dealing with problems between the citizens and their gods. It was not until the first century BC that a new phenomenon arose: the legal expert or jurist who was not necessarily involved in one of the priestly colleges. These jurists were not 'professionals'. They belonged to the elite, serving as magistrates and priests, acting as advocates, giving legal advice, and collecting and publishing their opinions. Some of them were experts in sacred law as well as in civil law. It is these jurists that were responsible for the rationalization of Roman law, at the same time guarding its religious roots.

Sacred law and civil law differ immensely as to our knowledge about them. Roman civil law has been relatively well documented in Justinian's *Digest*, which was compiled in the sixth century, but there is no such collection of sacred law. During the last two centuries, quite a few attempts have been made to reconstruct Roman sacred law. Olga Tellegen-Couperus discusses the most recent one, made by the well known expert in Roman religion, John Scheid. Focusing on pontifical law, Scheid reconstructed two elements of the punishment of a religious offence: the designation of the guilty person and the establishment of guilt. For the first element, he used a concept known from civil law, *noxae deditio*, for the second one he used a *regula* of the jurist and pontiff Q. Mucius Scaevola (cos. 95 BC). However, from the point-of-view of Roman law, this way of working does not convince. First, Scheid does not distinguish between the forms of *deditio* in early Roman law, about which next to nothing is known, and the *noxae deditio* of classical Roman law. The latter is well-attested in the sources and has nothing in common with the early *deditio*. Therefore the comparison does not hold and cannot support the reconstruction of the first element. Secondly, Scaevola

modified the extant distinction between intentional and unintentional wrongdoing in sacred law in order to relax the rules. In a civil law case, however, he is known to have introduced the same distinction in order to tighten the rules. Therefore, it is clear that, in the second century BC, sacred law and civil law had become two separate sets of law that, as far as we know now, cannot easily be used to fill up a lack of knowledge on either side. Moreover, the jurists started to publish their *responsa* and so made it possible for a body of civil law to come into being. Unfortunately, this did not happen for sacred law.

Important for understanding how law and religion operated, is an appreciation of the sacred in Roman life and society. James Rives sets to work almost like an archaeologist to discover the earlier layers of the trichotomy *sacer-sanctus-religiosus* mentioned by the second century jurist Gaius. These words were used to indicate respectively a temple, a city-wall, and a grave. As *res divini iuris*, they were not susceptible to human ownership. However, it was people who made them into *res divini iuris*: magistrates and priests created *res sacrae* and *sanctae*, whereas *res religiosae* were made by private people. The elite to which magistrates and priests of old belonged controlled the *res sacrae et sanctae*, but not the *res religiosae*. According to Rives, the latter may have even included more than graves. Festus, for instance, declared a place that was struck by a lightning bolt to be immediately *religiosus*. Such an event was completely outside any human control. Originally, even the adjective *sacer* may have applied to anything perceived as having some inherent connection with the divine. Rives suggests that the elite through the magistrates and the priests first appropriated what was *sacer* and *sanctus*, and in the time of the Empire also *res religiosae*. They did so by recognizing as such only a few specific cases, and in the end only graves.

Grave monuments were an important means to secure the immortality of the soul. However, after a person's death, it was (and still is) difficult to ensure that his descendants would keep his memory alive, for instance by erecting a monument for him. To this end, people often inserted a *fideicommissum* in their will or codicil with instructions regarding burial or cremation and the monument. Among the living, such a clause would be binding but, in the case of funerary monuments, the interested party was the deceased person who could not ensure that the request was executed. Jan Willem Tellegen discusses three different kinds of sources that deal with this problem: a letter by Pliny the Younger about a case in which the request was not carried out, two inscriptions on monuments which record instances when it was, and three *responsa* on the subject

that have been included in Justinian's *Digest*. It seems that, to a certain extent, the jurists were willing to support the attempts of testators to make their heirs build a sepulchral monument for them. However, there was a limit: the first century BC jurist Alfenus Varus denied that disinheritance could be used as a punishment for not erecting a monument. The liberty of the heirs to accept or forego the inheritance must never be curtailed. According to Tellegen, it is necessary to combine various kinds of sources in order to understand the paradoxical nature and the importance of the legal problems involved and to appreciate the common sense of the Roman jurists in solving these problems.

In conclusion, I hope that this volume will make clear that the Roman people were remarkable, but not for—at an early stage—secularising their law. In the first centuries of the Republic, religion permeated society. Magistrates received their power from the gods, priests performed secular as well as religious duties, and religious penalties were imposed for both religious and secular wrongs. A large part of this tradition remained intact well into the Empire. Around 300 BC, when the Roman territory had come to include the whole of central Italy, an important step towards rationalization was taken by the pontiffs introducing the solar calendar. The ensuing publication of the calendar and of the legal *formulae* enabled the Roman citizens to know when there would be market days and when assembly days, and when and how they could start legal proceedings. In the second century BC, civil law crystallized into a set of rules that differed from sacred law. Legal experts, and these were no longer necessarily pontiffs, began to publish their *responsa*, turning Roman law into a fixed set of concepts that for the centuries to come could (and would) be applied to a large variety of legal problems. The fact that this did not happen for sacred law does not mean that religion lost most or even some of its relevance to Roman law and society. It does mean that it is less easy to see the lasting connection between Roman law and religion. In my view, this connection can only be fully discerned when legal historians and historians of Roman religion work together more closely. I hope this book may inspire them to do so.

PART I

LAW AND RELIGION AS MEANS TO CONTROL THE FUTURE

DIVINE LAW AND THE PENALTY OF *SACER ESTO* IN EARLY ROME

Leon ter Beek

1. *The Concept of "Divine Law"*

Much has been said and written on the topic of divine law in the Roman Republic. In this paper I shall focus on the subject of divine law in early Rome until the first decades of the Roman Republic.

It has often been noted that, already at an early stage, Roman law had a distinctly secular character. However, the situation regarding law in early Roman society is not so unambiguous. One has to realize that archaic Rome did not distinguish between divine and human law or justice. Rather religion permeated all aspects of archaic Roman society.[1] To start with, the expression "divine law" can be understood in more than one way. It can be understood as referring to cultic or ritual laws, which means laws concerning the way in which the gods are worshipped. It is also possible to speak of "divine law" in cases in which legal provisions regarding human interaction contain some religious element. Yet another distinction that can be made in this respect is that between rules attributed to the gods and those reaching back to human lawmakers. Very often these distinctions appear to be blurred. Modern scholars, following the Roman sources, generally distinguish between *fas* and *ius*. Servius states that "*fas* refers to religion, *iura* to human beings".[2] In other words: *fas* is "divine law", "sacred law", whereas *ius* is "human law".[3]

According to tradition, the first laws in Rome were made by the first kings. In the sources, we find laws going back to and, in fact, attributed to

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[1] Cf. William Warde Fowler, *The Religious Experience of the Roman People from the Earliest Times to the Age of Augustus* (1911, repr. New York, 1971), p. 277 who stated that "it is most important to grasp the fact that procedure in the *ius civile* was originally of precisely the same nature as procedure in the *ius divinum*, and that precisely the same rigid exactness is indispensable in both."

[2] Servius, *In Vergilii Georgica* 1.269: *Ad religionem fas, ad homines iura pertinent*.

[3] This distinction can also be found in Dionysius Halicarnassus, *Roman Antiquities* 2.10.3 (*oute hosion oute themis*). See Karl Georg Bruns, *Fontes Iuris Romani Antiqui*, 7th ed. by O. Gradenwitz (1909; repr. Aalen 1969), p. 4.

Romulus and his successors. Now can we call these laws "divine"? After all, Romulus (who according to tradition ruled from 753 to 717 BC) as the son of the god Mars was a demigod. His successor, Numa Pompilius (who, as tradition has it, was elected king in 715 BC and ruled until his death in 673 BC) enacted laws which tradition claimed to be inspired by the nymph, Egeria.[4] Livy states that Numa Pompilius pretended that he met Egeria during nights; he claimed that, on her advice, he established the religious ceremonies that the gods approved of most and appointed the right priests to every one of the gods.[5] In one sense, these laws can be called "divine laws".

Of course, the question whether these so-called "laws of the kings", the *leges regiae*, are, in fact, historical is still debated. However, one should bear in mind that the tradition of the transmission of these *leges regiae* is by no means less reliable than the tradition of the transmission of the oldest legislation in the Republic, the Laws of the Twelve Tables.[6] Direct citations from the *leges regiae* in the Roman (and Greek) sources are by no means fewer than direct citations from the Twelve Tables. Of course, frequency of citations is no guarantee of reliability, but the idea of legislation for the period before the Republic is in itself perfectly plausible.[7]

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[4] The name Egeria means 'the Deliverer'. On the relations between Numa and Egeria, see H.J. Edwards, *Titi Livi ab urbe condita libri. Praefatio, liber primus* (Cambridge, 1968), p. 130; on Numa's *pia fraus*, see Robert Maxwell Ogilvie, *A Commentary on Livy Books 1–5* (Oxford, 1965), p. 95.

[5] Livy, *Ab urbe condita* 1.19.5: *Simulat sibi cum dea Egeria congressus nocturnos esse; eius se monitu, quae acceptissima diis essent, sacra instituere, sacerdotes suos cuique deorum praeficere*.

[6] A relevant text is Livius, *Ab urbe condita* 6.1.10: *In primis foedera ac leges—erant autem eae XII tabulae et quaedam regiae leges—conquiri, quae conparerent, iusserunt. Alia ex eis edita etiam in volgus; quae autem ad sacra pertinebant, a pontificibus maxime, ut religione obstrictos haberent multitudinis animos, suppressa*. On this text, see Moritz Voigt, *Über die leges regiae II. Quellen und Authentie der leges regiae* (Leipzig, 1877), pp. 667–670, and more recently: Alan Watson, "Roman Private Law and the *Leges regiae*," *Journal of Roman Studies* 62 (1972) 104, note 52; Zika Bujuklić, "Leges regiae: pro et contra," *Revue Internationale des Droits de l'Antiquité* 45 (1998) 117–118, n. 72.

[7] Thus, convincingly, Voigt, *Leges regiae* II, pp. 806–825; also S. Tondo, "Introduzione alle 'leges regiae'," *Studia et Documenta Historiae et Iuris* 37 (1971) 1–73; Watson, "Leges regiae," p. 105; and Bujuklić, "Leges regiae," pp. 139–141. To my mind, after Voigt in the nineteenth century had already proved that the claims of the spuriousness of the *leges regiae* were not well-founded, Alan Watson, *The State, Law and Religion. Pagan Rome* (Athens, Georgia-London, 1992), especially pp. 87–90, has all but proven positively the authenticity of these *leges*. For an opposite view, see (as two examples among many) Jochen Bleicken, *Lex publica. Gesetz und Recht in der römischen Republik* (Berlin-New York, 1975), pp. 96–97, who, however, fails to present any argument for his position, and T.P. Wiseman, *The Myths of Rome* (Exeter, 2004), p. 90.

In my view, early Roman law can be qualified as divine provided that it is regarded as having a religious as well as secular character. There is one concept that may help illustrate this ambivalence, i.e. the penalty of *sacer esto*, 'he must be cursed'. This penalty has a clearly religious connotation. The words *sacer esto* occur on the *stele* found beneath the famous *lapis niger* as well as in the *leges regiae* and the Laws of the Twelve Tables. Therefore, it will be interesting to ascertain whether they are used for wrongs committed against gods and / or humans.

In the following, I shall first compare early Roman law with the laws of two other and older civilizations, that of Israel and that of Babylon, in order to demonstrate that there is nothing unusual in early Roman law combining religious and secular elements (section 2). Next, I shall focus on the words *sacer esto*. I want to demonstrate that the *lapis niger* was a *res divini iuris* and that, here, the penalty of *sacer esto* was applied in a religious context (section 3). Then, I shall discuss those provisions of the *leges regiae* and the Twelve Tables that include the penalty of *sacer esto* and show that, there, it was used in a secular context (section 4). My conclusion will be that the law of early Rome had a secular-religious character but that the religious penalty of *sacer esto* allows us to qualify it as divine law.

2. *Early Roman Law, Torah, and the Code of Hammurabi: A Comparative Approach*

As I have already mentioned, many scholars emphasize the fact that, from its inception, Roman law was almost exclusively secular in nature. And certainly, the secular character of the Laws of the Twelve Tables must be clear to anyone studying the citations from and the comments on these laws which have come down to us. Many scholars attach great importance to this observation. Watson for instance states: "The Twelve Tables [...] omitted altogether public law and sacred law. We have here, apparently, the beginning of the famous distinction between public and private law that has been so prominent in subsequent Western law."[8] Obviously, modern scholars are a little bit surprised to find that Roman law is so secular in nature. I think that one of the reasons for their surprise is the fact that we, living in the modern world of the twenty-first century, are subconsciously and unintentionally inclined to compare Roman law to

[8] Watson, *Pagan Rome*, p. 21.

another tradition which has shaped and formed our civilization, namely the Biblical tradition of the covenant between the one God and his chosen people, the Jews, which is especially embodied in the books of Exodus and Deuteronomy.

These books—the second and fifth book of the Torah—describe how God gave his laws to the Jewish people. When we compare the laws from these books to Roman law, as we know it since the Twelve Tables, it is immediately obvious that we have two different kinds of legislation. The laws in the Bible are believed to have been directly issued by God himself and are divine laws without any form of human interference. Consequently, the laws in these books of the Bible, especially the Ten Commandments, are formulated in a way that differs greatly from what we see in Roman law. In Roman law, we find mostly casuistic law. More often than not a regulation begins with *si*, 'if'. In this manner, a concrete case is posed. "If this or that happens, then this or that action should be taken." We find this kind of legislation in Rome from the earliest times, even in a *lex regia* supposedly going back to Romulus.[9] Also according to Festus, king Numa Pompilius enacted a law which stated: "If a person with wrongful intent and knowingly kills a free man, he will be a *paricidas*".[10]

Some decades ago, Cloud and MacCormack showed that this law intended to put the legal consequences of knowingly and with wrongful intent killing a free man not belonging to the 'clan' of the killer on a par with the consequences of knowingly and with wrongful intent killing a free man who belonged to the 'clan' of the killer.[11] In this way, the lawmaker aimed at preventing blood feuds, the perpetrator was declared *sacer*.

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[9] Cf. Festus, *De verborum significatu* 260 L.: *Si nurus, sacra divis parentum estod*. I will discuss this text later.

[10] Festus, *De verborum significatu* 247 L: *Si qui hominem liberum dolo sciens morti duit, paricidas esto*. For instance, in *Fontes Iuris Romani Antejustiniani* 1, *Leges* (= FIRA), ed. Salvatore Riccobono (1941, repr. Florence, 1968), p. 13. On this text, see for instance Roberto Fiori, *Homo sacer. Dinamica politico-costituzionale di una sanzione giuridico-religiosa* (Naples, 1996), p. 62; Giorgio Agamben, *Homo sacer. Sovereign Power and Bare Life* (Stanford, 1998), p. 81; Leon ter Beek, *Dolus. Een semantisch-juridische studie*, 1 (Nijmegen, 1999), pp. 322–331 with literature.

[11] J.D. Cloud, "Parricidium: from the Lex Numae to the Lex Pompeia de parricidiis," *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte, romanistische Abteilung* 88 (1971), 2–18; Geoffrey MacCormack, "A Note on a Recent Interpretation of "Paricidas esto"," *Labeo* 28 (1982), 43. See also Jörg Rüpke, "You shall not kill. Hierarchies of Norms in Ancient Rome," *Numen* 39 (1992), 73, note 7; Ter Beek, *Dolus*, pp. 327–328.

Not only in the *leges regiae*, but also in the Twelve Tables this kind of casuistic law is prominent. As we know from various sources, the opening words of the Laws of the Twelve Tables are:

> If the plaintiff summons the defendant to court, he shall go. If he does not go, the plaintiff shall call witnesses thereto. Then only shall he take the defendant by force. If the defendant shirks or takes to heels, the plaintiff shall lay hand on him. If disease or old age shall be impediment, he [who shall summon the defendant to court] shall grant him team; if he shall not so desire, he should not spread with cushions covered carriage.[12]

From the cited examples, the casuistic character of these ancient Roman laws is evident.[13] When we compare this kind of legislation to the legislation that we find in the book of Exodus, we see that there is a completely different style of legislation. In the Decalogue (Exodus 20.2–17), and also in the smaller equivalent in Deuteronomy 5.6–21, the divine lawgiver addresses us directly.[14] The Decalogue opens with: "I am the Lord thy God" (verse 1). Verse 13 through 16 run: "Thou shalt not kill. Thou shalt not commit adultery. Thou shalt not steal. Thou shalt not bear false witness against thy neighbour."[15] This is not casuistic, this is apodictic. Here a concrete case is not posed followed by the course of action that should be taken if this case arises, but there is a direct command from God to

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[12] *Lex XII tabularum* 1.1–3 *Si in ius vocat, ito. Ni it, antestamino. Igitur em capito. Si calvitur pedemve struit, manum endo iacito. Si morbus aevitasve vitium escit, {qui in ius vocabit,} iumentum dato; si nolet, arceram ne sternito*. For instance, in FIRA, p. 26. On this text, see Dieter Flach-Andreas Flach, *Das Zwölftafelgesetz. Leges XII tabularum. Herausgegeben, übersetzt und kommentiert* (Darmstadt, 2004), pp. 37–41.

[13] Cf. David Daube, *Forms of Roman Legislation* (1956; repr. Westport 1979), p. 6: "First then, in early Roman legislation, the form 'If a man murders another man, he shall be put to death' predominates, whereas later, the form 'Whoever murders a man shall be put to death' is no less usual. This change reflects an evolution from what we might call folk-law to a legal system. 'If a man does this or that' tells you a story—though of something yet to come. It puts forward a situation which may arise, and informs you how to meet it. 'Whoever does this or that' refers, not to a situation, but to a category, a person defined by his action. It does not inform you how to meet a contingency, but declares the proper treatment of a murderer. It is more general, abstract, detached."

[14] On these decalogues, see Friedrich Horst, *Gottes Recht. Gesammelte Studien zum Recht im Alten Testament*, ed. Hans Walter Wolff (Munich, 1961), pp. 151 and 257; J. Blenkinsopp, "Deuteronomy," *The Jerome Biblical Commentary I. The Old Testament* (Englewood Cliffs, 1968), p. 106.

[15] See M.J. Paul, G. van den Brink, and J.C. Bette, *Studiebijbel Oude Testament*, 1 (Veenendaal, 2004), pp. 741–747.

man.[16] This apodictic style can also be found in Roman law, even in the *leges regiae*, but it is far less frequent than the casuistic style.[17]

So we have seen that there is a big difference between ancient Roman law and the law of the Israelites in the Torah. But we must not forget that there were numerous other law systems in Antiquity, with some of which we are quite familiar. The most well-known is the law of the Babylonians established by king Hammurabi and dating from around 1750 BC. This law code is written on a *stele*; the top of this column has the shape of the land-lending-columns we know from later times, the so-called *kudurrus*; it has been reserved for a relief which, in the general opinion of scholars, captures the moment in which the Sun-god Shamash, seated to the right on a throne, hands over his laws to king Hammurabi, who is depicted on the left hand side. Shamash is considered to be the god of justice probably due to the fact that he sees all. The laws consist of almost 300 "paragraphs", headed by a poetical preface and concluded by an epilogue which is no less epic. Both preface and epilogue were probably written by a court poet.

When we take a closer look at the picture of Shamash and Hammurabi,[18] we perhaps start to doubt that Shamash is really depicted as handing over his laws to the king. After all, the god is not handing over any clay tablets to Hammurabi. Now what is he handing over? Probably he is handing over symbols. Recently, scholars amongst whom I should mention Demsky have suggested that the symbols handed over to Hammurabi are the divine values called *meshārum* ('that which is true, truth') and *kinnātum*, which means something like 'correctness'.[19] In this famous picture, the Sun-god Shamash is depicted as handing over these values of 'truth' and 'correctness' in a very concrete form to king Hammurabi. The king is receiving them from Shamash and so he is able to implement them. His implementation is however completely subjective and human in its formulation. Only the underlying value system is divine. That is also the reason why the laws of the Code of Hammurabi are all casuistic.[20]

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[16] See J.E. Huesman SJ, "Exodus," *The Jerome Biblical Commentary I. The Old Testament* (Englewood Cliffs, 1968), pp. 56–58.

[17] For instance in Numa, 7: *Vino rogum ne respargito*. In FIRA, p. 11.

[18] See J.B. Pritchard, *The Ancient Near East*, *1. An Anthology of Texts and Pictures* (Princeton, 1958), figure 59.

[19] Seminar in Jerusalem, January 1994.

[20] Suffice it to cite *Codex Hammurabi* 1–4: 'If a seignior (*awēlum*) accused a(nother) seignior and brought a charge of murder against him, but has not proved it, his accuser shall be put to death. | If a seignior brought a charge of sorcery against a(nother) seignior, but has not proved it, the one against whom the charge of sorcery was brought, upon going

The gods want evil and chaos driven out of the world. They want law and order among mankind. Therefore they give to the king the divine values of *meshārum* and *kinnātum*, which the king implements in his law code. So this is the position of law in the Mesopotamian world. Law is not absolute. It is dependent upon the lawgiver, who is a human figure. There do not appear to have been divine lawgivers in the Mesopotamian world.

Another thing which strikes us when we read the law code of Hammurabi is the fact that it contains no regulation regarding divine worship or religion whatsoever. Religion is completely absent. The Code of Hammurabi is purely social in nature. Of course, the total absence of prescriptions concerning divine worship cannot be due to chance. It is therefore generally assumed that this law code illustrates Hammurabi's aspirations to separate 'church' and state as clearly as possible. In this law code, jurisdiction therefore lies not with the priests, but with civil servants appointed by the king himself.[21]

All this serves to show that the semi-secular character of Roman law is no exception. The vast majority of the laws of the peoples in the Ancient Near East is secular in nature, but based on divine values. This holds equally for the laws of Sumeria, those of the Hittites, the Assyrians, or the Babylonians.[22] The only exception to this rule is the divine law of the Torah, the Bible. Therefore there is no reason to be astonished by the semi-secular nature of Roman law; the exception to the rule, the odd one out, is Israel, not Rome.

3. *The* Lapis Niger *and the Clause* Sacer Esto

In the year 1898 an interesting discovery was made in Rome. On the boundary-line between the Forum and the Comitium, the remains of a black-coloured pavement were discovered. It was a square made of

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to the river, shall throw himself into the river, and if the river has then overpowered him, his accuser shall take over his estate; if the river has shown that seignior to be innocent and he has accordingly come forth safe, the one who brought the charge of sorcery against him shall be put to death, while the one who threw himself into the river shall take over the estate of his accuser. | If a seignior came forward with false testimony in a case, and has not proved the word which he spoke, if that case was a case involving life, that seignior shall be put to death. | If he came forward with [false] testimony concerning grain or money, he shall bear the penalty of that case.' Translation by Th.J. Meek, in Pritchard, *Ancient Near East*, p. 139.

[21] See H.A. Brongers, *Oud-oosters en bijbels recht* (Nijkerk, 1960) p. 38.

[22] See Huesman, "Exodus," pp. 56–57.

black marble slabs fenced in by a wall of white marble. The surface of the black pavement had been damaged in several places and, in one place, patched together with a piece of an inscription, but the patching had been done with great care. About five feet beneath the level of the Julio-Augustan pavement there was discovered a group of monuments from a very ancient period that had been covered over in late Antiquity and in part deliberately destroyed.

In the first place, covered only in part by the black pavement, are to be seen two bases of tufa, which seem especially appropriate for two reclining statues of lions. Between the two bases there lies (possibly not in its original position) a single block of stone. Behind, the two bases run against a foundation, a small *sacellum* (5.5 by 11.5 feet).[23] Under the black pavement stands a rectangular *stele* covered with inscriptions on all four faces. The letters show a great resemblance to the Greek alphabet. The inscription is dated to around 500 BC.[24] When the *sacellum* was excavated, the plinths of the bases were found packed in a layer of gravel which had been brought there intentionally: in this layer were found numerous dedicatory gifts, small idols of clay, bone, and bronze, pieces of terracotta bas reliefs, fragments of vases, bones of animal sacrifices and so forth. The objects come mainly from very ancient times, from the eighth to the sixth centuries BC.[25]

The antiquarian Pompeius Festus, whose work is an abridgement of a larger work by Verrius Flaccus, the court-grammarian of emperor Augustus, says that 'the black stone (*lapis niger*) in the Comitium marks an unlucky spot; according to some it was intended to serve as the grave of Romulus, but this intention was not carried out, and in the place of Romulus his foster-father Faustulus was buried'.[26]

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[23] This *sacellum* (shrine) is usually considered identical with the (intended) grave of Romulus mentioned by ancient writers. On this shrine, see F. Leifer, *Zum Problem der Foruminschrift unter dem Lapis Niger I. Zwei neuere Lösungsvorschläge (Graffunder und Stroux)* (1932; repr. Aalen 1963), p. 4.

[24] See T. Frank, "On the Stele of the Forum," *Classical Philology* 14 (1919) 87–88.

[25] On the archaeological evidence, see C. Smith, "The 'Tomb of Romulus'," *Classical Review* 13 (1899) 87–88; Samuel Ball Platner, "sep. Romuli," in *A Topographical Dictionary of Ancient Rome. Completed and revised by Thomas Ashby*, (London, 1929), pp. 482–484; J. Stroux, "Die Foruminschrift beim Lapis niger," *Philologus* 86 (1931) pp. 460–464; Filippo Coarelli, *Il Foro Romano. Periodo arcaico* (Roma, 1983), pp. 178–188; Pietro Romanelli, *Ricerche intorno ai monumenti del "Niger Lapis" al Foro Romano (1955),* (Roma, 1984), *passim*; R. Ross Holloway, *The Archaeology of early Rome and Latium*, (London-New York, 1994), pp. 81–88; A.J. Ammermann, "The Comitium in Rome from the Beginning," *American Journal of Archaeology* 100 (1996) 121–136 with literature.

[26] Festus, *De verborum significatu* 184 L.: *Niger lapis in comitio locum funestum*

Thus, the Roman sources supply evidence of the fact that in the Comitium there was a spot near the Rostra, identified by tradition as the place where either Faustulus or Romulus,[27] or both, were buried, that this spot was marked by a black stone, and possibly by one or two sculptured lions. Perhaps the *lapis niger* was a natural stone, and sculpture (and even inscriptions) were added at a comparatively late period, when the tradition had been fixed.[28] Let's take a look at what remains of this inscription. Although the inscription has been preserved only fragmentarily, nevertheless some words can be read:[29]

1 quoi hoi … | … sakros es|ed sor …
4 … ia. ias | recei | ic … | … evam | quos | re …
8 … m | kalato|rem | hai … | iod | iouxmen|ta | kapia | dotau …
11 m | ite | rit … | … m | quoi ha|velod | nequ … |od | iouvestod
16 loiuquiod …[30]

It is an inscription that is written *boustrophedon*, 'in the way an ox ploughs': the first line from right to left, the second line back again from left to right, the third line from right to left and so on.[31]

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significat, ut ali, Romuli morti destinatum, sed non usu ob in […] [Fau]stulum nutr[…] [Quinc]tilium avum tu […] cuius familiae [… tionem eius. On this text, see Bujuklić, "Leges regiae," p. 115, note 64; Paolo Pieroni, *Marcus Verrius Flaccus' De significatu verborum in den Auszügen von Sextus Pomponius Festus und Paulus Diaconus. Einleitung und Teilkommentar (154, 19–186, 29 Lindsay)* (Frankfurt am Main, 2004), pp. 159–161.

[27] According to others, it was the grave of Hostus Hostilius, the father of the third king Tullus Hostilius. Dionysius of Halicarnassus, who wrote in the time of Augustus, states that 'some people think that the stone lion, which was in the noblest place in the Forum Romanum, close by the Rostra, was a monument for Faustulus, who was buried on the spot where he had fallen in battle' (*Antiquitates Romanae* 1.87.2); see Carmine Ampolo, "La storiografia su Roma arcaica e i documenti," in *Tria corda. Scritti in onore di Arnaldo Momigliano*, ed. E. Gabba (Como, 1983), pp. 19–24; Pieroni, *Flaccus*, pp. 159–160.

[28] The fact that the stone was black would seem to strengthen this view; natural stones or aerolites of this kind—venerated in antiquity—were almost always black. Such, for instance, was the *lapis niger* brought to Rome from Pessinus in 205 BC and worshipped as *Magna mater* (cf. Livy, *Ab urbe condita* 29.14.5–14). See Smith, "Tomb of Romulus," p. 87; Warde Fowler, *Religious Experience*, pp. 329–330. Perhaps the place was originally a *Volcanal*, a sanctuary of the god Vulcanus; see Rüpke, *Religion*, p. 57.

[29] See Warmington, *Remains*, pp. 242–245.

[30] CIL I^2 1, in various editions, e.g., FIRA, pp. 19–20 and, most recently, R. Wachter, *Altlateinische Inschriften. Sprachliche und epigraphische Untersuchungen zu den Dokumenten bis etwa 150 v. Chr.* (Bern-Frankfurt am Main-New York-Paris, 1987), pp. 66–69.

[31] See R.E.A. Palmer, *The King and the Comitium. A Study of Rome's Oldest Public Document* (Wiesbaden, 1969), p. 1: 'The writing is *boustrophedon*, which is to say that it preserves the very old sense of *versus*: one line 'turns' into the next'; T.P. Wiseman, *Unwritten Rome* (Exeter, 2008), pp. 2–4.

Line 1 starts with the relative pronoun *quoi*, which is the archaic equivalent of the classical *qui*, meaning 'he who'. This, in itself, suggests the common opening of a legal formula.[32] The second word, on the same line, starts with *ho-* or *hoi-* or perhaps *hon-*. It may well be that we have to read this word as a form of the demonstrative pronoun *hic*, 'this'.[33] On the border of lines 2 and 3, which is at the end of line 2 and at the beginning of line 3, we read the words *sakros esed*. This is perfectly good archaic Latin for *sacer erit*,[34] 'he shall be cursed' or 'he must be cursed', which is to be understood as "dedicated to a certain god, forfeited to a certain deity".[35] In archaic Roman law, we mostly find the expression *sacer esto* rather than *sacer erit*.[36]

After *sakros esed* we read the letters *sor-*, which are followed by at least one more letter. Many suggestions have been made how to read this word. Interesting possibilities are *Sor[anoi]*, 'to Soranus', and *sor[des]*, 'dirt'.[37] If we read *Sor[anoi]*, then the inscription may be understood as 'must be forfeited to Soranus', Soranus being the Sabine god of the underworld whose cult, according to tradition, had been introduced to Rome by the Sabine king Titus Tatius, who ruled together with Romulus.[38] If we read *sordes*, then we have a prohibition to dirty the place of the inscription. This possibility also has its parallels in archaic law.[39]

In line 5, from right to left, we read *recei*, which is the archaic dative of *rex*, 'king'. Immediately after the discovery of the *lapis niger* in 1899, this word in particular caused great excitement among scholars. Natu-

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[32] Cf. *Lex XII tabularum* 8.1 (Flach-Flach, *Zwölftafelgesetz*): *Cui testimonium defugerit* …; *ibid.* 8.1 (Flach-Flach, *Zwölftafelgesetz*): *Qui fruges excantass{i}[e]t* …; *ibid.* 8.11 (Flach-Flach, *Zwölftafelgesetz*): *Qui se sierit testarier libripensve fuerit* …; see L. Adams Holland, "Qui terminum exarasset," *American Journal of Archaeology* 37 (1933), 550.

[33] See M. Warren, "The Stele Inscription in the Roman Forum," *American Journal of Philology* 28 (1907), 373.

[34] See Warren, "Stele Inscription," pp. 385–387; H. van den Brink, *Ius fasque. Opmerkingen over de dualiteit van het archaïsch-Romeins recht* (Amsterdam, 1968), p. 121.

[35] See Agamben, *Homo sacer*, p. 80.

[36] See Albanese, "Sacer esto", p. 156.

[37] E. Goldmann, *Zum Problem der Foruminschrift unter dem Lapis Niger II. Deutungsversuch* (1932, repr. Aalen, 1963), p. 81 restores the line as follows: *Sor[des quoi faxe]*.

[38] Cf. Servius, *In Vergilii Aeneidem* 11.785: *Sorani vero a Dite, nam Ditis pater Soranus vocatur*; see Leifer, *Foruminschrift*, pp. 49–50. J. Stroux, "Die Foruminschrift beim Lapis niger," *Philologus* 86 (1931) p. 489 restores line 1 as follows: *quoi ho[mce lapidem violased (violasit)] sakros esed So[ranoi]* and remarks: "Möglich, daß die Verfluchung geholfen hat, den Stein durch die Jahrhunderte zu retten".

[39] See Goldmann, *Foruminschrift*, pp. 81–83.

rally, many scholars initially thought that it referred to Romulus, whose (intended) grave, according to the ancient sources referred to above, was situated in exactly this part of the Forum.[40]

In line 7 we again read the relative pronoun *quos*. In the next lines, we can read the word *kalatorem*.[41] Festus states, correctly, that this substantive is derived from the verb *calare*, 'to call, announce'.[42] However, his explanation that slaves were called *calatores* because they could always be called or summoned obviously is wrong; *calator* rather, actively, means 'summoner'. In archaic Latin, this word referred to a kind of sacrificial servant, a servant of the priest.[43] The presence of this word diminishes the plausibility that *recei* actually refers to one of the kings of Rome, be it Romulus or one of his successors. Rather the word denotes the *rex sacrificulus*.[44]

The function of *rex sacrificulus* originated by the end of the Monarchy. To the best of our knowledge, Rome was initially ruled by kings. According to tradition, the first Roman king was Romulus, who had founded the city. After the unification of Rome with the Sabines he ruled together with Titus Tatius, who was said to be his Sabine counterpart. As far as we know, the Roman kings did not have absolute power. They were the political representatives of the Latin-Sabine people and they also supervised the state *sacra*.[45] After the expulsion of Tarquin the Proud, the religious

[40] F.H. Marshall, *Livy book VI* (Cambridge, 1934), pp. 64–65 thought it possible that the inscription of the *lapis niger* was an actual specimen of the *leges regiae*.

[41] See Palmer, *The King and the Comitium*, p. 2.

[42] Festus, *De verborum significatu* 34 L.: *'Calatores' dicebantur servi, 'apo tou kalein', quod est 'vocare', quia semper vocari possent ob necessitatem servitutis*. On the *calatores*, see M. Horster, "Living on Religion: Professionals and Personnel," in: *A Companion to Roman Religion*, ed. J. Rüpke (Malden-Oxford-Carlton, 2007), p. 332.

[43] In *In Vergilii Georgica* 1.268, Servius informs us about the functions of the *calatores*. In other sources, these *calatores* are termed *praecones*, cf. Macrobius, *Saturnalia* 1.16.9. A further parallel is probably offered by Festus, *De verborum significatu* 292 L. and 293 L. who, in this connection, discusses the word *praeciamitatores*. In these texts, the process of modernization of archaic expressions can be clearly seen. It leads us to think that *†praeciamitatores†* should be restored to *praeclamitatores*. See Goldmann, *Foruminschrift*, pp. 78–80; Van den Brink, *Ius fasque*, p. 317. Both the terms *praeclamitator* and *praeco* can probably be seen as modernizations of the archaic name *calator*, which was no longer understood.

[44] See Stroux, "Foruminschrift," p. 473: "Ohne jeden Zweifel also leitet der *kalator* der historisch klaren Zeiten auf einer priesterlichen *apparitor* und zwingt den *rex* [...] zunächst in dem sazerdotalen *rex*, der zum *collegium* der *pontifices* gehörte, wiederzuerkennen". See also Van den Brink, *Ius fasque*, pp. 316–323. On the *apparitores*, see Horster, "Living on Religion," pp. 334–336.

[45] See A. König–I. König, *Der römische Festkalender der Republik. Feste, Organisation und Priesterschaften* (Stuttgart, 1991), p. 107.

functions of the king were transferred to a so-called *rex sacrificulus*. This is apparent from the testimony of Festus, who says: "Sacrificial king was his name, because he had taken on the habit of performing the religious rituals that the kings had performed".[46] Festus informs us that the *rex sacrificulus*, after he had sacrificed, went to the Comitium.[47] Perhaps the inscription of the *lapis niger* must be seen as referring to such an occasion.

So we can see that the inscription speaks about a priest (the *rex sacrificulus*) and his servant (the *kalator*),[48] and by combining this with the evidence from the next lines, lines 10 and 11, we arrive at a meaningful interpretation. In these lines, we can read: *iouxmenta kapia*,[49] which surely means *iumenta capiat*,[50] 'he must take draught-cattle'[51] or 'he must take horses that have been put under the yoke'.[52] Perhaps the *kalator* is prescribed to take away the oxen or horses.

If so, we have a parallel in Cicero's work *De divinatione*, 'On prophesy'. Here, Cicero states that there are two ways not to hear Jupiter's warning: one can prevent the *auspicium* from taking place or one can avoid seeing it. According to Cicero, the *augures* (of whose college Cicero himself was a member) sometimes prevented a *iuges auspicium*: "which we, the *augures*, order, that no *iuges auspicium* takes place".[53] Festus tells us that *iuges auspicium* means that the two horses that have been put under the yoke both at the same time defecate.[54] Of course, this is a bad omen. So

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[46] Festus, *De verborum significatu* 422 L.: *Sacrificulus [rex appellabatur] qui ea sacra quae [reges facere a]ssueverant facit*, supplemented from Festus, *De verborum significatu* 423 L.: *Sacrificulus rex appellatus est, qui ea sacra quae reges facere adsueverant fecisset*. See John North, *Roman Religion* (Oxford, 2000), p. 23; C. Smith, "The Religion of Archaic Rome," in: *A Companion to Roman Religion*, ed. J. Rüpke (Malden-Oxford-Carlton, 2007), pp. 39–40; Horster, "Living on Religion," p. 333.

[47] Cf. Festus, *De verborum significatu* 311 L.: *Quandoc rex comitiavit fas, in fastis notari solet, et hoc videtur significare, quando rex sacrificulus divinis rebus perfectis in comitium venit*.

[48] See Leifer, *Foruminschrift*, p. 51.

[49] See Stroux, "Foruminschrift," pp. 470–471.

[50] Palmer, *King and Comitium*, p. 10, however, interprets *iouxmenta kapia* as 'teams of animals'.

[51] See Goldmann, *Foruminschrift*, pp. 67–69; Adams Holland, "Qui terminum exarasset," p. 551.

[52] See Stroux, "Foruminschrift," p. 484; Leifer, *Foruminschrift*, p. 27.

[53] Cicero, *De divinatione* 2.36.77: *quod nos augures praecipimus, ne iuges auspicium obveniat*.

[54] Festus, *De verborum significatu* 92 L.: *Iuges auspicium est, cum iunctum iumentum stercus fecit*.

it is possible that the inscription of the *lapis niger* at this point orders the *calator* to remove the yoke from the oxen in order to prevent such an *auspicium* from taking place.

Now we have reached the last lines of the inscription. In line 13, we read for the third time the relative pronoun *quoi*, followed by the word *havelod*, which has been interpreted in various ways, none of which is really satisfactory.[55]

After *neque*, 'and not', which we read in line 14, we find in line 15 the word *iovestod*, which is either a contraction of *Iovi estod*, 'must be … to Jupiter' or, more probably, an archaic form of the classical *iusto*.[56] In the latter case, it would point to a provision which prescribes something to be done in the proper, correct way. The term *iusto* fits well into the inscription; like *sakros esed* it belongs to the realm of sacred law.

Finally in line 16 we read *loiuquiod*, which some scholars interpret as an archaic ablative of *Lucius*, which could perhaps refer to Lucius Tarquinius, the king who was expelled from Rome in 509 BC. Perhaps it is best to interpret this word as a form of the substantive *lucus*, in archaic Latin *louqos* or as a form of the substantive *locus*, in archaic Latin *stloqos*.[57]

Let us have a look at the inscription of the *lapis niger* as a whole. Perhaps it says: "He who … [does something] … shall be forfeited to Soranus", or: "He who dirties this place … shall be cursed". These are lines 1 to 3. Then, in lines 5 to 11, we understand that there is a *rex sacrificulus* and his *calator*, who is ordered to take away the oxen which have been put under the yoke, perhaps to prevent a bad *auspicium*. Finally, in line 15 we read *iusto*: something should be done in the proper way.

As a parallel and partly as a corroboration of these assumptions, we have two texts from inscriptions, dating from the later Republic, in

[55] Lines 11–14 are very unclear; a most tempting reading would be ⟨*quo*⟩*m iter ri*⟨*ted facit ad quomitio*⟩*m*; see Leifer, *Foruminschrift*, p. 55; Goldmann, *Foruminschrift*, p. 89 restores these lines as *ite*⟨*r*⟩ *ri*⟨*ted fakit rex*⟩. See also Palmer, *King and Comitium*, pp. 23–24.

[56] See Festus, *De verborum significatu* 93 L.: *'Ioviste' compositum a 'Iove' et 'iuste'*. Palmer, *King and Comitium*, p. 25. Parallels are offered by Warren, "Stele Inscription," pp. 270–271.

[57] Leifer, *Foruminschrift*, p. 32 and FIRA, p. 20 note 3 opt for the former, Palmer, *King and Comitium*, pp. 26–42 prefers the latter.

which we find similar regulations. Firstly, we have an inscription from Spoletium in Umbria which was found in 1846. It reads:

> Honce loucom | ne qu[i]s violatod | neque exvehito neque | exferto quod louci | siet neque cedito || nesei quo die res deina | anua fiet; eod die | quod rei dinai causa [f]iat sine dolo cedre | licetod. Sei quis || violasit, Iove bovid | piaclum datod; | seiquis scies | violasit dolo malo, | Iovei bovid piaclum || datod et a[sses] CCC | moltai suntod. Eius piacli | moltaique dicator[ei] | exactio est[od].[58]

> Let no one (*ne quis*) damage (*violatod*) this grove (*honce loucom*). No one must cart (*exvehito*) or carry away (*neque exferto*) anything that belongs to the grove (*quod louci siet*), or cut wood in it (*neque cedito*), except (*nesei*) on the day when holy worship takes place every year (*res deina anua*). On that day (*eod die*) it shall be permitted (*licetod*) without prejudice (*sine dolo*) to cut wood (*cedre*) so far as it may be done for the purpose of sacred worship (*quod rei dinai causa [f]iat*). If anyone does damage (*seiquis violasit*), he shall make sin-offering (*piaclum*) to Jupiter (*Iove*) with an ox (*bovid*); if anyone does damage knowingly (*scies*) and with wrongful intent (*dolo malo*), he shall make sin-offering to Jupiter with an ox (*Iovei bovid piaclum datod*), and moreover let there be a fine (*moltai suntod*) of 300 *as*-pieces. The duty of exacting the said sin-offering and fine shall rest with the *dicator*.[59]

The inscription is probably to be dated not long after 241 BC, when Spoletium became a Latin colony.[60] It records a *lex dicta* which aimed at protecting a grove. The word "loucom" suggests that this grove is a religious spot.[61] Apparently, the causing of damage to the grove did not lead to the perpetrator being declared *sacer*, a sin-offering and a fine sufficed.[62] Yet, these penalties, i.e. at least the first one, clearly had a religious character.

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[58] *Lex Spoletina*; CIL I^2 366 = XI 4766, most recently in A. de Rosalia, *Iscrizioni latine arcaiche* (Palermo, 1978) p. 15.

[59] The *dicator* is probably the magistrate performing the rituals; see Th. Mommsen, *Römisches Strafrecht* (1899; repr. Graz, 1955), p. 811, note 5. On this text, see P. Voci, "Diritto sacro romano in età arcaica," *Studia et Documenta Historiae et Iuris* 19 (1953), 56–57; Palmer, *King and Comitium*, p. 47; Ter Beek, *Dolus* 1:334–336; John Scheid, *An Introduction to Roman Religion* (Edinburgh, 2003), p. 27.

[60] On the date of this text, see F. Bücheler, "Altes Latein," *Rheinisches Museum* 35 (1880), 627.

[61] Thus, for instance, Scheid, *Roman Religion*, p. 74: "Strictly speaking, a *lucus* was a clearing in a wood, and it would be in such a clearing, ritually cleared and tended, that the deity's cult would be celebrated. In some cases, temples and porticoes would be constructed there."

[62] On the concept of *piaculum*, see J. Rüpke, *Die Religion der Römer. Eine Einführung* (Munich, 2001), p. 81.

Secondly, we have an inscription from Luceria in Apulia, which also aimed at protecting a grove.[63] It reads:

> In hoce loucarid | stercus | ne [qu]is fundatid, neve cadaver | proiecitad neve parentatid. || Sei quis arvorsu hac faxit, [in] ium | quis volet pro ioudicatod n(ummum) L | manum iniect[i]o estod: seive | mac[i]steratus volet moltare | [li]cetod.[64]
>
> In this grove (*in hoce loucarid*) let no one tip dung (*stercus ne quis fundatid*) or cast a dead body (*neve cadaver proiecitad*) or perform sacrifices for dead relations (*neve parentatid*). If anyone shall have acted contrary to this, let there be, as for a judgment rendered (*pro ioudicatod*), laying of hands upon him (*manum iniectio estod*), to an amount of 50 pieces, on the part of anyone who shall so desire. Or if a magistrate shall see fit to inflict a fine, he shall be allowed to do so.[65]

The opening words "In hoce loucarid" suggest that the grove referred to is also a sacred spot. Unlike the *lex Spoletina*, the penalty for committing certain prohibited acts consists only of paying a fine.

Both inscriptions are relevant for two reasons. Firstly, they contain a reference to the place involved. The inscription from Spoletium refers to *honce loucom*, 'this grove', whereas the inscription from Luceria refers to *in hoce loucarid*, 'in this grove'. Perhaps the *lapis niger* also opened with a similar phrase: *quoi honce loucom*, 'he who … this grove' or *quoi honce stloqom*, 'he who … this place'.[66] If so, we may assume that the inscription belonging to the *lapis niger* refers to a grave or at least to a *res divini iuris*.

Secondly, the inscriptions from Spoletium and Luceria contain as penalties a sin-offering and fines, so more or less religious penalties. The clause *sacer esto* in the inscription belonging to the *lapis niger* was also a penalty for someone who desecrated a religious spot. Apparently, in the third century BC, these penalties were less severe than in early Roman law.

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[63] This inscription was published in 1861, but the stone on which it was carved has disappeared, so we cannot be sure whether the text has been correctly read and transcribed.

[64] *Lex Lucerina*; CIL I^2 401 = IX 782, most recently in De Rosalia, *Iscrizioni*, p. 4.

[65] On this text, see Palmer, *King and Comitium*, p. 47.

[66] Warren, "Stele Inscription," pp. 373–375, suggests reading *quoi honce kipom*, 'he who … this *cippus*', offering parallels. Palmer, *King and Comitium*, p. 49 translates: 'Whosoever [will violate] this [grove], let him be cursed.'

4. *The Concept of* Sacer *in the* Leges Regiae *and the Twelve Tables*

As I already mentioned briefly, the phrase *sakros esed* has parallels in Roman law. We have several testimonies which attribute this phrase to the laws of the kings, the *leges regiae*. Festus says that in the laws of Romulus and Tatius it was decreed that "if a daughter-in-law had maltreated her parents-in-law, she was forfeited to the gods of her parents (*sacra divis parentum estod*)".[67] It is clear that the wrong was committed against human beings, but that the penalty had a religious character.

The Greek historian Dionysius of Halicarnassus tells us that Romulus enacted a law which forbade a *patronus* and his *cliens* to press charges, testify or cast a vote against one another. "If a person is proved guilty of such a thing, he was liable under the law on treason, which Romulus had enacted, and everyone had the right to kill this person as an offering to Jupiter of the nether world (*tou katachthoniou Dios*)".[68] The phrasing of this remark by Dionysius suggests that the original Latin text contained the words *sacer Ditis*.[69] Again, the wrong is committed against a human being, either the *cliens* or the *patronus*, but the penalty had a religious character.

The phrase *sacer esto* is also ascribed to the second king of Rome, Numa Pompilius. Festus explains that the Romans used to make offerings to Terminus, because the guarding of the fields was thought to be under his patronage. Therefore, Numa decreed that a person who had removed a boundary stone by ploughing was forfeit (*sacros esse*), both he himself and his oxen.[70] In such a case, they were probably forfeited to *Iuppiter Terminus*.[71]

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[67] Festus, *De verborum significatu* 260 L: *In Romuli et Tatii legibus: "Si nurus, sacra divis parentum estod"*. For instance, in FIRA, p. 9. On this text, recently, Fiori, *Homo sacer*, pp. 187–191 with literature.

[68] Dionysius of Halicarnassus, *Roman Antiquities* 2.10.3; For instance, in FIRA, p. 5. See Fiori, *Homo sacer*, 225–229 with literature. On the legislation of Romulus as described in Dionysius of Halicarnassus, *Roman Antiquities* 2.7–29 in general, see E. Gabba, "Studi di Dionigi da Alicarnasso," *Athenaeum* 38 (1960), 175–225; also J.P.V.D. Balsdon, "Dionysius on Romulus: a Political Pamphlet?", *Journal of Roman Studies* 61 (1971), 18–19.

[69] For *Dis pater*, the god of the underworld, see Scheid, *Roman Religion*, p. 155.

[70] Festus, *De verborum significatu* 505 L.; *Termino sacra faciebant, quod in eius tutela fines agrorum esse putabant. Denique Numa Pompilius statuit eum qui terminum exarasset et ipsum et boves sacros esse.* For instance, in FIRA, p. 11. On this text, see Fiori, *Homo sacer*, pp. 204–208 with literature.

[71] Thus, Albanese, "Sacer esto," p. 155.

Dionysius of Halicarnassus follows the same tradition. According to him, Numa decreed that "if a person had removed or changed the position of the boundary stones, the offender was *hieros*[72] (forfeit) to the god".[73] The moving of a boundary stone would only harm the neighbour, a human being, yet the penalty was owed to a god.

Next, we have a direct citation from the laws of Numa Pompilius by Festus, who states that "if a person shall act otherwise (*aliuta*), he himself (*ipsos*) shall be forfeit (*sacer esto*) to Jupiter".[74] The context of this citation is unknown to us, so we cannot be sure about the nature of the wrong addressed here. However, it is clear that the penalty has a religious character.

And finally, again Festus informs us of a law enacted by king Servius Tullius, in which the phrase *sacer esto* is used: 'if a boy shall have maltreated (*verberit*) his parent, and this parent shall have turned to the court, the boy shall be forfeit to the gods of his parents'.[75] Again, in this case, the wrong is committed against a human being, but the punishment is owed to a god.

Also in the early Republic we find a trace of the phrase *sacer esto*. The Laws of the Twelve Tables decreed that 'if a patron shall have done harm to a client, he is to be cursed'.[76] This law refers to the *lex regia* that Romulus had enacted and that was also mentioned above. The Laws of the Twelve Tables confirm the rule that a wrong between *patronus* and *cliens*, so between human beings, led to a religious punishment.

Apart from these specimens of the phrase *sacer esto*, Festus also introduces the concept of *leges sacratae*: in his view, "they are laws ordaining

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[72] This is the Greek equivalent of *sacer*.

[73] Dionysius of Halicarnassus, *Roman Antiquities* 2.74.3. See Bruns, *Fontes*, 11; Fiori, *Homo sacer*, pp. 103–104 with literature.

[74] Festus, *De verborum significatu* 5 L.: *Si quis aliuta faxit, ipsos Iovi sacer esto*. For instance, in FIRA, p. 13 On the archaic style, see Voigt, *Leges regiae* II, p. 812. See also Fiori, *Homo sacer*, pp. 29–231 with literature.

[75] Festus, *De verborum significatu* 260 L.: *In Servi Tulli haec est: Si parentem puer verberit, ast olle plorassit paren(s) puer divis parentum sacer esto*. In FIRA, p. 17 = Ancient Roman Statutes. A translation with introduction, commentary, glossary, and index. General editor Clyde Pharr (Austin 1961), p. 5, nr. VI 6. On the word *verberit*, see Voigt, *Leges regiae* II, pp. 813–814; Fiori, *Homo sacer*, pp. 187–191. Obviously, Vergilius, *Aeneis* 6.609: *pulsatusve parens* refers to precisely this *lex regia*.

[76] *Leges XII tabularum* 8.10 (Flach-Flach): *Patronus si clienti fraudem f{eceri}[axsi]t, sacer esto*. See Van den Brink, *Ius fasque*, 67–68, 121, and 186; also Watson, *Pagan Rome*, 74–75. Again, in Vergilius, *Aeneis* 6.609: *aut fraus innexa clienti* should be taken as a reference to the law enacted by Romulus.

that a person who has done something contrary to its provisions shall be forfeited (*sacer*) to one of the gods (*alicui deorum*) together with his slaves and property".[77]

In the *leges regiae* and in the Laws of the Twelve Tables, we found three cases of wrongs committed against a human being that led to a religious punishment: the woman who maltreats her parents-in-law, the patron who violates the rights of his *cliens* or vice versa, and the person who removes a boundary stone. It seems that these cases all deal with a breach of trust that threatened society or, rather, the survival of the Roman people. Those who break that trust incur the penalty of being *sacer*.[78]

Of the meaning of *sacer* in these cases there can be little doubt. It puts a man apart from his fellow citizens and marks him as the property of a god.[79] Accordingly, Macrobius says: "for everything that is destined or intended for the gods is called *sacer*".[80] Being *sacer* means that all forms of protection enjoyed by all other people are lifted; in fact, a *homo sacer* is excommunicated from society and anyone may kill such a person without being punished. Moreover, the consequence of being *sacer* comes about immediately, without any kind of trial or judicial sentence. It is up to the gods to decide what will happen to the *sacer* person.

5. *Conclusion*

In the first part of this paper we have seen that the mixed secular-religious character of Roman law is no exception in the ancient world. Almost all the other law systems from Antiquity we know of, with the notable exception of the Torah, are secular in nature but based on divine values.

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[77] Festus, *De verborum significatu* 422 L.: *'Sacratae leges' sunt quibus sanctum est, qui⟨c⟩quid adversus eas fecerit, sacer alicui deorum †sicut† familia pecuniaque*. The sense is made clear by Festus, *De verborum significatu* 423 L.: *Sacratae leges dicebantur, quibus sanctum erat ut, si quis adversum eas fecisset, sacer alicui deorum esset cum familia pecuniaque*. See Fiori, *Homo sacer*, p. 321.

[78] See Albanese, "Sacer esto", p. 157.

[79] Thus Rüpke, *Religion*, p. 14: "Es gibt den Begriff des *sacer*, des ⟨Heiligen⟩. *Sacer* entstammt der Sprache des Eigentums. ⟨Heilig⟩ ist, was Eigentum eines Gottes, einer Göttin ist. Zumeist handelt es sich um irgendeinen Grundstück, auf dem ein Tempel errichtet werden sollte, auf dem dann auch bestimmte Gegenstände, Weihgaben vor allem, Statuen ⟨kon-sekriert⟩, somit in das Eigentum einer Gottheit überführt wurden." In the same vein, Scheid, *Roman Religion*, pp. 23–24: "The term *sacer*, often misunderstood under the influence of primitivist theories, referred to ownership."

[80] *Saturnalia* 3.7.3: *Nam quicquid destinatum est dis sacrum vocatur*. See also Macrobius, *Saturnalia* 3.3.2: *Sacrum est, ut Trebatius libro primo 'De religionibus' refert, quicquid*

Secondly, we have seen that, in archaic Roman law, the phrase *sacer esto* was used in religious and secular sources. The *lapis niger* seems to have had a religious function and, in the inscription, the words *sacer esto* indicate a penalty for a wrong committed against that religious character. The *leges regiae* and the laws of the Twelve Tables, on the other hand, had a predominantly secular character; there, the words *sacer esto* indicate a religious penalty for a wrong committed against other citizens.

My conclusion is that the words *sacer esto* indicated a religious penalty that was applied to religious wrongs as well as to secular wrongs, thus demonstrating the secular-religious, "divine" character of early Roman law.

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est quod deorum habetur. This refers to C. Trebatius Testa, the teacher of Labeo and a friend of Cicero, to whom the latter dedicated his *Topica*.

LAW AND DIVINATION IN THE LATE ROMAN REPUBLIC*

Federico Santangelo

1. *Introduction*

If one types the string "divination law" into a search engine, a range of references to two fairly recent events will come up. In 1951 a statute was passed by the North Carolina General Assembly whereby it was "unlawful for any person to practice the arts of phrenology, palmistry, clairvoyance, fortune-telling and other crafts of a similar kind in the counties named herein".[1] In the late Nineties a coalition of practicing pagans, psychics, and self-proclaimed witches started a campaign for the abolition of the law, which was eventually passed by the North Carolina General Assembly in 2003 and endorsed by the State Governor in 2004. In December 2007 the lower chamber of the Republic of Tajikistan passed a bill punishing those who indulge in sorcery and fortune-telling with a fine that equates to approximately 100 euros (between thirty and forty times the minimum monthly wage of the country). The bill was understood to have had the support of the Upper House and of President Imomali Rakhmon, who earlier in 2007 had passed new laws introducing fines for extravagant weddings and funerals—a revisitation of the ancient sumptuary laws, I suppose, although President Rakhmon presented them as part of an anti-poverty programme.[2]

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[1] See http://www.oldenwilde.org/oldenwilde/gen_info/blk_rib/nclaw_info.html, last accessed 01.06.11. The law included an important limitation: it did not prohibit "the amateur practice of phrenology, palmistry, fortune-telling or clairvoyance in connection with school or church socials, provided such socials are held in school or church buildings."

[2] See http://uk.reuters.com/article/oddlyEnoughNews/idUKL1256765520071212, last accessed 01.06.11. I am afraid I could not find evidence for the passing of the law in

As is well known, there is evidence for attempts to limit divination with legal measures under the Roman Republic too. Let us think of the events of 213 BC, when the Senate instructed the urban praetor to take on the "sacrificers and prophets" (*sacrificuli ac uates*) that were active in Rome and a number of texts dealing with divinatory and sacrificial rituals were confiscated; or of the expulsion of the Chaldaean astrologers in 139 BC. Cato's famous dictum that the *uilicus* should under no circumstances seek the advice of the haruspex, the augur or the Chaldaean seer, does not belong in a legal context, of course, but speaks volumes about the pitfalls that uncontrolled divination presented to someone in Cato's position.[3]

However, in this paper I do not intend to pursue the relationship between divination and law from the angles of repression and control. I would like to explore the links and the interaction between divination and law in a positive sense, so to speak, by discussing the lines of contact between these two crucial areas of Roman intellectual life. The affinities between divination and law have been widely explored in the scholarly literature in a number of different cultures, especially from an anthropological standpoint. The most widely known example is probably that of the Azande, the Central African population studied by the British anthropologist Edward Evans-Pritchard in the 1930s, who used divinatory methods in the solution of judiciary disputes: a chicken was thought to be the agent that could convey the voice of the ancestors. The animal was asked a question about a crime that had allegedly taken place; it was then fed with poison; if it died, the answer was considered to be affirmative; if it survived, the opposite was thought to be true. The performance of this ritual ensured a legitimate decision; as has been noted, the

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the Upper House. Cf. also the recent ruling of the Mexican Supreme Court on 2 June 2010, in which "the description of specific fraud contained in the Penal Code of the State of San Luis Potosí, which punishes whomever profits inadequately from the worries, superstitions or ignorance of people, by means of alleged spirit evocations, divinations or healings or other procedures lacking technical or scientific validity" is declared constitutional (full text available at http://www2.scjn.gob.mx/comunica2prensa/, last accessed 01.06.11).

[3] Confiscations in 213 BC: Livy, *Ab urbe condita* 25.1.6–12; 25.12. Expulsion of the Chaldaean astrologers in 186 BC: Valerius Maximus, *Facta et dicta memorabilia* 1.3.3. Cato, *De agricultura* 5.4: [*vilicus*] *haruspicem, augurem, hariolum, Chaldaeum nequem consuluisse uelit*. Cf. also, for the imperial period, the numerous attempts to prevent the consultation of astrologers and diviners *de salute principis*: see e.g. Ulpian, *Collatio* 15.2.3; Paul, *Sententiae* 5.21.3; *Codex Theodosianus* 16.10.12. For a recent reconsideration of the place of astrology in Roman society, see Pauline Ripat, "Expelling Misconceptions: Astrologers at Rome", *Classical Philology* 106 (2011), pp. 115–154.

chickens played a function that is not conceptually dissimilar to that of the law, in that they conferred legitimacy upon a decision-making process.[4]

The role of similar divinatory practices in reaching legal decisions has been noticed in other cultural contexts. The ritual known as ordeal, whereby the accused faces potentially fatal injury in order to prove their innocence, has been studied among the Efik, a population settled in the Calaba province in Nigeria, and in the Caribbean.[5] It would be misguided to dismiss the ordeal as a pagan practice, or one that is confined to exotic scenarios. It is also widely attested across early Medieval Europe, where the "trials by fire and water" were an important feature of the criminal justice system.[6] In England they were abolished only in 1215, when they were replaced by the advent of the jury system, but the use of divinatory and magical practices for the detection of criminals continued in private contexts for several centuries.[7]

Turning to earlier and completely different contexts, in third-century BC China the interaction of law and divination comes into play in very interesting frameworks. The tombs of officials excavated at Yunmeng and Baoshan show that legal texts played a part in the funerary ritual, and indeed the texts formed part of the material that was supposed to accompany the dead into his new life. They could include a set of rules on official conduct or on matters like public record-keeping. The material discovered in the Baoshan tomb includes some divinatory texts, which have to do with procedures of exorcism and purification: the diviner acts as a physician, or indeed as a judge, in identifying the spirit that is causing a disease and establishing its relationship with the patient. A text from the Yunmeng tomb deals with the divinatory techniques

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[4] Edward Evans-Pritchard, *Witchcraft, Oracles, and Magic among the Azande* (Oxford, 1937); Wade Mansell-Alan Thomson-Belinda Meteyard, *A Critical Introduction to Law*, 3rd ed. (London, 2004), pp. 31–35.

[5] Donald C. Simmon, "Efik Divination, Ordeals and Omens", *Southwestern Journal of Anthropology* 12 (1956), 223–228, esp. 224; Bastiaan D. van der Velden, *Een rechtsgeschiedenis van Curaçao: ik lach met Grotius en alle die prullen van boeken* (Willemstad, 2008), pp. 301–329 (I am very grateful to Dr. van der Velden for discussion and practical support).

[6] Robert Bartlett, *Trial by Fire and Water. The Medieval Judicial Ordeal* (Oxford, 1986).

[7] See John H. Baker, *An Introduction to English Legal History*, 3rd ed. (London, 1990), pp. 5–6, 578–579. In general on the end of the ordeal across Europe, see Barlett, *Trial*, pp. 34–102; on later developments, the starting point is Keith Thomas, *Religion and the Decline of Magic. Studies in Popular Beliefs in Sixteenth- and Seventeenth-Century England* (London, 1971), esp. pp. 252–264.

that can enable one to catch a thief; apparently, the time of day when a crime happened could reveal something about the identity of the villain.[8] Recent work on eighth-century AD. Tibet shows that legal decision-making often involved the use of cleromancy. The use of dice and of divinatory manuals in legal contexts is well-attested for this period and it was an essential feature of the making of a complex legal and bureaucratic system. The use of the dice could play a central part in the decision-making process: magistrates used it as a tool to legitimate their decisions by placing agency outside of their remit.[9] Interestingly, however, clear rules were set on whether the roll of the dice could be used or not: once a contract between two parties had been concluded, cleromancy could not be used in a legal dispute.[10] As is the case in many other societies, divination only makes sense within a specific framework of rules and constraints. The conceptual premises of these practices are clear: by delegating the solution of a legal controversy to a divinatory procedure divine support is sought and the outcome of the process is fully legitimised.[11]

Another aspect of the relationship between divination and law is brought to the fore by a divinatory ritual known as *namburbi*, which is well-attested in the ancient Near East; much of the evidence for it comes from the library of King Assurbanipal (685–c. 627 BC) in Nineveh. *Namburbi*s are based on the premise that omens are signs of the anger of the gods which are sent to men and are expected to elicit an appropriate ritual response. The gods will then judge on the appropriateness of that response, like a court of law would do. The person who has received a hostile sign turns up in front of the court of the gods, asking them to avert the fate which was allotted to him. If the ritual is successful, the gods will avert the punishment foretold in the omen. Extispicy rituals have a similar framework: the diviner's task is that of establishing a verdict by addressing the gods and asking them to produce a verdict in the case

[8] Mark E. Lewis, *The Early Chinese Empires. Qin and Han* (London, 2007), pp. 227–230.

[9] Brandon Dotson, "Divination and Law in the Tibetan Empire: the Role of Dice in the Legislation of Loans, Interest, Marital Law and Troop Conscription," in *Contributions to the Cultural History of Early Tibet*, eds. Matthew T. Kapstein and Brandon Dotson, Brill's Tibetan Studies Library 14 (Leiden-Boston, 2007), pp. 1–78, esp. pp. 29–32.

[10] Dotson, "Divination and Law," p. 40.

[11] On the role of the lot in Republican Rome, cf. Nathan Rosenstein, "Sorting Out the Lot in Republican Rome," *American Journal of Philology* 116 (1995), pp. 43–75 and Roberta Stewart, *Public Office in Early Rome. Ritual Procedure and Political Practice* (Ann Arbor, 1998), pp. 12–51.

under discussion. The terminology used in divinatory contexts is the same as that used in secular juridical contexts. Shamash, the Sun God who plays a central role in a number of divinatory consultations, is called "the lord of verdict" and "Judge of Heaven and Earth".[12] Divination is the tool that enables the production of divine judgments and provides a framework in which divine law is set out.

The development of Roman jurisprudence and the complexity of the social context in which it took shape are in many ways not commensurable to the examples that have been discussed so far. An isolated case is worth mentioning in passing: a passage of Ulpian shows that when an astrologer or an illegal diviner (*qui aliquam illicitam diuinationem pollicetur*) alleged that someone was guilty of theft, they were liable to be punished in case the allegation was incorrect (although they could not be sued for defamation under the praetorian edict).[13] However, the epistemological affinity between divination and law deserves to be explored in the context of Republican Rome too, for a number of reasons. First of all, both divination and law were important constituencies of Roman intellectual life, and both underwent an exceptional development in Rome, especially between the second and the first centuries BC. The contribution that they made to Roman culture, and indeed to the cohesion of the empire, was truly remarkable. Indeed, it can fairly be said that the place that divination and law have in Roman society and culture is not matched in other contexts, and is the outcome of developments that are typical of, and peculiar to, Rome. They do not have any parallels in any other

[12] Stefan M. Maul, "How the Babylonians Protected Themselves against Calamities Announced by Omens," in *Mesopotamian Magic: Textual, Historical and Interpretive Perspectives*, eds. Tzvi Absuck and Karel van der Toorn, Studies in Ancient Magic and Divination 1 (Groningen, 1999), pp. 123–129; Ulla S. Koch, "Three Strikes and You're Out! A View on Cognitive Theory and the First-Millennium Extispicy Ritual", in *Divination and Interpretation of Signs in the Ancient World*, ed. Amar Annus (Chicago, 2010), pp. 43–59, at pp. 51–53. The reference discussion of the *namburbi* rituals is Stefan M. Maul, *Zukunftsbewältigung. Eine Untersuchung altorientalischen Denkens anhand der babylonisch-assyrischen Löserituale (Namburbi)* (Mainz, 1994); the standard overview of Mesopotamian divination is id., "Omina und Orakel. A: Mesopotamien," *Reallexicon der Assyriologie* 10 (Berlin-New York, 2003), pp. 45–88.

[13] *Digesta* 47.10.15.13 (Ulpianus 77 *ad ed.*): *si quis astrologus vel qui aliquam illicitam divinationem pollicetur consultus aliquem furem dixisset, qui non erat, iniuriarum cum eo agi non potest, sed constitutiones eos tenent* ('If some astrologer or one offering some other unlawful foretelling, on being consulted, should say that someone is a thief when he is not, there will be no action for insult against him, but he is liable under imperial enactments', trans. Joseph A.C. Thomas). On this passage, see Marie Theres Fögen, *Die Enteignung der Wahrsager. Studien zum kaiserlichen Wissensmonopol in der Spätantike* (Frankfurt, 1993), pp. 57–58.

ancient society, and they are an important aspect of Rome's legacy. Secondly, divination and law deserve to be discussed in association because they were both so important to the practice and exercise of power in the Republic: they both dealt with issues of power, they influenced and directed the choices of the elites, and were profoundly engaged with the changes that the very concept of power went through in the last two centuries of the Republic. Thirdly, divination and law were both deeply affected by the changes that Roman culture went through in this same period. They were both affected by the emergence of competing professional discourses between the second and the first centuries BC. Developments as diverse as the emergence of Roman jurisprudence, the increasing influence of the haruspices in Roman affairs, the coming of Hellenistic grammatical theories to Rome, the rise of antiquarian and geographical literature, even the State-sponsored initiative that led to the making of the new corpus of the Sibylline books after the fire of 83 BC are all aspects of the complex cultural changes that occurred in the last decades of the Republic. These processes led to a considerable extension of the scope of the Roman intellectual debate and, on the other hand, to the emergence of branches of specialised knowledge. Fourthly, both diviners and lawyers, in Rome and elsewhere, usually expressed their knowledge through expert utterances and responses—in Latin, *responsa*. These were a specific form of expert advice, which could be both specific and generic, particular and universal, intrusive and non-committal, depending on the occasion, the climate, and the context in which they were practiced and produced.[14] Finally, and perhaps most significantly, law and divination are both forms of control of the future or, indeed, attempts to secure such control.[15] They both are specific and specialised forms of prediction.

[14] On the place of *responsa* in late Republican culture, see Elizabeth C. Rawson, *Intellectual Life in the Late Roman Republic* (London, 1985), pp. 201–206 and Alessandro Schiesaro, "Didaxis, Rhetoric, and the Law in Lucretius," in *Classical Constructions. Papers in Memory of Don Fowler, Classicist and Epicurean*, eds. Stephen J. Heyworth, Peta G. Fowler, and Stephen J. Harrison (Oxford, 2007), pp. 62–90, at pp. 71–73.

[15] Cf. Cicero, *De legibus* 1.19: *itaque arbitrantur prudentiam esse legem, cuius ea vis sit, ut recte facere iubeat, vetet delinquere, eamque rem illi Graeco putant nomine nomon suum cuique tribuendo appellatam, ego nostro a legendo. nam ut illi aequitatis, sic nos delectus vim in lege ponimus, et proprium tamen utrumque legis est. quod si ita recte dicitur, ut mihi quidem plerumque videri solet, a lege ducendum est iuris exordium. ea est enim naturae uis, ea mens ratioque prudentis, ea iuris atque iniuriae regula* ('And so they believe that law is intelligence, whose natural function it is to command right conduct and forbid wrongdoing. They think that this quality has derived its name in Greek from the idea of

Having set this background, in this paper I intend to concentrate on three problems. First, I will deal with the late Republican debate on the relationship between augury and divination, which should be understood as part of a broader reflection on augural law. Secondly, I will discuss some uses of the word *divinatio* in a legal context, trying to consider how the boundaries between divination and law were debated and defined between the second and the first centuries BC. Finally, I will explore the concepts of *prudentia* and *prudens*, the relationship of which with the divinatory and legal spheres calls for further scrutiny.

2. *Augury vs Divination?*

Let us start from book 1 of Cicero's *De divinatione*. Whatever line one takes on the interpretation of the dialogue (and I should perhaps confess that I am part of a minority that views it as a serious critique of divination and its pervasive function in Roman politics and society), it is uncontroversial that the polemic between Quintus and Marcus becomes at times rather aggressive.[16] Quintus' strongest point is that Marcus himself is an augur and cannot credibly make the case against divination (1.105). In fact, he should take charge for the "defence" of *auspicia*: *auspiciorum*

granting to every man his own, and in our language it has been named from the idea of choosing. For as they have attributed the idea of fairness to the word law, so we have given it that of selection, though both ideas properly belong to law. Now if this is correct, as I think it to be in general, then the origin of justice is to be found in law, for law is a natural force; it is the mind and reason of the intelligent man, the standard by which justice and injustice are measured', trans. Clinton W. Keyes, modified). See the valuable remarks on the analogy between jurisprudence and augural lore in Jill Harries, *Cicero and the Jurists. From Citizens' Law to the Lawful State* (London, 2006), pp. 166–168.

[16] I am therefore more inclined to follow Jerzy Linderski, "Cicero and Divination," *Parola del Passato* 37 (1982), 12–38 and Sebastiano Timpanaro, "Alcuni fraintendimenti del *De Divinatione*," in *Nuovi contributi di filologia e storia della lingua latina* (Bologna, 1994), pp. 241–264, than Mary Beard, "Cicero and Divination: the Formation of a Latin Discourse," *Journal of Roman Studies* 76 (1986) 33–46 and Malcolm Schofield, "Cicero for and against Divination," *Journal of Roman Studies* 76 (1986), 47–65. Quintus repeatedly blames Marcus for being inconsistent towards divination: *De divinatione* 1.12.19 (prodigies announcing Catiline's conspiracy)—response at 2.20.46; *De divinatione* 1.28.59 (a dream featuring Marius)—response at 2.67.140; *De divinatione* 1.32.68 (his reaction to an omen before Pharsalus)—response at 2.55.114. For a different reading of the polemic between Quintus and Marcus, see Celia E. Schultz, "Argument and Anecdote in Cicero's *De Divinatione*," in *Maxima debetur magistro reverentia: Essays on Rome and the Roman Tradition in Honor of Russell T. Scott*, eds. Paul B. Harvey, Jr. and Catherine Conybeare, Biblioteca di Athenaeum 54 (Como, 2009), pp. 193–206, at 202–205.

patrocinium.[17] Marcus's response is extremely interesting: augury may not be seen as a form of divination. He is a Roman augur, not a Marsian one, and divination is not part of his brief. He is not the sort of augur who predicts the future by looking at the flight of birds, or "with the observation of other signs" (2.70); later on, he says that foreign augural sciences are just superstition.[18] The duty of the augur is to perform a ritual and to interpret the signs of the non-hostility of the gods. Marcus admits that originally augury was assumed to have a divinatory dimension, and that the augural science was able to predict the future, but this interpretation is now superseded—antiquity got it wrong in many respects, Marcus says.

Unlike the Etruscan discipline, the augural lore is about ritual, not about prediction. We need to look at the development of public divination in Rome, with the coming of the haruspices to the centre of the Roman political arena and their increasing success in the second century BC: it is with their rise that we find explicit and detailed prophecies becoming part of the public discourse.[19] Marcus advocates that augury is based on a different set of practices. Augurs interpret augural signs,

[17] Cicero, *De divinatione* 1.47.105 [Quintus speaking]: *quid de auguribus loquar? tuae partes sunt, tuum, inquam, auspiciorum patrocinium debet esse* ('Why need I speak of augurs? That is your constituency, I say, the defence of the auspices has to be yours'). John Scheid, "La Parole des dieux: L'Originalité du dialogue des Romains avec leurs dieux," *Opus* 6–8 (1987–1989), 125–136, at 127–128 stresses that some features of the *de divinatione* recall judiciary oratory; the use of the word *quaestio* is significant in this respect, and this occurrence of *patrocinium* may well be too.

[18] Cic. *De divinatione* 2.70 [Marcus speaking]: *'difficilis auguri locus ad contra dicendum.' Marso fortasse, sed Romano facillumus. non enim sumus ii nos augures, qui avium reliquorumue signorum observatione futura dicamus. et tamen credo Romulum, qui urbem auspicato condidit, habuisse opinionem esse in providendis rebus augurando scientiam (errabat enim multis in rebus antiquitas), quam vel usu iam vel doctrina vel vetustate immutatam uidemus; retinetur autem et ad opinionem vulgi et ad magnas utilitates rei publicae mos, religio, disciplina, ius augurium, collegio auctoritas* ('"To argue against auspices is a hard thing", you say, "for an augur to do." Yes, for a Marsian, perhaps; but very easy for a Roman. For we Roman augurs are not the sort of augurs who foretell the future by observing the flights of the birds and the other signs. And yet I believe that Romulus, who founded the city by direction of the auspices, believed that augury was an art useful in seeing things to come, for the ancients had erroneous views on many subjects; but we see that the art has undergone a change, due to experience, education, or the long lapse of time. However, out of respect for the opinion of the masses and because of the great service to the state the augural practices, discipline, religious rites, laws and the authority of the augural college are maintained').

[19] The *vates* who were active in Republican Rome produced prophecies too, but they were seldom acknowledged or included within the institutional framework of public divination: cf. the notable exception of the *carmina Marciana* in Livy, *Ab urbe condita* 25.12.

which are warnings, or signs that an action is permitted by the gods. They do not reveal the verdict of fate or anticipate the outcome of any action.

This passage is only a moment in a lively and complex technical debate. Cicero developed the topic at greater length in a work that he appears to have devoted to the problem, a *De auguriis*.[20] Cicero does not refer to it in the *De divinatione*, and the discussion of augural science is closed by a quick promise to deal with the problem more fully on another occasion; this probably means that the treatise was still unpublished in 44 BC, or even that it had yet to be written. At any rate, it is certain that Cicero was gathering detailed information on the topic as early as in 50, during his governorship in Cilicia, when he wrote to his fellow augur Appius Claudius Pulcher and asked to send him a copy of his work on the augurate.[21]

The outcome of that background research may be found in an important passage of the *De legibus* (2.32–33), when Atticus explicitly says that some members of the augural college think that the auspices exist only for the sake of the Republic, while others claim that they are basically on a par with divination (*disciplina vestra quasi divinare videatur posse*).[22]

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[20] Evidence for Cicero's *De auguriis*: Cicero, *De divinatione* 2.76; Cicero, *Ad familiares* 3.9.3. On the late Republican literature on augury and auspices see Harries, *Cicero and the Jurists*, pp. 164–166.

[21] Cicero, *De divinatione* 2.74–75; *Ad familiares* 3.9.3 (written from Laodicea in 50 BC). Cicero had already received what seems to be the first part of the work in June 51 BC (*illo libro augurali*), which bore a dedication to him: *Ad familiares* 3.4.1.

[22] Cicero, *De legibus* 2.32–33. Atticus: *sed est in conlegio vestro inter Marcellum et Appium optimos augures magna dissensio—nam eorum ego in libros incidi—, cum alteri placeat auspicia ista ad utilitatem esse rei publicae composita, alteri disciplina vestra quasi divinari videatur posse. hac tu de re quaero quid sentias*. Marcus: *egone? divinationem, quam Graeci mantiken appellant, esse sentio, et huius hanc ipsam partem quae est in avibus ceterisque signis ⟨quod⟩ disciplinae nostrae. si enim deos esse concedimus, eorumque mente mundum regi, et eosdem hominum consulere generi, et posse nobis signa rerum futurarum ostendere, non video cur esse diuinationem negem. sunt autem ea quae posui, ex quibus id quod volumus efficitur et cogitur. iam vero permultorum exemplorum et nostra est plena res publica et omnia regna omnesque populi cunctaeque gentes, ⟨ex⟩ augurum praedictis multa incredibiliter vera cecidisse … nec vero Romulus noster auspicato urbem condidisset, neque Atti Navi nomen memoria floreret tam diu, nisi omnes hi multa ad veritatem admirabilia dixissent. sed dubium non est quin haec disciplina et ars augurum evanuerit iam et vetustate et neglegentia. ita neque illi adsentior qui hanc scientiam negat umquam in nostro collegio fuisse, neque illi qui esse etiam nunc putat. quae mihi videtur apud maiores fuisse duplex, ut ad rei publicae tempus non numquam, ad agendi consilium saepissime pertineret* (Atticus: '… but there is great disagreement in your college between Marcellus and Appius, both excellent augurs; for I have consulted their books and find that the one thinks that those auspices were invented to be of practical use to the State, while the other believes that your art is really capable of divination in some degree. I should like to have your opinion on this

Cicero's answer is complex, and appears at first sight to be at odds with the view expressed in *De divinatione*, 2: divination does exist, and observing the flight of birds is an aspect of it, and one of the prerogatives of augury. However, the augural lore (*disciplina et ars augurum*) has gone through a clear decline over the centuries—*et vetustate et neglegentia*. Therefore, augury no longer has a divinatory remit, despite what his fellow-augur Appius thinks, although it used to, despite what Marcellus, another member of the college, believes. The contradiction with the *De divinatione* is not very deep after all. Cicero clearly says that he is not involved in divinatory practices; the interpretation of augury in the past is only partly significant, and fits well in the celebration of early Rome that is typical of the *De legibus*. Secondly, the general scope and purpose of the *De legibus* must be borne in mind. It is a work that sets out to lay down a series of principles, rules, and institutions for an ideal community; Cicero thinks that the augurate is a valuable institution, and needs to justify its existence using more positive arguments than those he uses in the *De divinatione*. The statement in support of the existence of divination is not surprising either. The *De legibus* is a work in which the theme of consensus and concord is forcefully set out, as one might expect to be the case in a work that is supposed to set out general rules; in this context it is not surprising that Cicero chose not to pursue a divisive issue, and provided a generic praise of divination. Moreover, it should not be forgotten that there is no evidence that the *De legibus* was published during Cicero's lifetime, while it is certain that the *De divinatione* was. What has often been seen as a

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matter.' Marcus: 'My opinion? I feel that an art of divination, called *mantike* by the Greeks, really exists, and that a branch of it is that particular art which deals with the observation of birds and other signs—this branch belonging to our Roman science of augury. For if we admit that gods exist, and that the universe is ruled by their will, that they are mindful of the human race, and that they have the power to give us indications of future events, then I do not see any reason for denying the existence of divination … Moreover, the records of our Republic, as well as those of all kingdoms, peoples and races, are full of a multitude of instances of the marvellous confirmation of the predictions of augurs by subsequent events … Nor indeed would our own Romulus have taken the auspices before founding Rome, nor would the name of Attius Navius have been remembered all these years, had not all these people made many prophecies which were in remarkable agreement with the truth. But there is no doubt that this art and science of the augurs has by now faded out of existence on account of the passage of time and men's neglect. Therefore I cannot agree with Marcellus, who denies that this art was ever possessed by our college, nor do I subscribe to Appius' opinion that we still possess it. What I believe is that among our ancestors it had a double use, being occasionally employed in political crises, but most often in deciding on a course of action', trans. Clinton W. Keyes, modified).

contradiction in Cicero's views on augury was not perceived as such by his contemporaries, and it may well be regarded, after all, as just a later development of Cicero's approach to the problem. The years that separate the beginning of the composition of the *De legibus* from that of *De divinatione* were extremely intense for Cicero, and had a very serious impact on him. Hence the difference in approach.

3. Divinatio

Unsurprisingly, Cicero makes widespread use of the word *divinatio* in the *De divinatione*. Most importantly, he provides a definition of what the word means in this context at the very beginning of book one: *divinationem, quam Graeci mantiken appellant, id est praesensionem et scientiam rerum futurarum*.[23] To a large extent, what we mean by Roman divination still falls within this definition, and is an outcome of Cicero's construction of *divinatio*. Much of the ambiguity that we find in the earlier occurrences of the word *divinatio* in Cicero's work is reduced, even neutralised by this definition. First of all, a clear Greek parallel is produced: *mantike*, the art of the Greek diviners and soothsayers. The etymological and conceptual link between divination and gods is not matched by the Greek parallel, and it is not in the forefront. Divination is a method that brings about an anticipated perception of the future: *praesensio* does not entail the use of logical categories. But it would be reductive to confine it to this sphere. Divination is also a fully legitimate form of knowledge: it is a *scientia*.

The history of the noun *divinatio* is instructive. It does not appear before Cicero, and its presence in post-Ciceronian authors is rather sporadic. It is certainly not comparable to the place that divination has in Roman culture. The verb *divinare* appears already in Plautus, in a context that is quite instructive. Pyrgopolinikes is hiding in a room,

[23] Cicero, *De divinatione* 1.1: *vetus opinio est iam usque ab heroicis ducta temporibus, eaque et populi Romani et omnium gentium firmata consensu, versari quandam inter homines divinationem, quam Graeci mantiken appellant, id est praesensionem et scientiam rerum futurarum. magnifica quaedam res et salutaris, si modo est ulla, quaque proxime ad deorum vim natura mortalis possit accedere* ('There is an ancient belief, handed down to us even from mythical times and firmly established by the general agreement of the Roman people and of all nations, that divination of some kind exists among men; this the Greeks call *mantike*—that is, the foresight and knowledge of future events. A really splendid and helpful thing it is—if only such a faculty exists—since by its means men may approach very near to the power of gods', trans. William A. Falconer).

and Acroteleutium recognises his presence just by noticing his smell in the room. The *miles gloriosus* says to himself (*Mil.* 1257): *quia me amat, propterea Venus fecit eam ut divinaret*. The ability to guess derives from a form of divine inspiration: even in a context of mockery, the basic concept behind the act of divining is enunciated very clearly. It is apparent, at the same time, that the verb *divinare* already has a twofold meaning: it can be used to refer to a divinely inspired guess, which may be predictive too, or it can simply be referred to a very clever guess. One should not read too much into the occasional use of *divinare* in a comic context; on the other hand, it is quite clear that the complex meaning of the verb was already clear to Plautus, and surely to his audience. We cannot tell to what extent this awareness already entailed some sort of critical reflection about the scope and the limits of divination.

The meaning of *divinare* as "making a difficult guess" appears in a passing reference in Terence's *Hecyra*: *plane hic divinat* (696: "it's clear that he guesses right"). It also occurs in a reference that Cicero makes in the *Pro Quinctio*, his earliest speech preserved, in which he attacks Naevius' way of guessing the intentions of Quinctius: "At what time, Naevius, do you think Quinctius ought to have been defended in his absence, or how? Then, when you demanded leave to take possession of his goods? No one was present, for no one could guess (*neque enim quisquam divinare poterat*) that you were going to make such a demand; nor did it concern anyone to object to that which the praetor ordered not to be done absolutely, but to be done according to his edict."[24] In this case, there is a different emphasis on the use of the word—almost a scathing touch. No one could have reasonably guessed Naevius' intentions; only a diviner could have done so.

In a legal context *divinare* can even have an openly negative connotation. In the *Pro Plancio*, Cicero blames his counterpart Laterensis for refusing to have a trial before a panel of judges who could express an informed opinion on the case. The judges who heard the case were men

[24] Cicero, *Pro Quinctio* 19.60–61: *quo tempore existimas oportuisse, Naevi, absentem Quinctium defendi aut quo modo? tum cum postulabas ut bona possideres? nemo adfuit; neque enim quisquam divinare poterat te postulaturum, neque quemquam attinebat id recusare quod praetor non fieri, sed ex edicto suo fieri iubebat* ('At what time, Naevius, do you think Quinctius ought to have been defended in his absence, or how? Then, when you were demanding leave to take possession of his goods? No one was present, for no one could guess (*divinare*) that you were going to make such a demand; nor did it concern any one to object to that which the praetor ordered not to be done absolutely, but to be done according to his edict', trans. Charles D. Yonge).

from a different tribe, and could not express a fully informed judgement, because they were not aware of all the circumstances of the case: they would have to proceed by a divinatory method, rather than using the information that men of their standing needed in order to make an informed decision. The wording is quite strong: *cur denique se divinare malueris quam eos qui scirent iudicare*?[25] It seems that in a judicial context the ability to "divine" the future is considered an unreasonable expectation. There are other passages in which Cicero explores the blurry boundary between conjecture and divination: he does it in the *Pro Cluentio* and, more openly, in the *De inventione*, in a passage where he discusses the limits of *ratiocinatio* and the interpretation of poorly drafted legal texts.[26]

The word *divinatio* was also a specific legal term: it was used to define a specific sort of judiciary speech, which was given by a prospective prosecutor before the jury, in order to prove his credentials and be assigned the task of prosecuting the defendant. Only one *divinatio* survives, the *divinatio in Q. Caecilium*, a speech that Cicero gave before the Verres trial, in which he attacked Verres' quaestor Q. Caecilius and gave a summary of the crimes of Caecilius and Verres, along with a summary of his own credentials. Suetonius still had access to the *divinatio* that Caesar delivered in 77 BC in order to obtain the prosecution of Cn. Cornelius Dolabella (cos. 81 BC), a former governor of Macedonia who was accused of a number of offences against the provincials; according to the biographer, a significant part of the speech derived from the famous oration of Strabo Caesar for the people of Sardes.[27] It is not surprising that a *divinatio* would be heavily indebted to earlier speeches: it was not about the evidence that would be discussed in the case, but about the rhetorical ability of the prospective accuser.

Although we do not have a great deal of ancient evidence for this kind of speech, we have a number of attempts to define what a *divinatio* was, and to explain the etymology of the word. The starting point must be Quintilian's brief reference to *divinationes*, where he mentions Cicero's *cause célèbre* and his straightforward approach to the speech. In

[25] Cicero, *Pro Plancio* 28.46: 'why you prefer having them to proceed by guesswork (*divinare*), rather than those men to decide who had means of knowing the truth?' (trans. Charles D. Yonge).

[26] Cicero, *Pro Cluentio* 97 and 131; Cicero, *De inventione* 2.50. See also Cicero, *Pro Roscio Amerino* 96; *Pro Tullio* 50; *Pro Rabirio* 1.2.

[27] Suetonius, *Divus Julius* 55.2. On Dolabella's trial, see Erich S. Gruen, "The Dolabellae and Sulla", *American Journal of Philology* 87 (1966), pp. 385–399, at pp. 387–389.

Cicero's view, the main aim of a speech *de accusatore constituendo* ('on the designation of the accuser) must be to prove that a given prosecutor is the most suitable choice for the party that is launching the prosecution, and the least desirable one for the defendant.[28] Quintilian takes a different line, and argues that the main concerns must be different: why someone is keen to act as an accuser on a given case; whether he would be the strongest patron for a given case; whether he would come across as an honest prosecutor. In this case, the discussion of *divinatio* is developed entirely from the point of view of the jury that must pick the accuser; the uncertain aspects of the undertaking are emphasised.

More usefully for our purposes, Aulus Gellius offers some informed speculation about the etymology of the word.[29] According to Gavius

[28] Quintilian, *De institutione oratoria* 7.4.33: *de accusatore constituendo, quae iudicia divinationes uocantur: in quo genere Cicero quidem, qui mandantibus sociis Verrem deferebat, hac usus est divisione: spectandum a quo maxime agi velint ii quorum de ultione quaeritur, a quo minime velit is qui accusatur* ('There are cases concerned with the appointment of a prosecutor, which are known as *divinationes*. In this connection Cicero, who was indicting Verres on the instruction of our Sicilian allies, adopts the following division—to the effect that the main point for consideration is, by whom those the redress of whose wrongs forms the subject of the trial would prefer to be represented, and by whom the accused would least desire them to be represented', trans. Harold E. Butler).

[29] Gellius, *Noctes Atticae* 2.4.1: *quam ob causam Gavius Bassus genus quoddam iudicii 'divinationem' appellari scripserit; et quam alii causam eiusdem vocabuli dixerint. cum de constituendo accusatore quaeritur iudiciumque super ea re redditur, cuinam potissimum ex duobus pluribusve accusatio subscriptiove in reum permittatur, ea res atque iudicum cognitio 'divinatio' appellatur. id vocabulum quam ob causam ita factum sit, quaeri solet. Gavius Bassus in tertio librorum, quos de origine vocabulorum composuit: 'divinatio' inquit 'iudicium appellatur, quoniam divinet quodammodo iudex oportet, quam sententiam sese ferre par sit.' nimis quidem est in uerbis Gaui Bassi ratio inperfecta uel magis inops et ieiuna. sed videtur tamen significare velle idcirco dici 'divinationem', quod in aliis quidem causis iudex ea, quae didicit quaeque argumentis vel testibus demonstrata sunt, sequi solet, in hac autem re, cum eligendus accusator est, parva admodum et exilia sunt, quibus moveri iudex possit, et propterea, quinam magis ad accusandum idoneus sit, quasi divinandum est. hoc Bassus. sed alii quidam 'divinationem' esse appellatam putant, quoniam, cum accusator et reus duae res quasi cognatae coniunctaeque sint neque utra sine altera constare possit, in hoc tamen genere causae reus quidem iam est, sed accusator nondum est, et idcirco, quod adhuc usque deest et latet, divinatione supplendum est, quisnam sit accusator futurus* ('The reason given by Gavius Bassus for calling a certain kind of judicial inquiry *divinatio*; and the explanation that others have given of the same term. When inquiry is made about the choice of a prosecutor, and judgment is rendered on the question to which of two or more persons the prosecution of a defendant, or a share in the prosecution, is to be entrusted, this process and examination by jurors is called *divinatio*. The reason for the use of this term is a matter of frequent inquiry. Gavius Bassus, in the third book of his work *On the Origin of Terms*, says: "This kind of trial is called *divinatio* because the juror ought in a sense to divine what verdict it is proper for him to give." The explanation offered in these words of Gavius Bassus is far from complete, or rather, it is inadequate and meagre. But

Bassus' *De origine vocabulorum*, the term derived from the nature of the judgment that was expected from the jurors: they had to divine what the best choice would be. Gellius notes that this definition is partly correct, as the evidence that the jurors can rely upon is so meagre that their decision may be compared to a divinatory act. He also adds, however, that the word *divinatio* may have a different origin: since accuser and defendant are both integral to the trial, and the one cannot exist without the other, in the phase preceding the trial the figure of the prosecutor, who has not been appointed yet, has to be supplied by divination—imagining that a prosecutor is actually in place.

Pseudo-Asconius has a much more straightforward, and surely more interesting definition.[30] According to the anonymous commentator, who gives some introductory remarks on the *divinatio in Q. Caecilium* that opens the corpus of the *Verrines*, *divinatio* is a specific sub-genre of oratory. He then goes on to list several theories about the etymology of the word, which are in fact relevant for the interpretation of the exercise itself. Stangl may well have been right in noting that the nature of pseudo-Asconius' work is compilatory, but it is precisely to this readiness to record different definitions that we owe the mention of these

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at least he seems to be trying to show that *divinatio* is used because in other trials it was the habit of the juror to be influenced by what he has heard and by what has been shown by evidence or by witnesses; but in this instance, when a prosecutor is to be selected, the considerations which can influence a juror are very few and slight, and therefore he must, so to speak, 'divine' what man is the better fitted to make the accusation. Thus Bassus. But some others think that the *divinatio* is so called because, while prosecutor and defendant are two things that are, as it were, related and connected, so that neither can exist without the other, yet in this form of trial, while there is already a defendant, there is as yet no prosecutor, and therefore the factor which is still lacking and unknown—namely, what man is to be the prosecutor—must be supplied by divination', trans. John C. Rolfe). Cf. the entry on *divinatio* in Robert Maltby, *A Lexicon of Ancient Latin Etymologies*, ARCA Classical and Medieval Texts, Papers and Monographs 25 (Leeds, 1991), pp. 192–193.

[30] Pseudo-Asconius, 186 Stangl: *divinatio dicitur haec oratio, quia non de facto quaeritur et coniectura, sed de futuro, quae est divinatio, uter debeat accusare. alii ideo putant divinationem dici, quod iniurati iudices in hac causa sedeant, ut, quod velint, praesentire de utroque possint; alii, quod res agatur sine testibus, et sine tabulis, et his remotis, argumenta sola sequantur iudices, et quasi divinent* ('This speech is called *divinatio*, because it proceeds by conjecture and does not deal with facts, but it deals with the future, as to who is supposed to lead the prosecution. Others think that it is called *divinatio*, because the judges sit on this case without having taken an oath, so that they can get whatever impression they may be able to form about both accusers. Others argue that, since the matter is discussed without witnesses and without written evidence, and indeed far away from that sort of material, the judges follow only the arguments, and almost divine').

theories.[31] According to some, who held a view that was very close to that of Gavius Bassus and Gellius, the speech was an exercise in divination, because it would have been an informed speculation on the future development of the trial, and on the person who would be entrusted with the prosecution. According to others, the emphasis was on the judges. The word supposedly derived from the fact that the judges would be listening to the prospective accusers' cases without having taken an oath, in order to be able to form whatever opinion they may want about them. The divinatory nature of this exercise is confirmed by the use of the verb *praesentire*: according to Cicero's working definition at the beginning of the *De divinatione*, *divinatio* is a *praedictio* (prediction) and a *praesensio* (presentiment) of things that are usually deemed fortuitous. A third group of interpreters agreed in an important respect, in that the etymology of the word derived from the nature of the task of the judges: they have the difficult task of deciding who could be the best prosecutor, despite not having any evidence before their eyes. They are compelled to follow the arguments of the orators, and they cannot base their judgement on anything else but them. In this respect their exercise is comparable to a form of divination. It is not far-fetched to see a negative slant on divination in this definition. At any rate, it is pretty clear that the role of the diviner and that of the judge are regarded, according to this definition, as very different practices. The judge is supposed to rely on solid evidence; the diviner is not. We should perhaps not pursue this approach too closely; we have already seen a series of examples for the use of the general meaning of divination. However, it is important to note that the analogy between the diviner and the judge has often been made in a number of cultures, and has often been observed in anthropological literature. We have no evidence that it was ever explicitly made by any Roman intellectual, except for this definition of *divinatio*.

The contrast between the working definition that Cicero gives at the beginning of *De divinatione* and the passage of the *Pro Plancio* where the knowledge of the diviners is explicitly opposed to that of those who really have an informed knowledge of a case could hardly be stronger. The sharp difference of contexts explains the apparent contradiction; there is no point in trying to solve it. It is, if anything, a clear sign of the complex-

[31] Thomas Stangl, *Pseudoasconiana. Textgestaltung und Sprache der anonymen Scholien zu Ciceros vier ersten Verrinen auf Grund der erstmals verwerteten ältesten Handschriften*, Studien zur Geschichte und Kultur des Altertums 2.4–5 (Paderborn, 1909), p. 12.

ity of the meaning of this word, and of the variety of contexts in which it could be used: it could range from a vague reference to guesswork, more or less informed, down to wild speculation, and to divinatory experience.

4. Prudentia, Prudens, *and* Prudentes

The concept of *prudentia* is in many ways coterminous to *divinatio*. The occurrences of *prudentia* are much more numerous than those of *divinatio*: 126 in Cicero alone. There are obvious reasons for that: *prudentia* is a philosophical concept, one of the most significant virtues, and a personal quality, which applies very well to the political domain. It may be even barely more than a by-word for intelligence, or wisdom. With his usual keenness for identifying Greek parallels for Latin concepts, Cicero noted that it was the Latin equivalent of *phronesis*. This is surely a good translation, but it does not do justice to the obvious relevance that *prudentia* can have to divinatory matters: it derives from *pro-videre*, from "seeing before, seeing ahead".

Some passages show that this association was still seen and understood by some.[32] A full survey of this problem does not fall within the remit of this paper, but I would like to concentrate on a passage of Cicero's *De haruspicum responsis* which shows some of the potential line of contact between *divinatio* and *prudentia*. As he embarks upon his statement of loyalty to the main tenets of public divination, Cicero acknowledges the importance of the lesson of the ancestors, who have created the framework within which divination can make its contribution to the welfare of the State.[33] Cicero introduces his statement with several terms that evoke concepts of prediction and foresight: the ancestors were

[32] See Maltby, *Lexicon*, p. 504.

[33] Cicero, *De haruspicum responsis* 18: *ego vero primum habeo auctores ac magistros religionum colendarum maiores nostros, quorum mihi tanta fuisse sapientia videtur ut satis superque* ***prudentes*** *sint qui illorum* ***prudentiam*** *non dicam adsequi, sed quanta fuerit perspicere possint; qui statas sollemnisque caerimonias pontificatu, rerum bene gerundarum auctoritates augurio, fatorum veteres* ***praedictiones*** *Apollinis vatum libris, portentorum expiationes Etruscorum disciplina contineri putaverunt; quae quidem tanta est ut nostra memoria primum Italici belli funesta illa principia, post Sullani Cinnanique temporis extremum paene discrimen, tum hanc recentem urbis inflammandae delendique imperi coniurationem non obscure nobis paulo ante* ***praedixerint*** (the terms that refer directly to prediction and divination are in bold: 'But in the first place, I have our ancestors as my leaders and tutors in paying proper respect to religion—men whose wisdom appears to me to have been so great, that those men are sufficiently, and more than sufficiently prudent, who are able—I will not say to equal their prudence, but to be thoroughly

prudentes, because they decided to put in place a range of divinatory practices; Cicero says that, while he cannot hope to equal their *prudentia*, he is fully aware of the contribution that it has made to the welfare of the State. The list that follows confirms the impression that Cicero is playing on the etymological implication of *prudentia*: the prophecies of the Sibylline books are called *fatorum veteres praedictiones*, and the haruspices are praised, a few lines below, for having clearly predicted the recent political developments. However, the praise for the rewards of divination is not unqualified. The foresight of the ancestors is celebrated because they decided to limit the potential options of their divinatory practices. The emphasis is on *contineri*: augury sets a limit on the use of power, the Sibylline books provide a framework for ancient prophetic utterances, and the Etruscan discipline sets rules for the expiation of prodigies. Cicero certainly gives a favourable assessment of the role of public divination, but he qualifies it by saying that there is no orderly and meaningful divination without *prudentia*—without a sound set of checks and balances or ultimately without a range of political and legal practices. In fact, divination is useful and makes sense only because it is included within a specific and well-established legal framework.

The history of the adjective *prudens* follows similar lines to that of the noun *prudentia*, and its translation is equally problematic.[34] Occasionally, however, we see a reminiscence of the suggestive etymology of the word resurfacing: in a letter written to Plancius in October 45, Cicero recalls his efforts to avoid the civil war and the scepticism that his initiatives met in the optimate circles.[35] His peers failed to realise that his attempt would

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aware how great it was; who thought that the stated and regular ceremonies were provided for by the establishment of the pontificate, that due authority for the performance of all actions was to be derived from the auspices, that the ancient prophecies of our destinies were contained in the books of the prophets of Apollo, and the explanations of prodigies in the doctrine of the Etruscans; and this last is of such weight that within our own recollection they have predicted to us in no obscure language, first of all those fatal beginnings of the Italian war, and after that the imminent danger and almost destruction of the time of Sulla and Cinna, and very lately this recent conspiracy for burning the city and destroying the empire', trans. Charles D. Yonge, modified).

[34] Maltby, *Lexicon*, p. 504.

[35] Cicero, *Ad familiares* 4.14.4: *quibus si vicissent ii, ad quos ego pacis spe, non belli cupiditate adductus accesseram, tamen intelligebam, et iratorum hominum et cupidorum et insolentium quam crudelis esset futura victoria, sin autem victi essent, quantus interitus esset futurus civium partim amplissimorum, partim etiam optimorum, qui me haec praedicentem atque optime consulentem saluti suae malebant nimium timidum quam satis prudentem existimari* ('For if those that I have been drawn to join not by any desire for war, but by a hope for peace, had proved victorious by means of arms, I was none the less

have avoided an unprecedented bloodshed: far from being fearful, he was *prudens*. What is very interesting is the proximity, not attested elsewhere, of *prudens* (wise, but also able to see ahead) and *praedicere*.

The adjective *prudens* can be used in a legal sense too—indeed, it became a legal category of sorts quite early in the development of Roman jurisprudence. One of the most important responses of the jurist Q. Mucius Scaevola (cos. 95 BC) dealt with an important religious issue: whether the praetor who carried out business on a *dies nefastus* should be deemed guilty of a religious crime. The view was that a religious breach could be expiated with a sacrifice if the praetor had violated the prohibition unintentionally (*imprudens*); however, if the violation had been intentional (*si prudens dixit*), the offence was not expiable.[36] The word *prudens* is very suitable to convey the concept of a deliberate action: it indicates the conduct of someone who is aware of the implications of an action, and can foresee its consequences. Scaevola is here applying a general principle, which is of capital importance

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aware how sanguinary was bound to be the victory of men so angry, so rapacious, and so arrogant; and if on the other hand they were to be defeated, how crushing was bound to be the ruin of my fellow-citizens, some of them men of the highest rank, others of the highest character too, but who, when I foretold all this and recommended the wisest measures for their safety, preferred to regard me as unduly timid rather than appropriately prudent').

[36] Varro, *De lingua Latina* 6.4.30: *praetor qui tum fatus est, si imprudens fecit, piaculari hostia facta piatur; si prudens dixit, Quintus Mucius aiebat eum expiari ut impium non posse* ('The praetor who spoke on that day can purify himself by sacrificing an expiatory victim, provided that he made an honest mistake. If he deliberately misspoke, Quintus Mucius affirms that he cannot purify himself in any way, like someone who has committed an impious act', trans. Maurizio Bettini). Cf. also Macrobius, *Saturnalia* 1.16.9–10: *adfirmabant autem sacerdotes pollui ferias, si indictis conceptisque opus aliquod fieret. praeterea regem sacrorum flaminesque non licebat videre feriis opus fieri: et ideo per praeconem denuntiabant, ne quid tale ageretur, et praecepti neglegens multabatur. praeter multam vero adfirmabatur eum qui talibus diebus inprudens aliquid egisset porco piaculum dare debere: prudentem expiare non posse Scaevola pontifex adseverabat: sed Umbro negat eum pollui qui opus vel ad deos pertinens sacrorumve causa fecisset uel aliquid urgentem vitae utilitatem respiciens actitasset. Scaevola denique consultus, quid feriis agi liceret, respondit: quod praetermissum noceret* ('The priests used to maintain that a rest day was desecrated if, after it had been duly promulgated and proclaimed, any work was done on it. Furthermore, the high priest and the flamens might not see work in progress on a rest day, and for this reason they would give public warning by a herald that nothing of the sort should be done. Neglect of this command was punished by a fine, and it was said that one who had inadvertently done any work on such days had, in addition to the fine, to make atonement by the sacrifice of a pig. For work done intentionally no atonement could be made, according to the pontiff Scaevola; but Umbro says that to have done work that concerns the gods or is connected with a religious ceremony, or any work of urgent and vital importance does not defile the doer', trans. Percival V. Davies).

to the formation of a systematic discourse on legal matters. His interest in setting general guidelines based on some abstract theoretical tenets is indirectly confirmed by the point which he made in the same context that there was another important exception to the prohibition on doing business on a *dies nefastus*: anything that would have been harmful not to do on that particular day had to be attended to. This response is the symptom of the emergence of a new method. On the one hand, it is possible to see an effort to devise more sensible solutions that can facilitate the handling of religious and political business; on the other hand, there is an attempt to set general principles that can have wide-ranging implications.[37] Indeed, there is evidence for the later use of the term *prudens* in legal texts, not just with reference to intentional criminal behaviour, but also indicating a standard of liability and, more generally, qualifying someone who is drawing up a will or is making a promise by stipulation.[38]

Another use of *prudens*, however, is even more interesting for our purposes. We can see in Plautus that the adjective may be accompanied by the genitive to refer to a kind of knowledge or foresight that is applied to a specific form of knowledge.[39] This use is frequent, sometimes with the genitive, sometimes with the ablative, and it consistently defines a form of practical knowledge, an understanding of situations. This meaning is widely attested, again from the first century BC onwards, and with a variety of associations: in Cicero's *pro Quinctio*, the *pater familias* is *ceterarum rerum et prudens et attentus* (11); Nepos' Conon is an excellent military commander, because he is *prudens rei militaris et diligens* (1.2); according to Tacitus (*Ann*. 3.69), Tiberius was occasionally able to restrain his customary rage and to use some restraint—he was *prudens moderandi*. When the mythographer Hyginus touches upon the figure of Idmon from Argus, the first Argonaut who died during the

[37] On this passage see, John Scheid, "Oral Tradition and Written Tradition in the Formation of Sacred Law in Rome," in *Religion and Law in Classical and Christian Rome*, eds. Clifford Ando and Jörg Rüpke (Stuttgart, 2006), pp. 14–33 and Olga Tellegen-Couperus' contribution in this volume. See also, from a different angle, Maurizio Bettini, "Weighty Words, Suspect Speech: *fari* in Roman Culture," *Arethusa* 41 (2008), pp. 313–375, at pp. 330–332.

[38] Gellius, *Noctes Atticae* 20.1.17 (quoting Labeo's treatise on the Twelve Tables). See also Q. Cervidius Scaevola in *Digesta* 28.5.86 on the *testator*, and Iavolenus in *Digesta* 24.3.66.4 (quoting Labeo) on stipulation; a comprehensive inventory of references in *Vocabularium iurisprudentiae Romanae* 4.3 / 4, ed. Marianne Meinhart (Berlin-New York, 1985), pp. 1293–1294.

[39] E.g. Plautus, *Captiva* 45, where *prudens boni* is used in opposition to *insciens boni*.

expedition, he notes that he was able to foresee his death by looking at the flight of birds, and yet decided to join the expedition. Hyginus stresses that Idmon had a divinatory expertise (*augurio prudens*).[40]

The word *augurium* is here used in the more general sense of "faculty of divination".[41] The use of *prudens* is also very interesting in several respects. Hyginus worked in the Augustan period, and he knew that by that time the word *prudens* was customarily associated with forms of knowledge that had to do with the religious, and indeed the juridical sphere. He also knew, of course, that from Cicero's generation (at the latest: there may be earlier attestations that are lost to us) the adjective *prudens* could sometimes be used as a noun. Arguably, its original meaning was very close to that of the adjective: the *prudens* is an expert, someone who has a special knowledge on a certain issue. This is the meaning that we encounter at the beginning of the *Orator*, for instance, where Cicero mentions the criticism that may come from learned and wise men (1.1: *reprehensionem doctorum atque prudentium*). This definition of *prudens* as "the person who knows" soon became part of the legal jargon.[42] The role of the *responsa prudentium* in Gaius' division of the constituent parts of Roman law is well-known: the *prudentes* are those who are able to talk about legal matters and to give informed and binding opinions about it.[43] If the views of two *prudentes* on a certain matter are the same, a judge will be expected to follow that consensus; if there is disagreement, the judge will be at liberty to choose the course of action that he finds most suitable. Gaius' reflection is deeply rooted in a second-century AD context, in which the power of the emperor provides the only framework

[40] Hyginus, *Fabulae* 14.11.

[41] Virgil, *Aeneis* 12.394; Ovid, *Metamorphoses* 13.650.

[42] Jan W. Tellegen—Olga E. Tellegen-Couperus, "Law and Rhetoric in the causa Curiana," *Orbis Iuris Romani* 6 (2000), pp. 171–202, esp. pp. 186–187 offer a lucid demonstration of why the analogy between Roman lawyers (*iurisprudentes*, *iurisperiti* and *iureconsulti*) and modern *Fachjuristen* is not tenable.

[43] Gaius, *Institiones* 1.2: *constant autem iura populi Romani ex legibus, plebiscitis, senatus consultis, constitutionibus principum, edictis eorum, qui ius edicendi habent, responsis prudentium* ('Roman law consists of statutes, plebiscites, *senatusconsulta*, constitutions of the emperors, edicts of magistrates authorized to issue them, and responses of jurists'); 1.7: *responsa prudentium sunt sententiae et opiniones eorum, quibus permissum est iura condere. quorum omnium si in unum sententiae concurrunt, id, quod ita sentiunt, legis uicem optinet; si uero dissentiunt, iudici licet quam uelit sententiam sequi; idque rescripto diui Hadriani significatur* ('The responses of jurists are the decisions and opinions of persons authorized to lay down the law. If they are unanimous their decision has the force of law; if they disagree, the judge may follow whichever opinion he chooses, as is ruled by a rescript of the late emperor Hadrian').

within which the solution of legal disputes can take place: the lawyers can express their opinions because they have been allowed to do so by the emperor.[44] However, the core of the discussion is rooted in a much earlier learned dispute: Gaius' exercise is an attempt to offer a list of the sources of the law and to contribute to a tradition that had started in the early first century BC, with the attempts to identify the components of *ius* in the *Rhetorica ad Herennium*, and in Cicero's *De inventione* and *Topica*.[45] The debate on the *partes iuris* continued throughout the late Republic and the early Principate, and the acknowledgement of the role of the lawyers should probably be seen as a consequence of the increasingly significant role of precedents in the late Republican discussions.

Again, one could think of parallels in the divinatory practice. Precedents had a significant role in the main areas of Roman public divination. The haruspices based their responses on a *disciplina*, a set of theoretical knowledge that was also codified in a number of texts (none of which survives) and was taught under the patronage of the Roman government. The Sibylline Books and the rituals that were performed by the *decemviri s.f.* relied on a similar set of expertise: John Scheid has aptly called into play the concept of "jurisprudence divinatoire".[46] The same principle applies to the work of re-assembling the material that ended up in the new corpus of the Books after the fire of 83 BC: gathering the texts from a number of communities in Italy and beyond (notably Erythrae in Asia Minor), and establishing which ones were eligible to be included in the new collection implied a knowledge of the precedents. Finally, the very procedure that led to the handling and the expiation of prodigies implied an expert knowledge which encompassed the relevant precedents. It is not always clear what criteria the Senate used to decide

[44] Some recent discussions of the *ius respondendi* (all referring to earlier bibliography): Olga Tellegen-Couperus, *A Short History of Roman Law* (London-New York, 1993), pp. 95–98; Aldo Schiavone, *IUS. L'invenzione del diritto in Occidente* (Biblioteca di cultura storica 254) (Turin, 2005), pp. 330–332 (esp. 332: "si respira un'aria già da tardoantico"); Tessa G. Leesen, *Gaius Meets Cicero. Law and Rhetoric in the School Controversies*, Legal History Library 2 (Leiden-Boston, 2010), pp. 335–340; Kaius Tuori, "A Place for Jurists in the Spaces of Justice," in *Spaces of Justice in the Roman World*, ed. Francesco de Angelis, Columbia Studies in the Classical Tradition 35 (Leiden-Boston, 2010), pp. 43–65, at 48–55.

[45] See Jean-Louis Ferrary, "Le droit naturel dans les exposés sur les parties du droit des traités de rhétorique," in *Testi e problemi del giusnaturalismo romano*, eds. Dario Mantovani and Aldo Schiavone, Pubblicazioni del Cedant 3 (Pavia, 2007), pp. 75–94.

[46] John Scheid, "Les Livres Sibyllins et les archives des quindécemvirs," in *La Mémoire perdue. Recherches sur l'administration romaine*, ed. Claude Moatti (Rome, 1998), pp. 11–26, at p. 18.

whether the haruspices or the (*quin*)*decemviri* had to be consulted. It appears that the (*quin*)*decemviri* and the Sibylline books were consulted when a set of prodigies had occurred, while the haruspices were usually consulted when a response was needed on a single, specific occurrence—but this principle applies to the period between 200 and 167, which is covered by Livy's narrative, and less so to the rest of the second and first centuries BC, when the role of the haruspices became more prominent.[47] Establishing a clear pattern is problematic, but it is clear that the procedure that led to the expiation of a prodigy had legal implications, and that a set of practices was indeed established.

To conclude, let us go back to the problem of precedents. As far as we can tell from the *Digest*, the emergence of the meaning of *prudens* as "lawyer" dates to the early Principate. It is not found in the late Republican jurists like Scaevola, Sulpicius, or even Labeo, but its non-existence cannot be presumed. We cannot rule out that this was the case, of course, as so many texts have been lost, in this and in many other literary genres. Two points, however, should be made in this context.

First of all, the concept of *responsa prudentium*. It is apparent from Gaius' text that it was used and codified some time before Gaius' definition. The model that it implies is clear: the jurists act through responses, through specific utterances given on specific issues. They put their knowledge to use in solving a specific case. We are, of course, in the context of a well studied and well established feature of Roman intellectual life between the late Republic and the early Principate: the emergence and consolidation of a number of specialised branches of knowledge, and the establishment of different professional discourses. The birth of jurisprudence is a fundamental part of this process. It is a discipline where the relationship between general and particular, between universal and local, between principle and practice finds some of its most striking and instructive outcomes. This paper is not the place for a full exploration of this issue. It is important, however, to stress how the semantic development of the word *prudens* fits in this context: we see its evolution from adjective into noun, and—most strikingly—its application from the domain of "good sense, wisdom, expertise" to that of the new sciences that took shape in Rome between the second and the first century BC. The expression *responsa prudentium* is interesting for another reason too: its

[47] John A. North, *The Inter-Relation of State Religion and Politics in Roman Public Life from the End of the Second Punic War to the Time of Sulla* (Diss. Oxford, 1967), pp. 567–595.

complexity, even its evocative power. We have already discussed the etymology of *prudens* and *prudentia*, and its explicit affinity with the sphere of prediction, and indeed of divination.

Moreover, the word *responsum* brings to mind the ways in which divination was and is practised, in Rome and elsewhere: it happened, and still happens, mainly through a series of expert utterances, devoted to a specific problem, and based on a set of specific observations.[48] It is fascinating to see the *responsa* and the *prudentes*—two concepts that have such deep divinatory resonances—juxtaposed to form an intellectual category that marks the triumph of Roman jurisprudence, and its transformation into a major constituent of Roman law. The boundaries between *divinatio* and *prudentia* are more porous than has often been thought.

[48] Cf. the important discussion in Schiavone, *Ius*, pp. 91–110.

PART II

PRIESTS, MAGISTRATES, AND THE STATE

THE CURIATE LAW AND THE RELIGIOUS NATURE OF THE POWER OF ROMAN MAGISTRATES

Michel Humm

In Rome, a law (*lex*) is a text submitted for approbation by the citizens (*populus*) either by acclamation of the crowd or by vote (*suffragium*), within the context of an official assembly of the Roman people (*comitia*), convened and presided over by a magistrate of the *populus*.[1] The law as the expression of political power and civic community could have religious implications, or it could testify to the very close connection between politics and religion in Rome. Rome was firstly a city (*civitas*), that is to say a community of free men (*res publica*) associated with its gods, living in a territory with religiously-defined boundaries.[2] In Rome, as was the case in all the other cities of the Mediterranean world in Antiquity, the gods were part of the civic community: according to Scheid, "gods are, in a way, citizens".[3] Consequently, each "political" act—that is to say, each act regarding the *polis* or the *civitas*—was also a "religious" act, and vice-versa: they were the two sides of the same coin. The nature of Roman religion was therefore essentially political and social: the term "religion" (*religio*) both refers to "worship of the gods" (*cultus deorum*), therefore "what binds (*religare*) men to the

[1] Theodor Mommsen, *Le droit public romain* (hereafter cited as Mommsen, *DPR*), 6.1, trans. Paul Frédéric Girard, by permission of the author (Paris, 1889), pp. 351–359 (= Id., *Römisches Staatsrecht* [hereafter cited as *StR*], 3, 3rd ed. [Leipzig, 1888], pp. 309–315); Giovanni Rotondi, *Leges publicae populi romani* (Milan, 1912), pp. 4–73; Jochen Bleicken, *Lex publica. Gesetz und Recht in der römischen Republik* (Berlin-New York, 1975), esp. pp. 52–99; André Magdelain, *La loi à Rome. Histoire d'un concept*, Collection d'Études Latines 34 (Paris, 1978), esp. pp. 55–85; Jean Gaudemet, *Les institutions de l'Antiquité*, 2nd ed. (Paris, 1982), pp. 239–247; Mario Bretone, *Storia del diritto romano* (Rome-Bari, 1997), pp. 50–51. On assemblies and magistrates of the *populus*, see *infra* n. 7.

[2] See Pierangelo Catalano, "Aspetti spaziali del sistema giuridico-religioso romano. Mundus, semplum, urbs, ager, Latium, Italia", in *Aufstieg und Niedergang der römischen Welt* (hereafter cited as *ANRW*), 2.16.1, ed. Wolfgang Haase (Berlin-New York, 1978), pp. 440–553, esp. pp. 452–466; J. Linderski, "The Augural Law", in *ANRW*, 2.16.3 (Berlin-New York, 1986), pp. 2146–2312.

[3] John Scheid, *Religion et piété à Rome*, 2nd ed. (Paris, 2001), p. 69 (cf. *ibid*., pp. 69–76).

gods",[4] and to "religious scruple" linked to the fear of supernatural powers (from *relegere*, i.e. the fact of "ceaselessly worrying about something or someone, in a process of constant renewal").[5] Thus, in Rome, "religion" implies a community with the gods, and a system of obligations inferred by this community; in any case, *religio* does not indicate the sentimental, direct or personal bond between an individual and a divinity.[6]

1. *The Enigmatic Curiate Law*

The curiate law (*lex curiata*), voted at the time of the investiture of newly-elected magistrates of the *populus*,[7] shows the intimate links between Roman public law and the religion of the city during the time of the Republic. This law was voted by the old assembly of the *curiae* (*comitia*

[4] Cicero, *De natura deorum*, 2.8, ed. O. Plasberg (Leipzig, 1917): *Et si conferre volumus nostra cum externis, ceteris rebus aut pares aut etiam inferiores reperiemur, religione id est cultu deorum multo superiores*. Cf. Georges Dumézil, *La religion romaine archaïque*, 2nd ed. (Paris, 1974), p. 145.

[5] For Dumézil, *La Religion Romaine*, p. 57, "*religio*, quelle qu'en soit l'étymologie, a d'abord désigné le scrupule"; this meaning of the term *religio* is revealed by its etymological opposite, since the contrary of the right *religio* (from *re-lego*) is *neglegentia* (from *nec-lego*): the fact of "not worrying about …" (cf. *ibid*., p. 145, n. 2).

[6] See notably: John Scheid, *La religion des Romains* (Paris, 1998), esp. pp. 20–28; Id., *Religion et piété*, pp. 24–27; pp. 30–34; pp. 47–76; Id., *Quand faire, c'est croire. Les rites sacrificiels des Romains* (Paris, 2005), pp. 15–83; see also Michel Humm "I fondamenti della repubblica romana: istituzioni, diritto, religione", in *Storia d'Europa e del Mediterraneo*, ed. Alessandro Barbero, Vol. 5: *La* res publica *e il Mediterraneo*, ed. Giusto Traina (Rome, 2008), pp. 467–520, esp. pp. 468–473.

[7] In Roman public law, magistrates elected by one of the electoral assemblies of the *populus* (named *comitia*) are called "magistrates of the *populus*": in these assemblies, citizens were distributed in various units of vote (*curiae*, centuries or tribes, according to the nature of the *comitia*), and all the units gathered together formed the electorate (called the *populus*) under the presidency of a magistrate. Its sole function was to allow citizens to express their opinon by acclamation or vote (*suffragium*), by answering "aye" or "nay" to a question (*rogatio*) asked by the magistrate (on the election of another magistrate, the vote of a law or a legal decision); cf. Mommsen, *DPR*, 1 (Paris, 1892), pp. 1–20 (= Id., *StR*, 1, 3rd ed. [Leipzig, 1887], pp. 3–18); Id., *DPR*, 6.1 (Paris, 1889), pp. 341–482 (= Id., *StR*, 3, 3rd ed. [Leipzig, 1888], pp. 300–483); George Willis Botsford, *The Roman Assemblies from their Origin to the End of the Republic* (New York, 1909), *passim*; Lily Ross Taylor, *Roman Voting Assemblies from the Hannibalic War to the Dictatorship of Caesar* (Ann Arbor, 1966); Gaudemet, *Les institutions*, pp. 184–188; Claude Nicolet, *Le métier de citoyen dans la Rome républicaine* (Paris, 1976), pp. 280–424; Id., *Rome et la conquête du monde méditerranéen*, 1, *Les structures de l'Italie romaine*, Nouvelle Clio 8.1 (Paris, 1977), pp. 332–356; pp. 393–418; Adalberto Giovannini, *Consulare imperium*, Schweizerische Beiträge zur Altertumswissenschaft 16 (Basel, 1983), pp. 33–37 ("Ce qui distingue un

curiata), which was historically the oldest assembly of Roman citizens (that is to say, the people of the *Quirites*, who were, by definition and in origin at least, members of the *curiae*):[8] in this assembly, the citizens were divided into thirty voting units that corresponded to the thirty archaic *curiae*.[9] Towards the end of the Republic, while citizens did not even remember to which *curia* they belonged,[10] *comitia curiata* went on being convened, for which the presence of thirty lictors became

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magistrat d'un non-magistrat, c'est que le premier a les *auspicia* alors que le second ne les a pas"); Alexander Yakobson, *Elections and Electioneering in Rome. A Study in the Political System of the Late Republic*, Historia Einzelschriften 128 (Stuttgart, 1999), esp. pp. 20–64.

[8] Cf. Robert E.A. Palmer, *The Archaic Community of the Romans* (Cambridge, 1970), pp. 67–79: "What was a curia?"; pp. 156–160: "Quirites"; pp. 189–281: "The curiate constitution"; Dumézil, *La religion romaine*, p. 172; Jean-Claude Richard, *Les origines de la plèbe romaine. Essai sur la formation du dualisme patricio-plébéien*, Bibliothèque des Écoles Françaises d'Athènes et de Rome 232 (Rome, 1978), p. 131, n. 173; Gianmario Prugni, "*Quirites*", *Athenaeum* 65 (1987), 127–161; Michel Humm, *Appius Claudius Caecus. La République accomplie*, Bibliothèque des Écoles Françaises d'Athènes et de Rome 322 (Rome, 2005), pp. 199–203; pp. 404–406; pp. 414–419.

[9] We know very little about the nature and definition of the *curiae*, except for the fact they were probably the oldest institutional structure of the Roman city, in connection to the primitive gentilice organisation (cf. Laelius Felix, fr. 3 ed. Huschke: *cum ex generibus hominum suffragium feratur, curiata*). They probably date back to the synoecism which is at the origin of the birth of a city (*civitas*) in Rome: see Mommsen, *DPR*, 6.1 (Paris, 1889), pp. 98–114 (= Id., *StR*, 3, 3rd ed. [Leipzig, 1888], pp. 89–102); Jean-Baptiste Mispoulet, *Les institutions politiques des Romains*, 1, *La constitution* (Paris, 1882), pp. 7–9; Arnaldo Momigliano, "An interim report of the origins of Rome", *Journal of Roman Studies* 53 (1963), 95–121, esp. pp. 108–114 (= Id., *Terzo contributo alla storia degli studi classici e del mondo classico* [Rome, 1966], pp. 545–598); Palmer, *The Archaic Community*, pp. 67–79; Francesco De Martino, *Storia della Costituzione Romana*, 1, 2nd ed. (Naples, 1972), pp. 152–155; Id., "La costituzione della città-stato", in *Storia di Roma*, 1, *Roma in Italia*, eds. A. Momigliano and Aldo Schiavone (Turin, 1988), p. 351. Modern scholars explain the term curia etymologically by *co-viria**, which conjures up a picture of a gathering of armed men, a kind of "fighting fraternity": cf. Paul Kretschmer, "Lat. *quirites* und *quiritare*", *Glotta* 10 (1920), 147–157; Prugni, "*Quirites*", *passim*; Carmine Ampolo, "La nascita della città", in *Storia di Roma*, 1, *Roma in Italia*, pp. 175–176; Michel Humbert, *Institutions politiques et sociales de l'Antiquité*, 5th ed. (Paris, 1994), pp. 180–181; Christopher John Smith, *The Roman Clan: the* gens *from Ancient Ideology to Modern Anthropology* (Cambridge, 2006), pp. 184–234.

[10] The Roman calendar even had a special day of celebrations, the *Quirinalia* or *feriae stultorum* (Varro, *De linga Latina*, 6.13; Ovid, *Fasti* 2.513–532; Plutarch, *Roman Quaestions* 89 = *Moralia*, 285d; Festus, *De verborum significatu* 304–305 L. and 418–419 L.), to enable those who had not joined the celebrations, because they did not know to which *curia* they belonged, to accomplish the ritual sacrifices; the sacrifices were performed collectively for the *Manes* within each *curia* (during the *Fornacalia*): cf. Kurt Latte, *Römische Religionsgeschichte*, 2nd ed. (Munich, 1967), p. 143; Taylor, *Roman Voting Assemblies*, p. 4; Dumézil, *La religion romaine*, pp. 170–172.

sufficient,[11] in order to pass the curiate law when magistrates of the *populus* were invested. The voting on the law seems to have been important, or even necessary, since tribunes of the plebs could sometimes exert their veto (*intercessio*), so as to prevent a magistrate they disapproved of from his investiture.[12] To be deprived of investiture led to a number of legal incapacities that could really thwart a magistrate: for instance, in 54 BC, the absence of a curiate law compelled the consul Appius Claudius Pulcher to invent a false testimony, so that he could take over the command of a province at the end of his consulship, and this led to public outrage.[13] In 49 BC, the consuls who had followed Pompeius to Thessalonica renounced their task of presiding over the election of magistrates for the following year, because they had left Rome without having secured their investiture from the *curiae*.[14] In other words, a magistrate who had not procured and secured the vote of the curiate law saw himself hindered to some degree in exercising his power: as Magdelain has already observed, "the curiate law, even fictive, resisted desuetude".[15]

Yet, what was the actual use of the curiate law, voted right after the election of a magistrate? Cicero, who was well-informed on the matter of public law and aware of the constitutional necessity of this law, offers a peculiar explanation: he considers that, thanks to this law, the people could express their opinion twice for each magistracy; after the election, "one would express his opinion a second time on the same candidates, so that the people had full power to retract, should they resent or regret their choice".[16] In other words, the vote of the curiate law would have been a sort of confirmation by the people of the choice that had been made at the time of the election, following a procedure that allowed them to think twice, and possibly to retract their choice. Cicero's explanation was given

[11] Cicero, *De lege agraria* 2.31, ed. André Boulanger (Paris, 1932): *Sint igitur xviri neque veris comitiis, hoc est, populi suffragiis, neque illis ad speciem atque ad usurpationem vetustatis per* XXX *lictores auspiciorum causa adumbratis constituti.*

[12] Cicero, *De lege agraria* 2.30, ed. Boulanger: *Consulibus legem curiatam ferentibus a tribunis plebis saepe est intercessum*. Cf. Cassius Dio, *Roman History* 39.19.3 (on magistrates in 56, deprived of curiate law by the tribunes).

[13] Cicero, *Ad Atticum* 4.17.2–3 (1st October 54); cf. *Ad Atticum* 4.18.4 (late October); *Ad familiares* 1.9.25 (December 54).

[14] Cassius Dio, 41.43.2.

[15] A. Magdelain, *Recherches sur l'« imperium ». La loi curiate et les auspices d'investiture* (Paris, 1968), p. 1.

[16] Cicero, *De lege agraria* 2.26, ed. Boulanger: *Maiores de singulis magistratibus bis vos sententiam ferre voluerunt. (. . .), tum iterum de eisdem iudicabatur, ut esset reprehendendi potestas, si populum benefici sui paeniteret*. See also 2.27: *Ita cum maiores binis comitiis voluerint vos de singulis magistratibus iudicare (. . .).*

in the context of a denunciation of the tribune P. Servilius Rullus' agrarian bill in 63 BC. This project proposed the establishment of a commission of ten members in charge of the settling of colonies and the distribution of land: according to the bill (*rogatio*), those "decemviri" were to be elected by only seventeen tribes selected by lot from the thirty-five tribes—so they were incomplete *comitia*, according to Cicero, since the majority could have been achieved with only nine tribes—yet their powers would have had to be confirmed by a curiate law introduced by the praetor.[17] Those "decemviri" would not have been regularly elected then, but they nevertheless would have retained the right of taking the auspices (with *pullarii*) as well as a praetorian power (*potestas praetoria*) thanks to the vote of a curiate law.[18] Nevertheless, even if Cicero's explanation of the people's double vote for each magistracy (by electoral *comitia* during the election, then by the vote of the curiate law during investiture) is probably right, the possibility for the people to withdraw their decision expressed at the electoral *comitia*, by refuting to vote the *lex curiata*, matches no example or institutional reality, since the consuls, both in 54 and 49 BC, were not prevented from practicing their functions in spite of the absence of a curiate law.[19]

Cicero's contemporary Appius Claudius intended for his part to take up his provincial government in Cilicia immediately after his consulate, even if he had not obtained a curiate law.[20] He even went as far as asserting that "the vote of a curiate law, for a consul, was useful but not indispensable." He added that, from the moment he entered upon his proconsulate after a *senatus consultum*, he would automatically gain the power of command (*imperium*) by means of a *lex Cornelia* on provincial administration. And this, he professed, could exempt him from the vote of the curiate law.[21] Indeed, a provincial governor had to possess the power of military command (*imperium militiae*) in order to be able to command his troops. Appius Claudius' arguments meant that people generally accepted the fact that such power of command could

[17] Cicero, *De lege agraria* 2.16–29.

[18] Cicero, *De lege agraria* 2.31–32.

[19] Cf. Nicolet, *Le métier de citoyen*, pp. 296–297.

[20] Cicero, *Ad Quintum fratrem* 3.2.3; *Ad Atticum* 4.18.4; *Ad familiares* 1.9.25.

[21] Cicero, *Ad familiares* 1.9.25, ed. L.-A. Constans (Paris, 1950): *Appius in sermonibus antea dictitabat, postea dixit etiam in senatu palam sese, si licitum esset legem curiatam ferre, sortiturum esse cum collega provinciam; si curiata lex non esset, se paraturum cum collega tibique successurum; legemque curiatam consuli ferri opus esse, necesse non esse; se, quoniam ex senatus consulto provinciam haberet, lege Cornelia imperium habiturum, quoad in urbem introisset.*

only be practiced once the vote of the curiate law had been secured, yet he thought he could be exempted from it thanks to constitutional dispositions dating back to Sulla's reforms on the administration of provinces.[22] However, his arguments are specious, and only serve his purpose of finding a legal subterfuge in order to take possession of his proconsulate, even without a curiate law, as the proconsulate was expected to be a source of profits and personal enrichment.[23]

In fact, written testimonies by Cicero and Livy clearly show that the vote of the curiate law was a compulsory constitutional element for exercising military command. In the *De Republica*, Cicero repeatedly states that the newly-appointed kings presented a curiate law about their

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[22] Mommsen saw in the *lex Cornelia* a hint of the thorough reform of the provincial government he credited Sulla for: Mommsen, *DPR*, 2 (Paris, 1892), p. 284 and n. 4 (= Id., *StR*, 1, 3rd ed. [Leipzig, 1887], p. 614 and n. 4); see also Mommsen, *DPR*, 1, p. 65 (= Id., *StR*, 1, p. 57); Id., *DPR*, 3 (Paris, 1893), p. 108 and pp. 245–251 (= Id., *StR*, 2, 3rd ed. [Leipzig, 1887], p. 94 and pp. 214–219). But rather than the so-called *lex Cornelia de provinciis ordinandis*, which is only an invention of contemporary historiography, as it is now established (Giovannini, *Consulare imperium*, pp. 73–101; Theodora Hantos, Res publica constituta. *Die Verfassung des Dictators Sulla*, Hermes Einzelschriften 50 (Stuttgart, 1988), pp. 97–120 (esp. pp. 97–107); Klaus Martin Girardet, "*Imperia* und *provinciae* des Pompeius," *Chiron* 31 (2001), 153–209 (= Id., *Rom auf dem Weg von der Republik zum Prinzipat*, Antiquitas: Reihe 1, Abhandlungen zur alten Geschichte 53 [Bonn, 2007], pp. 1–67); Nathalie Barandon and Frédéric Hurlet, "Les gouverneurs et l'Occident romain," in *Rome et l'Occident (II^e siècle av. J.-C.–III^e siècle ap. J.-C.). Gouverner l'Empire*, ed. F. Hurlet (Rennes, 2009), pp. 35–75, esp. pp. 40–41), it consists in fact in a Sullan law on the rights and duties of the governors of the provinces: this law forbade them to leave their province with their troops or start a war without due consent of the senate or the Roman people, it compelled them to leave their province within thirty days following the arrival of their successor, and it maintained them in possession of their *imperium* until their return to the Capital (Appius Claudius alluded to that in his argumentation): Giovannini, *Consulare imperium*, pp. 91–97.

[23] In Cicero's day, and probably also in former centuries, consuls had to have a province on the day they came into office, and they took possession of this province during their consulate, as consuls (still, the outgoing governor continued ruling the province temporarily until the new proconsul arrived): Giovannini, *Consulare imperium*, pp. 83–90. However Cicero deplored several times that, at his time, promagistrates often commanded the armies of Rome without auspices, and he accused the great noble families of neglecting the science of the augures: Cicero, *De natura deorum* 2.9; *De divinatione* 2.76–77. Appius Claudius consequently considered exerting his provincial command without *lex curiata*, hence without the full right of auspices (see *infra* pp. 65–73), as he had already proceeded for his consulate, following the ill habit that had become the rule in the government of provinces, much to Cicero's dismay: see Pierangelo Catalano, *Contributi allo studio del diritto augurale* (Turin, 1960), pp. 472–473; Giovannini, *Consulare imperium*, pp. 77–79. At the same time, he must have considered that the *lex Cornelia* legally founded the promagistates' *imperium*, and that he therefore did not need a *lex curiata*: Magdelain, *Recherches sur "l'imperium"*, pp. 21–23 and n. 2.

imperium at the time of their investiture.[24] Livy writes, for instance, that the dictator L. Papirius Cursor (in 310 BC) presented "the curiate law concerning his *imperium*".[25] From such instances, modern historians invented the expression *lex curiata de imperio*,[26] and generally deduced—as Heuss did—that the vote of this law was a compulsory preliminary to the conferment of the power of military command (*imperium militiae*).[27] Latte went even further in asserting that the *lex curiata* was a survival of the archaic military organisation, in which *coniuratio* was used for the raising of the troops: he saw the curiate law as a military pledge of allegiance (*sacramentum* or *coniuratio*) to the new general in chief who had been chosen by the army of the citizens.[28] But the *lex curiata* was definitely a legal text (being a *lex rogata et lata*), therefore it could

[24] Cicero, *De republica* 2.25, eds. Esther Bréguet and Guy Achard (Paris, 1991): *Qui* (sc. *Numa Pompilius*) *ut huc venit* (…), *ipse de suo imperio curiatam legem tulit*. 2.33: (…) *rex a populo est Ancus Marcius constitutus itemque de imperio suo legem curiatam tulit*. 2.38: (…) *iussusque* (sc. *Servius Tullius*) *regnare, legem de imperio suo curiatam tulit*.

[25] Livy, *Ab urbe condita* 9.38.15, eds. Wilhelm Weissenborn and H.J. Müller (Berlin, 1890): *Papirius C. Iunium Bubulcum magistrum equitum dixit; atque ei legem curiatam de imperio ferenti triste omen diem diffidit, quod Faucia curia fuit principium, duabus insignis cladibus, captae urbis et Caudinae pacis, quod utroque anno eiusdem curiae fuerat principium*.

[26] The expression *lex curiata de imperio* appears in most main textbooks on Roman public law, for example: De Martino, *Storia della Costituzione*, pp. 155–159; Bleicken, *Lex publica*, p. 72 and n. 2, and p. 106; Gaudemet, *Les institutions*, p. 188; Eugen Cizek, *Mentalités et institutions politiques romaines* (Paris, 1990), p. 100, p. 217 and p. 224; etc.

[27] Alfred Heuss, "Zur Entwicklung des Imperiums der römischen Oberbeamten," *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte, romanistische Abteilung* 64 (1944), 57–133 (= Id., *Gesammelte Schriften* 2, *Römische Geschichte* [Stuttgart, 1995], pp. 831–907). The same idea can be found in many other authors' works: for J. Bleicken (Id., *Lex publica*, pp. 72–73), "war die *lex curiata de imperio* keine normative Bindung, mochte sie nun das militärische Kommando des Königs begründen, wie man heute allgemein annimmt, oder aber nur die bestimmte Kriegserklärung sein"; "⟨das Curiatgesetz betraf⟩ die militärischen Kompetenzen des obersten Beamten (*rex, praetor, consul*)" (Id., "Zum Begriff der römischen Amtsgewalt: *auspicium—potestas—imperium*," *Nachrichten der Akademie der Wissenschaften in Göttingen* 9 (1981), 257–300, esp. pp. 269–275); for J. Rüpke (Id., Domi militiae. *Die religiöse Konstruktion des Krieges in Rom* [Stuttgart, 1990], pp. 49–51), whose analysis rests mostly upon Appius Claudius' case in 54 BC (see Cicero, *Ad familiares* 1.9.25), "ist die permanente Assoziierung von *lex curiata* und *imperium* auffällig", therefore "die ursprüngliche, staatsrechtliche Konstruktion ist die Übertragung von *imperium* im umfassenden Sinn"; finally, for T. Corey Brennan (Id., *The Praetorship in the Roman Republic*, 1 [Oxford, 2000], p. 19), "The strong military associations our sources (particularly Cicero) attach to the *lex curiata* practically force us to accept that the law can have conferred only *auspicia militiae* on dictators, consuls, praetors, and (so it seems) certain nonmagistrates".

[28] Kurt Latte, "*Lex curiata* und *coniuratio*", *Nachrichten der Akademie der Wissenschaften in Göttingen*, New Series 1 (1934/36), 59–77 (= Id., *Kleine Schriften zu Religion, Recht, Literatur und Sprache der Griechen und Römer* [Munich, 1968], pp. 341–354).

hardly have been a military oath.[29] It is true that the voting of the law was "indispensable to the exercise of military command".[30] Cicero had already emphasized this point when he stated that "a consul was not allowed to perform military functions if he did not obtain the curiate law".[31] Likewise, for Livy, the *comitia curiata* "have military questions as their of jurisdiction (*quae rem militarem continent*)".[32] Thus, it was normally impossible for a superior magistrate to achieve the honors of the triumph if he did not secure the vote of a curiate law.[33]

However, as Mommsen has already pointed out, the expression *lex curiata de imperio* in itself "neither rests on any text, nor seems accurate":[34] the term *lex curiata de imperio* is seldom to be found and does not cover the competence of the law (in technical language, the law is usually just called *lex curiata*). The expression can only apply *stricto sensu* to greater magistrates who exert *imperium*, whereas the explicit testimony of the augur M. Valerius Messala extends the application of the law to lesser magistrates too (who, by definition, could not hold *imperium*).[35] Mommsen concluded that the curiate law was "the act through which the people expressly commit to obey" the newly-elected magistrate: according to him, the law would then be an act of allegiance by the people to the magistrate, like an oath of obedience and a mere "formality" that

[29] A. Magdelain, "Note sur la loi curiate et les auspices des magistrats", *Revue historique de droit français et étranger* 42 (1964), 198–203, esp. p. 198 (= Id., *Jus Imperium Auctoritas. Études de droit romain*, Collection de l'École française de Rome 133 [Rome, 1990], p. 307); Id., *Recherches sur l'« imperium »*, p. 2 (the expression *legem ferre* applies to it, as well as to other laws, with reference to occurences); Palmer, *The Archaic Community*, pp. 184–188 and pp. 212–213 (the *lex curiata* was not an oath, but it had to be adopted unanimously—this testified to the necessity of periodically renewing a sort of oath by the community).

[30] Magdelain, *Recherches sur l'« imperium »*, p. 17.

[31] Cicero, *De lege agraria* 2.30, ed. Boulanger: (…) *consuli, si legem curiatam non habet, attingere rem militarem non licet*.

[32] Livy, *Ab urbe condita* 5.52.16, ed. Jean Bayet (Paris, 1954): *Comitia curiata, quae rem militarem continent* (…).

[33] Cicero, *Ad Atticum* 4.18.4 (October 54); cf. Mommsen, *DPR*, 1 (Paris, 1892), p. 144 n. 4 (= Id., *StR*, 1, 3rd ed. [Leipzig, 1887], p. 126 n. 4); Hendrik Simon Versnel, *Triumphus. An Inquiry into the Origin, Development and Meaning of the Roman Triumph*, (Leiden, 1970), pp. 319–355; Jean-Luc Bastien, *Le triomphe romain et son utilisation politique à Rome aux trois derniers siècles de la République*, Collection de l'École française de Rome 392 (Rome, 2007), pp. 196–201.

[34] Mommsen, *DPR*, 2 (Paris, 1892), p. 279 and n. 2 (= Id., *StR*, 1, 3rd ed. [Leipzig, 1887], p. 609 n. 2); see also Mispoulet, *Les institutions politiques*, 1, p. 197 n. 13; Magdelain, *Recherches sur l'« imperium »*, p. 17: "l'expression *lex curiata de imperio*, forgée par les modernes, est trompeuse".

[35] See *infra* pp. 65–67.

would enable the people to confirm the conferral of powers on the newly-elected and invested magistrate.[36] De Martino defended a similar position when he said that the curiate law would have been an act through which the people acknowledged the greater magistrate and submitted to his *imperium*.[37] More recently, Lintott alleged that the curiate law "confirmed" the rights vested in magistrates who had just been elected by the people (thus following the explanation given by Cicero in the *De lege agraria*), even though the real meaning of the law seemed "obscure" at the end of the Republic.[38]

2. *The Curiate Law, the Source of the Right of Auspices*

As Magdelain perceived it, the function of the curiate law clearly appears in an excerpt from the first book of M. Valerius Messala Rufus' technical work *De auspiciis*.[39] Messala was truly an expert on that topic since he not only had been a consul (in 53 BC), but had also held the office of augur for fifty-five years.[40] Valerius Messala's text is quoted by Gellius (*Noctes Atticae*, 13.15.4):

> *Patriciorum auspicia in duas sunt divisa potestates. Maxima sunt consulum, praetorum, censorum. Neque tamen eorum omnium inter se eadem aut eiusdem potestatis, ideo quod conlegae non sunt censores consulum aut praetorum, praetores consulum sunt. Ideo neque consules aut praetores censoribus neque censores consulibus aut praetoribus turbant aut retinent auspicia; at censores inter se, rursus praetores consulesque inter se et uitiant et obtinent. (…) Reliquorum magistratuum minora sunt auspicia. Ideo illi "minores", hi "maiores" magistratus appellantur. Minoribus creatis magistratibus tributis comitiis magistratus, sed iustus curiata datur lege; maiores centuriatis comitiis fiunt.*
>
> The auspices of the patricians (*patriciorum auspicia*) are divided into two fields of competence (*potestates*). The greatest (*maxima*) are those of the consuls, praetors and censors. Yet the auspices of all these are not the

[36] Mommsen, *DPR*, 2 (Paris, 1892), pp. 279–285 (= Id., *StR*, 1, 3rd ed. [Leipzig, 1887], pp. 609–614); cf. Cicero, *De lege agraria* 2.26–27.

[37] De Martino, *Storia della Costituzione*, 1, pp. 155–159.

[38] Andrew Lintott, *The Constitution of the Roman Republic* (Oxford, 1999), pp. 28–29 and p. 49.

[39] Magdelain, *Recherches sur l'« imperium »*, pp. 12–17.

[40] Macrobius, *Saturnalia* 1.9.14 (cf. Festus, *De verborum significatu* 154 L.; 300 L.; 476–477 L.); see Martin Schanz and Carl Hosius, *Geschichte der römischen Literatur bis zum Gesetzgebungswerk des Kaisers Justinian*, 1, *Die römische Literatur in der Zeit der Republik*, 4th ed. (Munich, 1927), p. 600.

> same or have no bearing with the same field of competence, for the reason that the censors are not colleagues of the consuls or praetors, while the praetors are colleagues of the consuls. Therefore neither do the consuls or the praetors interrupt or hinder the auspices of the censors, nor the censors those of the praetors and consuls; but the censors may vitiate and hinder each other's auspices and again the praetors and consuls those of one another. (…) The lesser auspices (*minora auspicia*) belong to the other magistrates. Therefore these are called 'lesser' and the others 'greater' magistrates (*ideo illi minores, hi maiores magistratus appellantur*). When the lesser magistrates (*minores magistratus*) are elected, their office is conferred upon them by the assembly of the tribes, but their magistracy (*magistratus*) only becomes lawful (*iustus*) by a curiate law (*curiata lege*); the higher magistrates (*maiores magistratus*) are chosen by the assembly of the centuries.[41]

The augur M. Valerius Messala makes a hierarchical distinction between the "patrician" magistracies (that is to say magistracies of the *populus*)[42] according to the nature of auspices each one had at his disposal: the greatest auspices (*maxima auspicia*) for "greater" magistrates (*maiores magistratus*) elected by *comitia centuriata* (consuls, praetors and censors), and lesser auspices (*minora auspicia*) for the other so-called "lesser" magistrates (*minores magistratus*), elected by *comitia tributa* (aediles and quaestors). All these magistrates were directly elected by the *populus* (whether within the frame of *comitia centuriata* or *comitia tributa*), however their magistracy only became "legal" (*iustus*, i.e. in conformity with the law, the *ius*) after the vote of the curiate law (*sed ⟨magistratus⟩ iustus curiata datur lege*). Among those magistrates, only the "greater" ones could exercise *imperium*; still, all of them had to be invested after their election by a curiate law (save the censors, who were invested by a centuriate law).[43] On the subject of the ten com-

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[41] Translated after John C. Rolfe, *The Attic Nights of Aulus Gellius* 2, Loeb Classical Library (London-Cambridge, Mass., 1968), pp. 451–453.

[42] Here, Valerius Messala uses the technical meaning of the expression "patrician magistracies", as Cicero did when referring to the voting of the curiate law for magistrates other than censors (*De lege agraria* 2.26: see *infra* n. 43): the law concerns all the magistracies of the people (*populus*), whether greater or lesser (*supra* n. 7), also named "patrician" since they were reserved for patricians at the beginning: Mommsen, *DPR*, 1 (Paris, 1892), p. 19 (= Id., *StR*, 1, 3rd ed. [Leipzig, 1887], p. 18); Magdelain, *Recherches sur l'« imperium »*, p. 13 n. 2.

[43] Cicero, *De lege agraria*., 2.26, ed. Boulanger: *Nam cum centuriata lex censoribus ferebatur, cum curiata ceteris patriciis magistratibus* (…). Magdelain, *Recherches sur l'« imperium »*, pp. 13–14, explains that feature of the censors, invested by a centuriate law rather than a curiate law, both with historical arguments (the censorship was more recent than the praetorship or the consulate), and with the peculiar nature of the relationships

missioners that the *rogatio agraria* proposed to appoint—magistrates who belonged to the category of *magistratus minores*—Cicero remarks that Rullus had well understood that these could not use their *potestas* (and so, take possession of their office) without a curiate law.[44] Consequently, the curiate law did not confer *imperium* on a magistrate: it was necessary, though not sufficient, to gain *imperium*, but it served to define the *potestas* integral to his magistracy: and the same holds true for all magistrates of the people, be they lesser or greater.[45] The law had to define precisely a magistrate's field of competence (*potestas*), like the contingent right to appoint other magistrates, as was the case for the first quaestors, initially appointed by consuls to take care of military matters.[46] Yet this very field of competence (*potestas*) corresponded to the one enabling the magistrate to take the auspices.[47] The

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between the censors and the centuriate assembly. It is not our purpose here to discuss the nature of the censors' *imperium*: this prerogative has often been contested in their case by the modern historians, since they were not invested by a curiate law and because they did not have fasces (see Mommsen, *DPR*, 1 [Paris, 1892], p. 25 [= Id., *StR*, 1, 3rd ed. (Leipzig, 1887), p. 23]; Id., *DPR*, 2 (Paris, 1892), p. 18 [= Id., *StR*, 1, 3rd ed. (Leipzig, 1887), p. 386]; Id., *DPR*, 4 (Paris, 1894), p. 28 [= Id., *StR*, 2, 3rd ed. (Leipzig, 1887), p. 354]); however, the *senatus consultum* of 211 (Livy, *Ab urbe condita* 26.10.9) classifies them among the *imperium*-endowed magistrates—and A. Magdelain considers censors might have had a special greater *imperium*, connected to the major auspices (*auspicia maxima*) they held (cf. Valerius Messala's account) in order to be able to convene the centuriate assembly (*exercitus urbanus*): Magdelain, "Auspicia ad patres redeunt," in *Hommages à Jean Bayet*, eds. Marcel Renard and Robert Schilling, Collection Latomus 70 (Bruxelles-Berchem, 1964), pp. 427–473, esp. pp. 434–435 (= Id, *Jus Imperium Auctoritas*, p. 348).

[44] Cicero, *De lege agraria* 2.28, ed. Boulanger: *Vidit et perspexit sine curiata lege xviros potestatem habere non posse*.

[45] "Deux pouvoirs caractérisent les magistratures romaines: *potestas* et *imperium*" (Gaudemet): lesser magistrates only possess the former, while greater magistrates (praetors, consuls, dictators) possess both the *potestas* and the *imperium*. The *potestas* designates "toute forme d'autorité reconnue par le droit à une personne sur une autre personne ou sur des biens" (Gaudemet); in public law, it implies "the capacity of expressing the will of the city on the form of prescriptions" that are compulsory (*ius edicendi*), and "the possibility to exert a constraining power" (*coercitio*). As for *imperium*, it is the power of absolute command of public power in both the civil and military fields (for the former, it is the right to convene and preside over the Senate or assemblies of the *populus*, and also the right to administer justice; for the latter, it is the fact of commanding the armies). Cf. Mommsen, *DPR*, 1 (Paris, 1892), pp. 21–26 (= Id., *StR*, 1, 3rd ed. [Leipzig, 1887], pp. 19–23); Gaudemet, *Les institutions*, pp. 184–186; Bleicken, "Zum Begriff", pp. 278–287.

[46] Tacitus, *Annales* 11.22.4, ed. Pierre Wuilleumier (Paris, 1976): *Sed quaestores regibus etiam tum imperantibus instituti sunt, quod lex curiata ostendit ab L. Bruto repetita. Mansitque consulibus potestas deligendi, donec eum quoque honorem populus mandaret*.

[47] For J. Bleicken, "Zum Begriff", pp. 264–267, the term *auspicium* is used by Valerius Messala instead of *potestas*: this term would be the most ancient way of designing the public powers.

vote of the curiate law was then indispensable for the magistracy to be "lawful" (*iustus*), since this law conferred the *auspicium*, that is to say the *ius auspiciorum* (it was, in a way, a *lex curiata auspiciorum causa*).[48]

What was the exact nature of the auspices, and what role did they play in Roman public law? The auspices (*auspicia*) were a set of techniques for the observation of omens (*auguria*) according to precise ritual rules.[49] The interpretation of these omens enabled people to discover the gods' will, and particularly that of Jupiter Optimus Maximus: the main omens under scrutiny were the flight of some species of birds, thunder and lightning, and also the appetite and behaviour of the sacred chickens; actually, the auspices did not enable one to foresee the future (as most people commonly believe), but they were used to procure the gods' consent, and again, especially Jupiter's, who was "the master of the auspices". The consulting of Jupiter through the taking of the auspices was, therefore, a highly political act and was always performed by a magistrate who possessed the right of the auspices (*auspicium*): it was performed in the presence of an expert priest (an augur) before each political or military event that would affect the future of the city.[50] First of all, this ceremonial occurred when a city or a colony was founded. On such occasion, the "inaugural" taking of the auspices was supposed to reproduce the founding act of Rome: according to the tradition, the city was founded after Romulus took the auspices (*auspicia*), i.e. consulted Jupiter by observing birds flying in the sky (*avium spectio*) so as to procure his assent and

[48] Cf. Cicero, *De lege agraria* 2.27, ed. Boulanger: *comitia curiata auspiciorum causa*; 2.31: *xxx lictores auspiciorum causa*. Already discussed by: Catalano, *Contributi*, pp. 470–475; Magdelain, *Recherches sur l'« imperium »*, pp. 12–20; Robert Develin, "*Lex curiata* and the Competence of Magistrates", *Mnemosyne* 30 (1977), 49–65; Giovannini, *Consulare imperium*, pp. 44–56; Cizek, *Mentalités et institutions*, p. 222. J.J. Nichols (Id., "The Content of the *Lex curiata*", *American Journal of Philology* 88 (1967), 257–278) claims that the curiate law did not apply to auspices linked to the *imperium*, but to auspices belonging to the *curiae*: such a distinction between auspices never appears in our sources.

[49] See Georg Wissowa, *s.v. Augures*, in *Pauly's Realencyclopädie der classischen Altertumswissenschaft*, 2 (1896), col. 2313–2344; Id., *s.v. Auspicium*, in *Pauly's Realencyclopädie*, 2 (1896), col. 2580–2587; Dumézil, *La religion romaine*, pp. 587–589; Catalano, "Aspetti spaziali," pp. 440–553.

[50] Only magistrates had the right of auspices (Varro, in *Nonius*, p. 131 ed. Lindsay: *de caelo auspicari ius nemini est praeter magistratum*); augurs (*augures*) were priests, with expertise in augural law and techniques, but they could not serve as substitutes for magistrates in their function, they only took part in the proceedings as consultants, or for the announcement of oblative omens (i.e. omens not asked for): A. Magdelain, "L' inauguration de l'*urbs* et l'*imperium*", *Mélanges de l'École française de Rome-Antiquité* 89 (1977), pp. 11–29, esp. pp. 17–18 (= Id., *Jus Imperium Auctoritas*, p. 216).

alliance in this founding act.[51] The founding act of a city occurred each time Rome founded a colony, and it was both a political and religious proceeding.[52] Magistrates also had to take auspices before each decision binding the city's future, be it before convening an assembly—*comitia* or Senate—before appointing another magistrate (for instance a dictator),[53] or before engaging in battle. That is why only "inaugurated" places, *templa*, where the gods' will could express itself, could be used as meeting venues for political assemblies (the Senate, or the assemblies of the *populus*).[54] Finally, the magistrates had to take the auspices when they came into office in order to obtain Jupiter's assent for the duration of their magistracy: these were "investing auspices" and they took place on the *auguraculum*, on the *arx* (on the Capitol), facing the city that lay at their feet (the Sacra Via, on the Forum, formed the line of sight (*spectio*) in the direction of the sanctuary of Jupiter Latiaris on the *mons Albanus*, as well as the median line splitting the *urbs* into two parts (*regiones*), north and south: fig. 1, B).[55] The ritual of the taking of the auspices shows then

[51] Livy, *Ab urbe condita* 1.6.4–7.3; Dionysius Halicarnassus, *Roman Antiquities* 1.86–88; Plutarch, *Romulus* 9.4–11.5.

[52] See Varro, *De lingua Latina* 5.143; see also Catalano, "Aspetti spaziali," pp. 479–491.

[53] In 310, for example, the consul Q. Fabius Rullianus appointed L. Papirius Cursor dictator (*dictatorem dixit*), "at night, during the *silentium* (*silentio*), according to the custom" (Livy, *Ab urbe condita* 9.38.14), which means, in augural language, that he practised an auspicial *dictio* during the augural time for auspices while no technicality was stated. On the meaning of *silentium* in the context of auspices, see Cicero, *De divinatione* 2.71–72; Varro, *De lingua Latina* 6.7; Festus, *De verborum significatu* 474 L.; 476 L.; 29 L.; cf. M. Humm, "Silence et bruits autour de la prise d'auspices", to be published in the proceedings of the international conference *Les sons du pouvoir*: verba, silentia, sonitus *dans les lieux institutionnels, d'Alexandre le Grand à l'Antiquité tardive (Université de La Rochelle, les 24, 25 et 26 novembre 2010)*, ed. Maria Teresa Schettino. On *dictio dictatoris*, see especially Magdelain, "Auspicia ad patres redeunt," pp. 445–447 (= Id., *Jus Imperium Auctoritas*, pp. 358–359).

[54] Jyri Vaahtera, "On the Religious Nature of the Place of Assemby," in *Senatus Populusque Romanus. Studies in Roman Republican Legislation*, ed. Unto Paananen *et al.*, Acta Instituti Finlandiae 13 (Helsinki, 1993), pp. 97–116.

[55] The boundaries of *auspicia urbana* were nevertheless drawn by the line of the *pomerium*, which was the religious border of the city, that surrounded the urban space inaugurated by the founding auspices of the city, and consequently, it delimited the area of the urban auspices (*finis urbani auspicii*): cf. Varro, *De lingua Latina* 5.143; Livy, *Ab urbe condita* 1.44.4–5; Tacitus, *Annales* 12.24; Gellius, *Noctes Atticae* 13.14.1. See especially Magdelain, *Recherches sur l'« imperium »*, pp. 64–67; Id., "L'*auguraculum* de l'*arx* à Rome et dans d'autres villes," *Revue des Études Latines* 47 (1969), 253–269, esp. pp. 256–262 (= Id., *Jus Imperium Auctoritas*, pp. 196–201); Id., "Le *pomerium* archaïque," pp. 95–97 (= Id., *Jus Imperium Auctoritas*, pp. 178–180); Catalano, "Aspetti spaziali," pp. 479–488; Filippo Coarelli, "La doppia tradizione sulla morte di Romolo e gli *auguracula* dell'*arx* e del Quirinale," in *Gli Etruschi e Roma. Atti dell'incontro di studio*

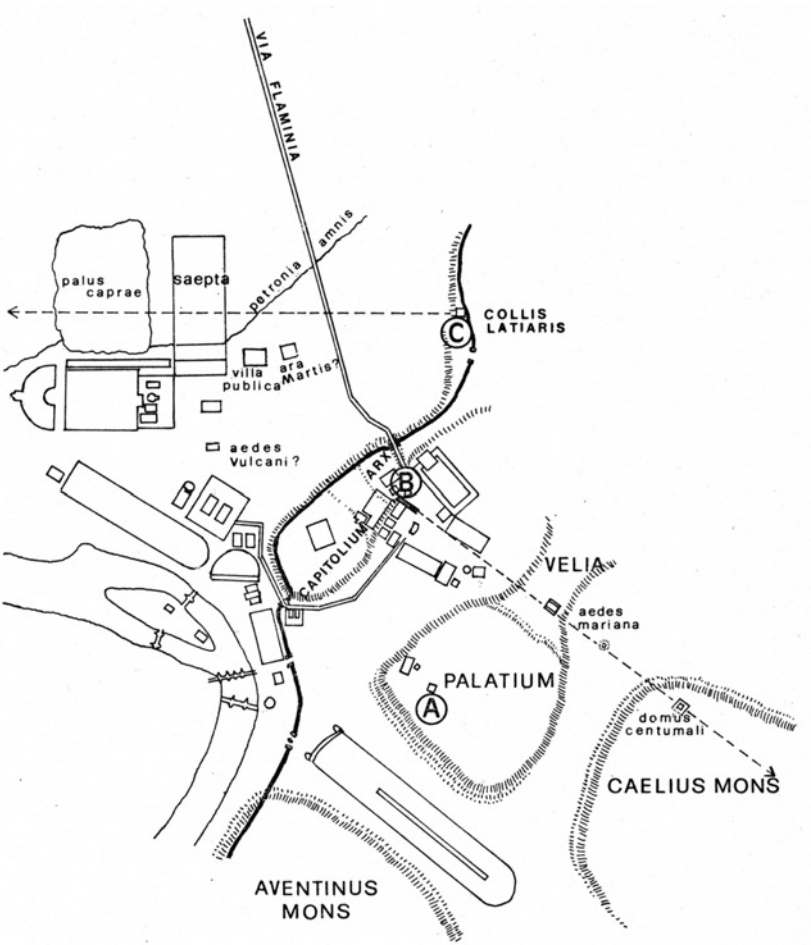

Fig. 1. Observation points for the taking of auspices in Rome. A: *auguratorium* of the Palatine; B: *auguraculum* of the *arx*; C: *auguraculum* of *collis Latiaris*. F. Coarelli, "La doppia tradizione sulla morte di Romolo e gli *auguracula* dell'*arx* e del Quirinale", in *Gli Etruschi e Roma. Atti dell'incontro di studio in onore di Massimo Pallottino (Roma, 11–13 dicembre 1979)*, (Rome 1981), p. 180, fig. 1.

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in onore di Massimo Pallottino (Roma, 11–13 dicembre 1979) (Rome, 1981), pp. 173–188; Id., *Il Foro Romano*, 1, *Periodo arcaico*, 2nd ed. (Rome, 1986), pp. 97–107; Id., *s.v. Auguraculum* (*arx*), in *Lexicon Topographicum Urbis Romae* (hereafter cited as *LTUR*), 1, ed. Eva Margareta Steinby (Rome, 1993); Linderski, "The Augural Law," pp. 2260–2279; Maddalena Andreussi, *s.v. Pomerium*, in *LTUR*, 4 (Rome, 1999), pp. 96–105.

precisely the close link between the religious and the political aspects of archaic and republican Rome—a link that survived until the imperial period.

The *auspicium* (i.e. the *ius auspiciorum*) a priori concerned all the magistrates of the *populus*, and not only the main ones (consuls, praetors, censors and dictators): as is shown by Valerius Messala's text.[56] This is also what Cicero recommended in the *De legibus*: "That all magistrates possess the right of auspices and the right of justice (…)".[57] Augural right made a clear-cut distinction between the interpretation of omens on the one hand (*nuntiatio*), which was left in the hands of the augurs, and the direct consulting of the gods on the other hand (*spectio*), which was the "consuls' and other magistrates' " private matter.[58] Consequently, each magistrate could take the auspices at any time, and thus be able to prevent another magistrate from convening *comitia* on that day, by using

[56] It has often been emphasized that Valerius Messala's text as quoted by Gellius seems truncated, but this is no reason to alter its meaning, as A. Magdelain emphasized (Id., *Recherches sur l'« imperium »*, p. 14): "après avoir parlé de l'élection et de la loi curiate des magistrats mineurs, il aborde l'élection des magistrats majeurs et s'arrête brutalement. La suite sur la loi centuriate des censeurs et la loi curiate des autres magistrats majeurs a été coupée, soit par Aulu-Gelle lui-même (…), soit par le copiste du manuscrit archétype. De cette coupure résulte une disharmonie, qui a parfois fait soupçonner le texte d'être corrompu. Des réécritures ont été proposées, elles tendent à renverser les éléments du texte et à déclarer que les magistrats mineurs n'avaient pas de loi curiate et que les magistrats majeurs seuls en avaient une. C'est faire dire à Messala exactement le contraire de ce qu'il dit. Cette voie n'est pas la bonne. La loi curiate des magistrats mineurs (…) est attestée également par Cicéron." See also Catalano, *Contributi*, pp. 469–471; Develin, "*Lex curiata*," pp. 51–52. Amongst the attempts at re-constructing the text (which lead to the opposite meaning), cf. Ulrich von Lübtow, "Die *lex curiata de imperio*", *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte, romanistische Abteilung* 69 (1952) 154–171, esp. p. 171; Versnel, *Triumphus*, p. 325 and n. 1.

[57] Cicero, *De legibus* 3.10, ed. Georges de Plinval (Paris, 1968): *Omnes magistratus auspicium iudiciumque habento* (…); cf. 3.27: (…) *omnibus magistratibus auspicia et iudicia data sunt; iudicia, ut esset populi potestas ad quam provocaretur, auspicia, ut multos inutiles comitiatus probabiles impedirent morae. Saepe enim populi impetum iniustum auspiciis di immortales represserunt*. Cicero's statement probably indicates the institutional reality of the Republic—as most of the other institutions that one can find in his constitutional treaty—, or at least the Republic as it was before the institutional decay produced by the crisis he denounces.

[58] Cicero, *Philippicae* 2.81, eds. A. Boulanger and P. Wuilleumier (Paris, 1959): *Nos* (sc. *augures*) *enim nuntiationem solum habemus, consules et reliqui magistratus etiam spectionem*. Festus, *De verborum significatu* 446 L.: *Spectio in auguralibus ponitur pro aspectione et nuntiato, quia omne ius sacrorum habent au[x]guribus. Spectio dumtaxat quorum consilio rem gererent magistratus, non ut possent impedire nuntiando quae, cum vidissent; at is spectio sine nuntiatione data est, ut ipsi auspicio rem gererent, non ut alios impedirent nuntiando*.

the right of *obnuntiatio* (the right of notifying unfavourable auspices to a magistrate and so prevent him from doing what he intended to do). For this reason consuls would publish a decree before convening an assembly of the people, forbiding each lesser magistrate (*magistratus minor*) to "observe the sky".[59] So, all the magistrates (of the *populus*) had the right of the auspices: that is why "the curiate law ⟨was⟩ as necessary to lesser magistrates as to greater ones".[60]

Some wished to limit the benefit of the curiate law to greater magistrates alone, but in his speech against Rullus' agrarian law in 63 BC, Cicero clearly asserted that, if the censors used to be invested by a centuriate law, "the other patrician magistrates" were invested by a curiate law (*curiata ⟨lex⟩ ceteris patriciis magistratibus*), and this explicitly refers to all the other magistrates of the *populus*, both greater and lesser ones.[61] Furthermore, Cicero says that the "decemviri" whom the bill planned to appoint, should have, thanks to the vote of a curiate law, disposed of pullaries (the magistrates' auxiliaries in charge of the sacred chickens), and of praetorian *imperium*: with the pullaries, they should also have disposed of the auspices.[62]

Others contested the idea that the people gathered in *comitia curiata* could have the legal capacity to confer the right of auspices on newly-elected magistrates:[63] this, however, is what several extracts from Cicero's writings clearly argue when speaking of "auspices conferred by the people" (*a populo auspicia accepta*) or of "auspices of the Roman *populus*" (*auspicia populi Romani*).[64] Besides, Cicero strongly asserts that "the

[59] Gellius, *Noctes Atticae* 13.15.1, ed. R. Marache (Paris, 1989): *In edicto consulum, quo edicunt, quis dies comitiis centuriatis futurus sit, scribitur ex vetere forma perpetua: 'ne quis magistratus minor de caelo servasse velit'*. See *supra* n. 50; see also J.-B. Mispoulet, *Les institutions politiques des Romains*, 2, *L'administration* (Paris, 1883), pp. 419–420 and n. 75.

[60] Magdelain, *Recherches sur l'« imperium »*, p. 12.

[61] Cicero, *De lege agraria* 2.26 (see *supra* n. 43); on the technical meaning of the expression "patrician magistracies", see *supra* n. 42.

[62] Cicero, *De lege agraria* 2.31–32.

[63] Versnel, *Triumphus*, pp. 327–339.

[64] Cicero, *De divinatione* 2.76, ed. O. Plasberg (Leipzig, 1910): *Solebat ex me Deiotarus percontari nostri augurii disciplinam, ego ex illo sui (. . .). Atque ille iis semper utebatur, nos nisi dum a populo auspicia accepta habemus quam multum iis utimur?* Cicero, *De domo sua* 38, ed. C.F.W. Mueller (Leipzig, 1908): *Ita populus Romanus brevi tempore neque regem sacrorum neque flamines nec Salios habebit, nec ex parte dimidia reliquos sacerdotes neque auctores centuriatorum et curiatorum comitiorum, auspiciaque populi Romani, si magistratus patricii creati non sint, intereant necesse est, cum interrex nullus sit, quod et ipsum patricium esse et a patriciis prodi necesse est*. Cicero, *De natura deorum* 2.11, ed. O. Plasberg (Leipzig, 1917): '*An vos Tusci ac barbari auspiciorum populi Romani*

comitia curiata have only survived thanks to and because of auspices",[65] and he adds (still on the topic of *comitia curiata*), that "these purely formal *comitia*, held in order to perpetuate an ancient custom through the office of thirty lictors, took care of auspices".[66] The orator probably exaggerates when saying that *comitia curiata* only survived for this purpose, however Valerius Messala also speaks of the curiate law in relation to magistrates acquiring auspices, and he specifies that it is the only way the latter can obtain a *iustus magistratus*. Magdelain sensibly concludes that "during the investiture of a magistrate by the *curiae*, the most important part is his entrusting of the right of auspices":[67] thanks to this *ius auspiciorum*, the greater magistrate (*maior magistratus*) could take possession of his civil powers (*imperium domi*) when coming into office (during the ceremony of investiture). Later on, if he were a magistrate with the greatest auspices (*auspicia maxima*), he could also take up a military command (*imperium militiae*) thanks to the ceremony of "departure auspices".

3. *"Investing Auspices" and "Departure Auspices"*

Actually, a Roman magistrate took his powers (be they civil, military or legal) neither from the election that singled him out from other candidates, nor from the curiate law that conferred on him the right of

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ius tenetis et interpretes esse comitiorum potestis?'. Still, there are authors who consider that the expression *auspicia populi Romani* came of late and does not correspond to any legal or institutional reality, since the Roman people would not have been guardians of the auspices: Versnel, *Triumphus*, pp. 329–332; Bleicken, "Zum Begriff," pp. 260–261; *contra*: Catalano, *Contributi*, pp. 450–500; Develin, "*Lex curiata*," pp. 52–54, who rightly notes that if the *patres* were actually the guardians of the *auspicia* (cf. the official expression "*auspicia ad patres redeunt*"), these were in fact the property of the whole *populus*, the Roman state; see also Magdelain, "Auspicia ad patres redeunt", namely pp. 429–431 and pp. 440–443 (= Id., *Jus Imperium Auctoritas*, pp. 343–344 and pp. 353–356): "les *auspicia populi Romani* sont l'alliance entre Jupiter et Rome, passée d'abord avec les rois, ensuite avec les magistrats;" magistrates were invested *auspicato* (see Livy, *Ab urbe condita* 6.41.6), this sort of investiture entrusted them with *auspicia populi Romani*: there was also "un renouvellement, en la personne des magistrats éponymes, du pacte auspicatoire entre Rome et Jupiter"; that is why *auspicia populi Romani* were exclusively conferred on magistrates, not on augurs.

[65] Cicero, *De lege agraria* 2.27, ed. Boulanger: *Nunc, Quirites, prima illa comitia tenetis, centuriata et tributa, curiata tantum auspiciorum causa remanserunt*.

[66] Cicero, *De lege agraria* 2.31, ed. Boulanger: *Sint igitur xviri neque veris comitiis, hoc est, populi suffragiis, neque illis ad speciem atque ad usurpationem vetustatis per xxx lictores auspiciorum causa adumbratis constituti*.

[67] Magdelain, *Recherches sur l'« imperium »*, p. 20.

auspices, but from the taking of auspices that conferred on him Jupiter's initial approbation, through a direct contact with the god. Magdelain showed in a convincing manner the three steps that a Roman magistrate had to follow when he took his office:[68]

- firstly, the election by the *comitia* that enabled people to choose, between various candidates, the one who was to be entrusted with the powers, as defined by the curiate law; originally, it even seems that such a choice was actually made by his predecessor: the latter had the new magistrate cheered by the people gathered in *comitia* (such cheering would be the etymological sense of *suffragium*): we can find instances of this in the republican procedure of *renunciatio* of the elected candidate, left to the good will of the president of the electoral assembly (the *Wahlleiter*);[69]
- next came the civil investiture by the *comitia curiata*; according to Magdelain, these *comitia* were convened by the new magistrate's predecessor (since the new magistrate did not have the right of the auspices yet) so as to propose to the *curiae* the vote of the law that was to enable him to take the auspices;[70] as magistrates of the people under the Republic always took their office on the day of the Kalends or the Ides, and as those days were not comitial, this step had to take place on the day before their official coming into office (and the previous argument makes their predecessor's intervention indispensable);
- finally the religious (or "sacral") investiture took place, through which the magistrate, thus newly elected and invested with the curiate law, obtained Jupiter's blessing that vested him with the completeness of his powers; as soon as he received the *auspicium*, the magistrate had to take the auspices according to the terms or prescriptions that were to be found in his curiate law: in other words, that law had to define the nature of the auspices (*minora* or *maxima*) he was allowed to take, and this would determine the

[68] Magdelain, *Recherches sur l' « imperium »*, *passim*; Id., "L' inauguration de l'*urbs*," *passim* (= Id., *Jus Imperium Auctoritas*, pp. 209–228).

[69] See Rolf Rilinger, *Der Einfluss des Wahlleiters bei den römischen Konsulwahlen von 366 bis 50 v. Chr.*, Vestigia 24 (Munich, 1976), *passim*.

[70] According to A. Giovannini (Id., *Consulare imperium*, p. 54), this procedure would not be indispensable since it was not compulsory to have the auspices in order to propose a law to the *curiae*, as is shown by the procedure followed by the *pontifex maximus* (who did not have the right of taking the auspices) for claims of adoption.

nature of his powers: simple *potestas* for a lesser magistrate, *potestas* and *imperium* for a greater one.[71]

Literary sources record the importance of the religious investiture: "patrician magistrates created by the *populus* can only be magistrates after the consulting of the auspices", writes Livy.[72] Likewise, Dionysius of Halicarnassus—who undoubtedly uses here an excellent annalistic source—considers that this procedure was issued from Romulus and was supposed to have been a model for the investiture of magistrates-to-be of the Republic to emulate: "When Romulus, therefore, upon the occasion mentioned had received the sanction of Heaven also, he called the people together in assembly; and having given them an account of these omens, he was chosen king by them, and established it as a custom to be observed by all his successors, that none of them should accept the office of king or any other magistracy until Heaven, too, had given its sanction. And this custom relating to the auspices long continued to be observed by the Romans, not only while the city was ruled by kings, but also after the overthrow of the monarchy, in the elections of their consuls, praetors and other legal magistrates".[73] This "inaugural" taking of the auspices had considerable importance, since direct communication with Jupiter allowed the *auspicatus* magistrate to obtain approbation of the god, in other words, to get Jupiter's blessing that conferred his full power of command: his *imperium* (the civil power), but also his *iuris dictio* (the legal power). The power of command (*imperium*) was permanent as long as he retained his office, and he did not need to take new auspices before he came out of office.

The nature of such auspices would thus define the nature of a magistrate's power of command: the "investing auspices" were taken in the *auguraculum* of the *arx*, on the Capitol, facing the city (*urbs*) lying at the

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[71] On *potestas* and *imperium*, see *supra* n. 45.

[72] Livy, *Ab urbe condita* 6.41.6: (…) *quos populus creat patricios magistratus non aliter quam auspicato creet*. See *supra* n. 42 about the technical term "patrician magistrates".

[73] Dionysius Halicarnassus, *Roman Antiquities* 2.6.1: τότε δ' οὖν ὁ Ῥωμύλος ἐπειδὴ τὰ παρὰ τοῦ δαιμονίου βέβαια προσέλαβε, συγκαλέσας τὸν δῆμον εἰς ἐκκλησίαν καὶ τὰ μαντεῖα δηλώσας βασιλεὺς ἀποδείκνυται πρὸς αὐτῶν καὶ κατεστήσατο ἐν ἔθει τοῖς μετ' αὐτὸν ἅπασι μήτε βασιλείας μήτε ἀρχὰς λαμβάνειν, ἐὰν μὴ καὶ τὸ δαιμόνιον αὐτοῖς ἐπιθεσπίσῃ, διέμεινέ τε μέχρι πολλοῦ φυλαττόμενον ὑπὸ Ῥωμαίων τὸ περὶ τοὺς οἰωνισμοὺς νόμιμον, οὐ μόνον βασιλευομένης τῆς πόλεως, ἀλλὰ καὶ μετὰ κατάλυσιν τῶν μονάρχων ἐν ὑπάτων καὶ στρατηγῶν καὶ τῶν ἄλλων τῶν κατὰ νόμους ἀρχόντων αἱρέσει. Translation by Earnest Cary, on the basis of the version of Edward Spelman, *The Roman Antiquities of Dionysius of Halicarnassus* 1, Loeb Classical Library (London-Cambridge, Mass., 1937).

foot of the hill (fig. 1, B); consequently, they were taken within the area of the *pomerium* and were referred to as "urban" (*auspicia urbana*).[74] From then on, the power of command obtained from Jupiter would exclusively be exercised within this urban area. For that very reason, in the case of major auspices (*auspicia maxima*), the *imperium* thus obtained extended *domi* (a locative form used to designate the city itself up to a maximum distance of one Roman mile from the *pomerium*). The urban space, where the power of command was exercised, was supposed to have been determined by the augural ritual of the *inauguratio* at the time when the city was founded: this ritual, which was meant to have the city benefit from a very special favour from the gods, allowed the urban space (*urbs*) to be delimited and distinguished from the surrounding rural space (*ager Romanus*), both areas being separated by the religious boundary of the *pomerium*.[75] In the myth of Romulus (in the account given by Ennius, as well as in Livy's), the initial taking of the auspices associates the *inauguratio* of the *urbs* with the assumption of the *imperium domi* by the new king:[76] Romulean auspices, through the famous omen of the twelve vultures (cf. Octavian again, at the time his auspices had invested him as a consul, on 19th August 43 BC),[77] not only vested him with his power of command (*imperium*), but furthermore allowed him, as founder of the city (*conditor urbis*), to draw the *pomerium* that would later delimited the urban space where his command would be exercised (*auspicio augurioque* or *ad inaugurandum templa capiunt*). The last verses of the excerpt from Ennius' writings on this event give evidence of that link between the power of command (*imperium*) of the new king and the inauguration of the *urbs*: "from that omen, Romulus saw strips of land left unturned by the plough (*scamna*) that had been given to him, and the soil of his kindgom strengthened by his taking

[74] See *supra* n. 55.

[75] On the technical meaning of the term *inauguratio*, see Magdelain, "L'inauguration de *l'urbs*," pp. 15–16 (= Id., *Jus Imperium Auctoritas*, pp. 213–215).

[76] Ennius, *Annales*, 77–78 ed. Johannes Vahlen, 2nd ed. (Leipzig, 1903) = 72–73 ed. Otto Skutsch, 2nd ed. (Oxford, 1986): *Curantes magna cum cura tum cupientes / regni dant operam simul auspicio augurioque*. Livy, *Ab urbe condita* 1.6.4, ed. Jean Bayet (Paris, 1940): *Quoniam, cum gemini essent, nec aetatis verecundia discrimen facere posset, ut di quorum tutelae ea loca essent auguriis legerent qui nomen novae urbi daret, qui conditam imperio regeret, Palatium Romulus, Remus Aventinum ad inaugurandum templa capiunt.*

[77] Suetonius, *Augustus* 95.2; Cassius Dio, *Roman History* 46.46; Appian, *Civil War* 3.94; Iulius Obsequens, *Prodigiorum liber* 69 (129); see Frédéric Hurlet, "Les auspices d'Octavien / Auguste," *Cahiers du Centre Gustave Glotz* 12 (2001), 155–180.

of the auspices (*auspicio*)".[78] The Romulean example hints at the fact that the auspices conferring the *imperium domi* on magistrates were also supposed to renew the *inauguratio* of the *urbs*, as if the foundation of the city was symbolically renewed each time the *imperium* passed into other hands.[79] These investing auspices, taking place whenever a new (greater) magistrate came into office, consequently made it possible to define the *imperium domi*, that is to say, the power of civil command which, by definition, could only be exercised in relation to the urban space within the *pomerium*, and corresponding to the land whose *inauguratio* had been renewed by the same auspices.

By contrast, the power of military command (*imperium militiae*) was not permanent since it could not be exercised within the city (*domi*). Consequently, it required a new taking of the auspices (the "departure auspices") that also took place on the Capitol, but this time this was oriented towards the *ager Romanus (antiquus)*, i.e. the peri-urban territory:[80] indeed, departure auspices, unlike urban auspices, could not be exercised within the city as delimited by the *pomerium*, but their territory would stretch as far as the eye could see, past the city and its

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[78] Ennius, *Annales* 95–96 Vahlen = 90–91 Skutsch: *Conspicit inde sibi data Romulus esse propritim / auspicio regni stabilita scamna solumque*. See Catalano, *Contributi*, pp. 575–583; Otto Skutsch, *The Annals of Q. Ennius*, 2nd ed. (Oxford, 1986), pp. 236–238.

[79] Magdelain, *Recherches sur l'« imperium »*, pp. 67–69; Id., "L'inauguration de l'*urbs*," pp. 16–22 (= Id., *Jus Imperium Auctoritas*, pp. 215–221).

[80] Auspices *in agrum* were necessary to the departure auspices (before setting out to war), the *repetitio auspiciorum*, the convening of the *comitia centuriata*, the appointment of the *interrex* and the *dictio dictatoris*: see Wissowa, *Auspicium*, col. 2585; Catalano, "Aspetti spaziali," pp. 501–502. It is likely that, in this case, the observation was not east-orientated, as it happened for the urban auspices, but south-orientated (taking Jupiter's place, as he was sitting in the north). That could offer an explanation for the two traditions regarding the orientation of the auspices: Varro, in Festus, *De verborum significatu* 454 L. *(. . .) A deorum sede cum in meridiem spectes, ad sinistram sunt parte⟨s⟩ mundi exorientes, ad dexteram occidentes (. . .)*; cf. Varro, *De lingua Latina* 7.7; Cicero, *De divinatione* 1.31; Livy, *Ab urbe condita* 1.18.6; Paul. Festus, *De verborum significatu* 244–245 L. (toward the south); Livy, *Ab urbe condita* 1.18.7; Isidorus, *Origines*, 15.4.7 (toward the east); cf. Magdelain, "L'*auguraculum* de l'*arx*," pp. 258–263 (= Id., *Jus Imperium Auctoritas*, pp. 197–201); Linderski, "The Augural Law," pp. 2280–2289. The *spectio in agrum* from the *auguraculum* of the *arx* was only possible if orientated to the south, where the pomerial limit ran through the *Ara Maxima* (at the Forum Boarium), the Consus' altar (at the Circus Maximus) and the Curiae Veteres (Tacitus, *Annales* 12.24.1), offering the eye a view towards the Aventine hill, outside the *pomerium* and so, part of the *ager* (this could indeed explain why the Aventine remained outside of the *pomerium* during the whole Republican period, whereas the hill was included within the area of the Servian Wall).

pomerium, in the *ager effatus et liberatus* (the rural territory delimited ⟨"by speech"⟩ and freed from ⟨"evil spirits"⟩).[81] The *ager Romanus* (outside the *pomerium*) thus had other auspices than those of the urban space:[82] "likewise, in these two sections, namely the city and the countryside, opposite kinds of *imperia* are enforced: a civil and a military one" since "the *domi* and the *militiae* powers correspond to spaces which have independent religious statuses," they are separated by a line which is also of a religious nature, the *pomerium*.[83] From a religious point of view, what tells these two spaces apart is the fact that only the *urbs* could be "inaugurated", and this "inauguration" (*inauguratio*) granted it a special character (it became a *locus augustus*), with the result that it was forbidden

[81] Varro, *De lingua Latina* 6.53, ed. Pierre Flobert (Paris, 1985): *Hinc effata dicuntur, qui augures finem auspiciorum caelestum extra urbem agri⟨s⟩ sunt effati ut esset*. Servius, *In Vergilii Aeneidem* 6.197, ed. Hermann Hagen and Georgius Thilo (Leipzig, 1881): SIC EFFATUS *proprie effata sunt augurum preces: unde ager post pomeria, ubi captabantur auguria, dicebatur effatus*. The *effatio* consists of orally delimiting a territory: thus, a *locus effatus* is an area delimited by the declaration of an augur for the taking of the auspices; the *liberatio* is a form of exorcism aiming at freeing a territory from the evil spirits dwelling on it (the *ager*, subject to the taking of the auspices, had to be preliminarily *effatus et liberatus*): cf. Magdelain, "L'inauguration de l'*urbs*," pp. 13–15 and pp. 23–24 (= Id., *Jus Imperium Auctoritas*, pp. 211–213 and p. 222).

[82] Livy, *Ab urbe condita* 1.18.7: (…) *prospectu in urbem agrumque capto* (…); here, Livy makes up a tale starting from an old formula of auspices: the distinction between *prospectum in urbem capere* and *prospectum in agrum capere* corresponds in fact to two opposite inaugural actions concerning respectively the city (defined as a *templum*, i.e. an inaugurated area) and the *ager* (a *tescum*, i.e. a wild land which will be used to take auspices and which belongs to the competence of undetermined deities before being *effatus et liberatus*): Eduard Norden, *Aus altrömischen Priesterbüchern* Unveränderter Neudruck der Erstauflage 1939, mit einem Nachwort von John Scheid (1939; repr. Stuttgart-Leipzig, 1995), pp. 3–106 and pp. 281–286; Kurt Latte, "*Augur* und *templum* in der varronischen auguralformel," *Philologus* 97 (1948) 143–159 (= Id., *Kleine Schriften*, pp. 91–105); Magdelain, "L'*auguraculum* de l'*arx*," pp. 258–267 (= Id., *Jus Imperium Auctoritas*, pp. 197–205); Id. "L'inauguration de l'*urbs*," pp. 11–29 (= Id., *Jus Imperium Auctoritas*, pp. 209–228); Linderski, "The Augural Law," pp. 2256–2279 (cf. Varro, *De lingua Latina* 7.8–10; Festus, *De verborum significatu* 488 L.; Paul. Festus, *De verborum significatu* 489 L.). G. Wissowa remains sceptical on the subject of a difference of orientation between *in urbem* auspices and *in agrum* auspices, yet he does not take into account the formula of auspices, nor the topographical context (cf. *supra* n. 80): Wissowa, *Augures*, col. 2341–2342; Id., *Auspicium*, col. 2584–2585.

[83] Mommsen, *DPR*, 1 (Paris, 1892), pp. 69–85 (= Id., *StR*, 1, 3rd ed. [Leipzig, 1887], pp. 61–75); Magdelain, "L'inauguration de l'*urbs*," *passim* (= Id., *Jus Imperium Auctoritas*, pp. 209–228); Rüpke, *Domi militiae*, pp. 29–57. *Contra*: Giovannini, *Consulare imperium*, pp. 9–15: founding his reasoning on the expressions *domi* and *militiae* at the end of the Republic, the author reckons "il n'est pas possible de comprendre territorialement la formule *domi militiae*que"; it is true that owing to the extension of the *ager Romanus*

for military power to be exercised there in normal times. Consequently, the power of military command (*imperium militiae*) could not be a permanent one, and required specific auspices each time a general was to leave Rome for the army (it was also renewable outside the normal duration of a magistracy thanks to the *prorogatio imperii*, unlike the *imperium domi*).[84] The greater magistrate on whom had been conferred the command of an army by the Senate or the *populus* had to go to the *auguraculum* of the Capitol in order to take the "departure auspices". These enabled the magistrate to be directly entrusted with both the *imperium militiae* and the war auspices by Jupiter: through the observation of birds during the taking of the auspices, the general was subject to a divine *addictio* that conferred on him his titles and qualities, as is shown in a passage by the antiquarian L. Cincius concerning the departure auspices of the Roman general who was to take command of the army of the Latin league.[85] Once *auspicatus*, the magistrate would put on the military cloak of the general (*paludamentum*), he would solemnly make his prayers and vows to the deity for himself, his army, and the city (*solemnis votorum nuncupatio*), and then he was required to leave the *pomerium* before sundown. When he crossed the *pomerium*, his lictors would place axes in their fasces, thereby signifying that, with the *imperium militiae*, the right for the citizens to appeal against a legal decision made by this magistrate (*provocatio*) came to an end.[86] In the event of a technical problem, and

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and the integration of the whole of Italy into the Roman citizenship after the Social War, such a distinction bore no more territorial sense and did not correspond to the (abstract) distinctions between the civil and military fields; yet the right of the auspices shows that this distinction originally had a concrete territorial base.

[84] Magdelain, "L'inauguration de l'*urbs*," p. 12 (= Id., *Jus Imperium Auctoritas*, p. 210): "L'annalité de la magistrature interdit la prorogation de l'*imperium domi*. Seul l'*imperium militiae* peut être prorogé, lequel s'exerce seulement hors du *pomerium*. L'attribution extraordinaire de l'*imperium* à un *privatus* (le *privatus cum imperio*) ne concerne que le pouvoir militaire hors les murs."

[85] Festus, *De verborum significatu* 276 L.: *Praetor ad portam nunc salutatur is qui in provinciam pro praetore aut pro consule exit: cuius rei morem ait fuisse Cincius in libro de consulum potestate talem*: (. . .) "*itaque quo anno Romanos imperatores ad exercitum mittere oporteret iussu nominis Latini, conplures nostros in Capitolio a sole oriente auspicis operam dare solitos. Ubi aves addixissent, militem illum, qui a communi Latio missus esset, illum quem aves addixerant, praetorem salutare solitum, qui eam provinciam optineret praetoris nomine*". See Franz Peter Bremer, *Iurisprudentiae antehadrianae quae supersunt*, 1, *Liberae rei publicae iuris consulti* (Leipzig, 1896), p. 253 (Cincius, *De consulum potestate liber*); Magdelain, *Recherches sur l'« imperium »*, p. 42.

[86] On the topographical regime of *provocatio*, based on and complying with the nature of the *imperium* and of the auspices, see also Magdelain, *Recherches sur l'« imperium »*, p. 45; see also Giovannini, *Consulare imperium*, pp. 19–26.

also as far as delays were concerned, the auspices had to be taken again on the following day. When he came back, the magistrate would automatically lose his *imperium militiae* as he crossed the *pomerium* (save for exceptional circumstances or special decree of the Senate, for example for the ceremony of triumph or when the city was under siege). These ritual obligations are clearly and negatively described in the annalistic account of the departure in 217 BC of the consul C. Flaminius, who had left Rome to join his army without having taken the auspices: for political reasons, Flaminius was in a conflict with the Senate who opposed him and wanted to prevent him from taking the command of the army.[87] So, the consul left Rome secretly, without taking the departure auspices; nor did he make his vows to Jupiter, and he left without *paludamentum* and without lictors (more specifically, without the axes placed in his lictors' fasces), therefore he left without *imperium militiae*. According to Livy, he left like a simple citizen (*privatus*), without regular auspices (*inauspicatus*), and this condition marred all his later actions with a religious flaw (and was also supposed to account for the bitter defeat he suffered with his army at Lake Trasimene): "an ordinary citizen (*privatus*), auspices (*auspicia*) do not go with him, and once he has gone without auspices (*sine auspiciis profectum*), he cannot take new unmarred ones (*nova atque integra*) on foreign ground (*in externo solo*)".[88] This event consequently shows that the taking of the departure auspices was indispensable in order to obtain the *imperium militiae*.

The magistrate who would convene and preside over the *comitia centuriata*, an assembly of the *populus* also called the "urban army" (*exercitus urbanus*) or "centuriate army" (*exercitus centuriatus*) meeting on the Field of Mars (that is to say, outside the *pomerium*),[89] also had to have taken the "departure auspices" or similar auspices:[90] a fragment from the *Commentarii consulares* quoted by Varro indicates that the convening of *comitia centuriata* by a consul was an act of *imperium militiae*.[91] Another

[87] Livy, *Ab urbe condita* 21.63.

[88] Livy, *Ab urbe condita* 22.1.7, ed. R.S. Conway and C.F. Walters (Oxford, 1963): *nec privatum auspicia sequi, nec, sine auspiciis profectum, in externo ea solo nova atque integra concipere posse*.

[89] Varro, *De lingua Latina* 6.88; 93. See G.V. Sumner, "The Legion and the Centuriate Organization," *Journal of Roman Studies* 60 (1970) 67–78; Luigi Capogrossi Colognesi, *Storia delle istituzioni romane arcaiche* (Rome, 1978), p. 246.

[90] Magdelain, *Recherches sur l'« imperium »*, pp. 46–51.

[91] Varro, *De lingua Latina* 6.88, ed. P. Flobert: *In Commentariis consularibus scriptum sic inveni: "Qui exercitum imperaturus erit accenso dicit hoc*: (. . .). *Dein consul eloquitur ad exercitum: 'Impero qua convenit ad comitia centuriata'."*

example is provided by the elections for the consulship in 163 BC, when the consul Ti. Sempronius Gracchus (the father of the Gracchi), who presided over the electoral *comitia*, made a mistake that led to the cancellation of the elections: in order to take the auspices for the coming *comitia centuriata*, he had pitched his augural tent in Scipio's gardens stretching over the slopes of the Quirinal, over the Field of Mars, where the people had gathered for the *comitia* (fig. 1, C); yet, in the meantime, he had had to go back to the city to consult the Senate, and therefore crossed the *pomerium* forgetting that he was thus losing his *imperium militiae*, and so he was supposed to take the "departure auspices" again before he could return to preside over the electoral assembly.[92] Scipio's gardens, where Ti. Gracchus had his tent pitched, were outside the *pomerium* (since they were the *horti* of a *villa*): such a place was ideal because it was located near the *auguraculum* of the Quirinal on the Latiaris hill—which is mentioned in the *Ceremonial of the Argei* quoted by Varro—(see fig. 1, C); this *auguraculum* was suitable for taking the auspices before the opening of the *comitia* (in order to ask the divinity to allow them to take place through assembly auspices).[93] Furthermore, the magistrate who convened the assembly had to possess the *imperium militiae*, and for this matter, he had to take the "departure auspices" (or similar ones) within the *urbs*, before he crossed the *pomerium* (cf. Flaminius in 217 BC): yet these auspices failed Ti. Gracchus when he came back to the Field of Mars after consulting the Senate inside the city.

4. *The Religious Nature of the Power of the Magistrates*

The augural law would, therefore, match the two aspects of *imperium*, civil and military, with the two zones of the *urbs* and the *ager Romanus*, following a spatial distribution expressed by the locatives *domi* and *militiae* that are still in use at the end of the Republic and at the beginning of the Principate. This spatial distinction between the two types of powers that a greater magistrate could possess would depend directly on the nature of the auspices that the curiate law had vested in him. The

[92] Cicero, *De divinatione* 1.33; 2.74–75; *De natura deorum* 2.10–11; Granius Licinianus, *Annales* 8–9 ed. Michael Flemisch (Leipzig, 1904) = 28, 24–28 ed. Nicola Criniti (Leipzig, 1981); Valerius Maximus, *Facta et dicta memorabilia* 1.1.3.

[93] Varro, *De lingua Latina* 5.52; cf. Coarelli, "La doppia tradizione", pp. 181–188; Id., *s.v. Auguraculum (collis Latiaris)*, in *LTUR*, 1 (Rome, 1993), p. 143.

prevalence of the auspices for the determination of the type of power of command that a magistrate could exercise, is expressed in the phrase *auspicio imperioque* that can be found on the inscriptions of victorious generals.[94] As Magdelain underlines, "this expression, of an archaic origin, puts the power and its source side by side: departure auspices gained for the general the conferment by Jupiter of the *imperium*"; *auspicium* is put in first place as "la cause précède l'effet".[95] In other words, *imperium* has its source in the auspices, and those, in their turn, can only be taken after the magistrate receives permission from the *lex curiata*: this is both true for the *imperium domi* and for the *imperium militiae*, since "departure auspices, like those for coming into office, must be preceded by a curiate law".[96] It is only in this perspective that we can rightly speak of a *lex curiata de imperio*. However, it is not the curiate law that confers the power of command (*imperium*) on the magistrate, rather it is exclusively the taking of the auspices: the real, genuine source of the *imperium* is not the people, who does not dispose of it, but Jupiter. The *imperium* is indeed, first and foremost, a power of absolute command, the power of Jupiter of which the unique source is Jupiter himself: neither the *populus*, convened in the *comitia*, nor anyone else, could entrust the magistrate with this power, either by election (which is but a choice among several candidates), or by the passing of a law. The people gathered in *comitia* (even when they are purely formal *comitia* such as the curiate assembly) can only give licence to the magistrate to go and take the auspices.[97] All the rest of his attributions, that is to say the civil, military, or legal powers deriving from his *potestas* and his *imperium*, are of religious origin, since they are provided through Jupiter's will and certified during the taking of the auspices.[98]

In the procedure that finally prevailed, which we can find towards the end of the Republic, the magistrate recently elected by the *comitia* pro-

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[94] E.g. *CIL* I², 626 = *ILLRP* 122; Livy, *Ab urbe condita* 40.52.5; 41.28.8–9; see Magdelain, *Recherches sur l'« imperium »*, p. 41; Id., "L'inauguration de l'*urbs*," pp. 26–27 (= Id., *Jus Imperium Auctoritas*, pp. 225–226); Bastien, *Le triomphe romain*, pp. 198–201.

[95] Magdelain, *Recherches sur l'« imperium »*, p. 41.

[96] Magdelain, *Recherches sur l'« imperium »*, p. 40; cf. Cicero, *De lege agraria* 2.30, ed. Boulanger: (…) *consuli, si legem curiatam non habet, attingere rem militarem non licet*.

[97] Magdelain, *Recherches sur l'« imperium »*, p. 41: "La loi curiate n'est à cet égard qu'une investiture préalable de nature purement laïque: elle autorise l'investiture proprement dite par Jupiter."

[98] Contrary to what A. Magdelain asserts (Id., *Recherches sur l'« imperium »*, pp. 17–19), the *iuris dictio* of a magistrate does not derive more from the curiate law than from his *imperium*, since his legal capacity directly comes from his *imperium* (*domi*).

ceeds forth to the Capitol in order to take the auspices: the auspices that had preceded the electoral assembly were considered as a sacral investiture of the magistrate that enabled him to ask for sacral investiture himself. In other words, people finally considered that the elected magistrate automatically received the *auspicium* (i.e. the *ius auspiciorum*) by the mere fact that he had been elected by an assembly inaugurated by the auspices and presided by an *auspicatus* magistrate. This would be, though, a real "contresens juridique" (Magdelain), as only the curiate law was able to confer on the elected magistrate the right to take the auspices: the election, which is nothing but a mere choice that confers no real power, eventually usurped the value of an investiture of powers, and the vote of the curiate law, as well as the ritual of taking the auspices, turned out to become mere formalities, whose true meaning had been lost. However, this political and institutional evolution of the very late Republic did not prevent the vote of the curiate law from remaining indispensable in order to obtain military command, and consequently the position of governor in a province. On the other hand, the role played by the election in the appointment of a new magistrate is more recent than the curiate law, since the curiate assembly is historically more ancient than the other *comitia*: before being elected by an assembly of the people, the new magistrate was "named" by his predecessor, following a procedure of archaic designation of which *renunciatio* is a trace—that procedure was used long after in the designation procedure of the dictator by the consul. In other words, at the beginning of the Republic, the new magistrate was chosen by his predecessor who later introduced him to the *comitia curiata*, for him to be greeted by a unanimous cheer (*suffragium*), and obtain the vote of the curiate law that enabled him to go and take the auspices, and be granted powers by Jupiter.

The preliminary authorisation to take the auspices must have been a breakthrough of the republican regime, as this principle was foreign to the regal period when the king took auspices probably by his own authority.[99] So the curiate law must have been created after the monarchy had disappeared in Rome, and the law had to specify the type of auspices to which the magistrate was entitled (*auspicia maxima* for a greater magistrate or *auspicia minora* for a lesser one). The extent of his *potestas* and, in some cases, of his *imperium*, derived directly from the nature of his *auspicium* (*ius auspiciorum*). According to Magdelain's highly suggestive

[99] Magdelain, *Recherches sur l'« imperium »*, pp. 34–35; pp. 38–39.

hypothesis, the curiate law would also have specified or defined the period of magistracy, which means it would have specified in advance for how long the magistrate would possess his *auspicium*.[100] In other words, the *lex curiata* might have determined the term of a year for magistracies (or six months for a dictator), and this would have been at the origin of one of the fundamental principles of republican institutions: the limited period during which magistrates could hold their office. At the same time, the *lex curiata*, by officially conferring the *auspicium* on the magistrate, was the corollary of the principle according to which the powers he possessed did not really derive from the *populus*, but ultimately from Jupiter's approbation. In other words, the power of command of a greater Roman magistrate was not conferred by the people electing him (or, formerly, by his predecessor who appointed him), but by Jupiter himself, and the nature of this power originated in the "religious system" of the city. This is most probably one of the things that hindered the affirmation of a principle of sovereignty of the people, and the development of a true democracy in Rome.

[100] Magdelain, "Note sur la loi curiate," pp. 202–203 (= Id., *Jus Imperium Auctoritas*, pp. 310–311); Id., *Recherches sur l'« imperium »*, pp. 34–35.

RATIONALIZING RELIGIOUS PRACTICES: THE PONTIFICAL CALENDAR AND THE LAW

Jörg Rüpke

1. *Watching the Moon: The Structure of the Roman Months*

Roman antiquarians who wrote between the second century BC and the fifth century AD permit the drawing of a detailed picture of the oldest Roman calendar. It consisted of lunar months which had a clear-cut internal structure based on four ritually marked days.

The start of the month witnessed the most peculiar proceeding. On a day close to the appearance of the new moon, a 'scribe' observed the moon. This person was an assistant to a group of Roman patricians who were referred to as pontiffs and were entrusted for life with all manner of domestic political issues, especially legal and sacral tasks. The goal of this observation was to estimate how many days remained until the first quarter of the moon (or a comparable set measurement). Along with the *rex sacrorum*, the scribe proceeded to a small shrine on the Capitol, the Curia Calabra, supposedly thatched by the city founder Romulus himself (Servius) or located close to the hut of Romulus (Macrobius) in the not quite correct topography of late ancient writers and thus tied to a corner stone of historical memory. Both persons there performed a sacrifice. Afterwards, the scribe (later known as *pontifex minor*), addressed the goddess thus:

> "I call to you, Juno Covella! I call to you, Juno Covella! I call to you, Juno Covella! I call to you, Juno Covella! I call to you, Juno Covella!"[1]

Repeating this call five times signalled to the participants that the public assembly day, which was determined by the first quarter of the moon, would be in five days, counting the day on which the sacrifice and address were performed.[2] Depending on the particular phase of the moon, this

[1] Varro, *De lingua Latina* 6.27; Macrobius, *Saturnalia* 1.15.10.

[2] Verrius Flaccus, *Inscriptiones Italiae* 13.2.111 (Fasti Praenestini on 1 January); Servius, *In Vergilii Aeneidem* 8.654 (with the notes from the *Scholia Danielis*, "Servius Auctus"); Macrobius, *Saturnalia* 1.15.9–12.

period of time until the next public assembly could be announced by four or six, indeed even seven repetitions of the call—not only the five or seven of the standardized later calendar. The wife of the *rex sacrorum*, the queen of the sacrifice (*regina sacrorum*), sacrificed a sow or a ewe to the goddess Juno on the same day in the Regia, a cultic building at the entrance to the forum.[3] But it was the act of calling out, *kalo* in Latin, which gave the day on which this ritual took place its name, *kalendae*, 'calends'.

On the day thus announced, the second structural day, the people assembled again (probably only a fraction of the few thousand inhabitants of Rome). On this day the announcements were of more substance than the mere indication of the length of a period. The *rex sacrorum* announced the situation of all holidays for that month, presumably not only the date but also, as relevant, the place where central rituals would be performed and the festive decorations or offerings of the participants.[4] Such announcements in medieval churches were still the most important act of communication of the calendar at the beginning of each year. We know nothing of specific rituals, but can assume that this assembly also served as a forum for markets, legal business, and possibly also political assemblies. The name of the day on which these detailed announcements were made is drawn from the interval between it and the day of the full moon, *nonae*, 'nine days'. The day of the full moon itself was referred to by a word of Etruscan origin as Ides (*idus*).[5] The 'Nones' were 'nine days before the Ides', while Roman inclusive counting meant that the nine days included both the Ides and the Nones.

The Ides, the third day of the monthly structure, were the summit of the month. The whole day was *feriatus*, a festive break in some types of work. The *Flamen Dialis*, the priest of the extraordinary god Jupiter, attended by other religious specialists, regularly sacrificed a white ram.[6] The colour of the animal relates to the god who was considered the creator of the bright sky.[7] The form of festivities went beyond these routine rituals, however. The oldest games, wagon racing, two-man compe-

[3] Macrobius, *Saturnalia* 1.15.19.

[4] Varro, *De lingua Latina* 6.28; Macrobius, *Saturnalia* 1.15.12–13.

[5] Macrobius, *Saturnalia* 1.15.14–16.

[6] Ovid, *Fasti* 1.56, 587–588; Festus, *De verborum significatu* 372.8–12 L.

[7] Macrobius, *Saturnalia* 1.15.15. See also Plutarch, *Roman questions* 24; Lydus, *On months* 3.10 (p. 47 Wünsch). Catherine Trümpy, *Untersuchungen zu den altgriechischen Monatsnamen und Monatsfolgen* (Heidelberg, 1997) shows that the days of the full moon were also the most ancient holidays in Attica.

titions dedicated to Jupiter or Mars, took place on the Ides, as did the *ludi Romani* in September, the *ludi Capitolini* and the 'October Horse' (a race with a pair of horses and a sacrifice to Mars) in October, and later the *ludi plebeii*, the 'plebian games', in November.[8] New Year rituals on the Ides of March and the sacrifice in May to Maia, the goddess after whom the month was named, both also show that the religious formulation of the Ides was lavish and dense.

What about the fourth day of the monthly structure? Eight days (or nine, by Roman reckoning) after the Ides, such a concentration of old and even more important festivals was repeated. The later calendars show evidence of important and popular holidays which were probably very ancient, such as the day of the dead or Feralia in February, the birthday of the city or Parilia in April, the feast of booths or Neptunalia in July, the ancient race in the valley of the Circus Maximus, or Consualia, in August, and finally the Divalia, a festival related to the winter solstice in December, dedicated to the goddess Diva Angerona.

For at least two months, these festivals fail to obscure completely rituals which were originally monthly and then were either abandoned or continued in the shadow of the larger festivals—for the latter hypothesis, however, evidence is small.[9] In March, as in May, Roman calendars note a *Tubilustrium*, a complex of rituals which has many parallels with other structural days in the month. As on the Calends, a lamb was sacrificed,[10] and an assembly was held on the same day or the following day. In later times, the assembly was led by the *pontifex maximus*, the leader of the pontiffs, but the *rex sacrorum* was also involved in some manner.[11] The very blowing of the trumpet in the waning phase of the month during the ritual of the Tubilustrium[12] is reminiscent of the ritual for strengthening the moon which was performed repeatedly during lunar eclipses.[13] These

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[8] See Frank Bernstein, "The Games," in *A Companion to Roman Religion*, ed. Jörg Rüpke (Oxford, 2007), pp. 222–234; on the October Horse, see Jörg Rüpke, "Equus October und ludi Capitolini: Zur rituellen Struktur der Oktoberiden und ihren antiken Deutungen," in *Antike Mythen: Medien, Transformationen und Konstruktionen: Fritz Graf zum 65. Geburtstag*, eds. Ueli Dill and Christine Walde (Berlin, 2009) pp. 97–121.

[9] See Jörg Rüpke *The Roman Calendar from Numa to Constantine: Time, History, and the Fasti*, trans. David M.B. Richardson (Oxford, 2011), p. 27.

[10] Festus, *De verborum significatu* 480.25–29 L.

[11] Varro, *De lingua Latina* 6.31; Ovid, *Fasti* 5.727–728; Plutarch, *Roman Questions* 63; Paulus, *ex Festo* 311.1–3 L.

[12] Festus, *De verborum significatu* 480.25–29 L. and Varro, *De lingua Latina* 6.14; *Inscriptiones Italiae* 13.2.123 (Fasti Praenestini, also composed by Festus' main source, Verrius Flaccus).

[13] Juvenal, *Saturae* 6.442–443. Tacitus, *Annales* 1.28.1–2.

rituals were performed by a group of religious specialists of the city of Rome who in terms of prestige were just inside that circle of religious functionaries which the Romans referred to with the term *sacerdotia*, or 'priesthoods', granting them a special dignity. These were the *Tubicines*, trumpet-players commissioned for public sacrifice.[14]

The calendar, now, consisted of Calends followed by a variable period, Nones heading the first week of eight days, Ides heading the second, and the 'Tubilustria', the typical festival date eight days after the Ides. The Tubilustria again headed a week of eight days, another *nundinum*, a nine-day unit on Roman reckoning—ending on the Calends. Now the monthly form of this empirical lunar calendar and its basis in observation become apparent. The central day was the day of the full moon, the Ides belonging to Jupiter. Eight days earlier, on the Nones, there was an assembly of the people, which served, among other things, to announce the sequence of holidays. This assembly was followed by three eight-day periods, which respectively ended with the Ides, the feasts and assemblies of the Tubilustria and with the assembly on the Calends, thus reaching the new month. The only variable was the time between the Calends and the Nones. In order to make sure that the Ides fell on the next full moon, this earliest period of the month was determined empirically and then announced—and this announcement determined the name of the day, 'Calends'. The part of the month after the full moon of the Ides was, with its two times eight days, significantly longer than that the period before. Therefore it covered more than half a lunar period. At the end of the month, there would be one to three days of moonless nights. On the Calends, the moon was again visible, well enough for a reliable judgment to be made about the number of days remaining until the next full moon.

The system allotted the Ides a more important role in establishing a boundary than it did the Calends: while the preceding days were counted as days "before the Ides", there seem to be vestiges of an old way of counting "after the Ides".[15] In classical Roman calendars the days after the Ides, in January for example, were called "the ninth day before the Calends of February". Thus, the visible or audible name of the month changed in the middle of January, just after the Ides.

[14] Festus, *De verborum significatu* 482. 27–29 L.
[15] See Rüpke, *The Roman Calendar*, p. 34.

2. *From a Lunar to a Solar Calendar*

The calendar thus far described was an empirical lunar calendar driven by observation, similar to the practice found everywhere in Italy and the Mediterranean world. The *Feriale*, which is referred to as *Tabula Capuana* and is a ritual calendar from the time around 470 BC, is especially important here. This text regulated the cult at the shrine Haema, near Capua, which must have been a regional cultic centre.[16] In contrast to the much younger Etruscan cultic calendar, which took the form of a written text on linen and has been preserved on the wrappings of the mummy of Agram,[17] the days on the seal from Capua were not counted out. Only a few repeated days with proper names were noted for each month. First come the Ides, which the Romans believed to be originally Etruscan,[18] and which here are referred to as *iśveita*. According to the late antique source, Macrobius, and his late Republican sources, the Etruscans had a system of weeks in which the Nones occurred every eight days. If so, they may, like the Roman calendar just described, also have had 'weeks' headed by a sequence of four structuring days (Nones, Ides, Tubilustrium, Calends) which began anew each month. The dates given on the tablet from Capua fit exactly onto this structure. Here, the Ides, which mark each new month, were followed, one week later, by the day known as *celuta* (waning moon, Tubilustrium to the Romans), then came the *tiniana*, connected to the celestial deity Tinia (or the Roman Calends, dedicated in Rome to the goddess Juno), and finally the day called *aperta*, with the waxing moon, or the Roman Nones. The only name for a day in this Etruscan text which has a comparative basis in a number, *macvitule*, contains the word for five, and thus would have fallen (assuming Roman inclusive counting) in the middle of a 'week'. In view of the limited sources from this time, it is not possible to determine who adopted which calendar from whom. It suffices to conclude that the calendar used by the city of Rome can be understood as a variant of middle-Italian calendar customs.

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[16] Mauro Cristofani, *Tabula Capuana: Un calendario festivo di età arcaica*. Istituto nazionale di studi etruschi e italici: biblioteca di Studi Etruschi 29 (Florence 1995). The *tabula Capuana* is presently held in Berlin. On the following, see my review in *Gnomon* 71 (1999), 272–274.

[17] Karl Olzscha, "Die Kalenderdaten der Agramer Mumienbinde," *Aegyptus* 39 (1959), 340–355. Ambros Josef Pfiffig, *Studien zu den Agramer Mumienbinden (AM) (Der etruskische liber linteus)* (Vienna, 1963).

[18] Macrobius, *Saturnalia* 1.15.14; weeks: ibid., 13.

Like the other Mediterranean calendars which worked with lunar months, the Roman calendar also strove after a stable relation with the solar year, which determined the course of the natural year, for both agriculture and sailing, and not least for the possibilities for going to war. The occasional interpolation of a thirteenth month made this correspondence possible with the solar year in the calendars known to us, whether it was given a name of its own or consisted of a reduplication of one of the twelve normal months. If an extra month was included every two to three years, the relation of the lunar calendar to the solar year remained stable in the long term. Thus, such systems for reckoning time should not be called lunar calendars, but rather lunisolar calendars. They manage to reflect both the periodicity of the satellite orbiting around the earth and the orbit of the earth around the central star fairly well.

Mathematically, the formula for determining the leap years can be found without a problem. The Greeks of the sixth century BC already knew that three leap years in eight years, the so-called *Octaëteris*, produced a very precise result. The remaining discrepancy of about one and a half days in such a cycle motivated Meton and his student Euktemon to introduce a more precise cycle around the year 432. In a nineteen-year cycle, there were to be a total of 235 lunar months, of which 125 had thirty days and 110 had 29 days.[19] Apparently, this Metonic Cycle assumes an established convention for the lunar month: the observation of the moon is replaced by the scheduled shifting from months with thirty to those with 29 days, in order to reflect the lunar cycle with its average of 29,54 days.

All precise historical data which are known to us contradict the view that these cycles were applied regularly in the major Greek cities. Those responsible often succumbed to the temptation to tamper with the system to extend their own term of office or tenancy, or the period during which they could exercise authority. In Rome, the fatal consequences of this practice can be observed especially well.[20]

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[19] A brief account can be found in Thomas Vogtherr, *Zeitrechnung: von den Sumerern bis zur Swatch* (Munich, 2001), pp. 30–31 and a more extensive one in Alan E. Samuel, *Greek and Roman Chronology: Calendars and Years in Classical Antiquity* (Munich, 1972), pp. 42–49. For the 76-year cycle of Kalippos, see Alexander Jones, *Astronomical papyri from Oxyrhynchus (P. Oxy. 4133–4300a)*, 2 vols. (Philadelphia, 1999).

[20] On Greece, see William Kendrick Pritchett, *Ancient Athenian Calendars on Stone* (Berkeley-Los Angeles, 1963), p. 346; id. *Athenian Calendars and Ekklesias* (Amsterdam, 2001); on early criticism, see Walter Robert Connor, "Tribes, Festivals and Processions:

In Rome, leap years were maintained, occasionally a thirteenth month being added. This indicates that the Roman calendar aimed at being a lunisolar calendar, sacrificing the regularity of the annual number of twelve months to the advantage of a rough correspondence of a certain month and seasonal features. Attempts to legally regulate intercalation may have reached back into the fifth century BC.[21] This simply shows how controversial this point was. Even the earliest Roman calendar revolution, which can hardly be called anything else and will be described shortly, failed to deliver any change on this point. It is not by chance that only after the breakdown of the republic the dictator Caesar was the first to resolve this issue.

In the fifth and fourth centuries BC, the Roman calendar can be considered fully integrated into the regional and meta-regional context. The lunar phases were the same everywhere, while the names of the months, and when and how often monthly or yearly leaps were made, varied from place to place. Different names for months every fifteen kilometres were more the rule than the exception in the small-scale political spaces of Italy and Greece.

Change, however, was imminent. As in the processes just analysed, we do not know the details of the reform. Not even the date is certain. Following Humm and retracting my earlier reconstruction of 1995, it is more plausible to connect the reform of the calendar with certain evidence for the publication of the calendar at the end of the fourth century than with dissipated and unclear, possibly fictional information on the calendar-related activities of the second Roman decemvirate in the middle of the fifth century.[22] The content of the reform can be deduced

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Civic Ceremonial and Political Manipulation in Archaic Greece," *Journal of Hellenic Studies* 107 (1987), 40–50.

[21] Pace second century BC historians quoted by Macrobius, *Saturnalia* 1.13.21, in the fifth century AD.

[22] I here follow the arguments of Michel Humm, "Spazio Tempo Civici: Riforma delle tribu e riforma del calendario alla fine del quarto secolo a. C," in *The Roman Middle Republic: Politics, Religion, and Historiography c. 400–133 B.C.*, ed. Christer Bruun (Rome, 2000) pp. 91–119 against Agnes Kirsopp Michels, *The Calendar of the Roman Republic* (1967; repr. Princeton, 1978) and her dating, which is still accepted in Jörg Rüpke, *Kalender und Öffentlichkeit: Die Geschichte der Repräsentation und religiösen Qualifikation von Zeit in Rom* (Berlin, 1995); see Michel Humm, *Appius Claudius Caecus: la République accomplie* (Rome, 2005), pp. 455–469, for a summary of the arguments. Unfortunately, the political contextualisation of the date of reformation claimed by Egon Flaig, "Kampf um die soziale Zeit—in der römischen Republik," *Historische Anthropologie* 4 (1996), 280–285 is lacking in Humm. See now Rüpke, *The Roman Calendar*, pp. 38–67.

from the form of the pre-Julian calendar, which is known primarily from the *Fasti Antiates maiores*, a wall calendar from a building in the Latin town of Antium, probably painted in the 60s BC.[23]

At first sight, this calendar appears to correspond to the Roman lunar calendar: Calends, Nones, Ides, Tubilustrium are all present, along with a thirteenth month called *Interkalaris*, or 'called between'. The revolutionary character of this intervention is only apparent with a second look, and appears in the last line of the calendar.

The reform affected the length of the months, which were fixed. January had 29 days, February 28, March 31, April 29, May 31, and so on. This produces a sum of 355 days, one day more than the average lunar calendar. Initially, this appears simply to be the replacement of empirical lunar months with conventional fixed ones. The resulting error, a gradual lagging behind the phases of the moon, seems to have been compensated for by the shorter twenty-seven day 'leap-month'. To this extent, everything remains in the framework of customary local variations. But an examination of this extra month reveals something extraordinary: the last five days of it are identical with the last five days of February. This is confirmed by ancient sources which simply register that the extra month actually added only twenty-two days (or sometimes twenty-three),[24] rather than twenty-seven, since it simply replaces the last five days of February. Instead of fleeing on the feast of *Regifugium*, the 'flight of the king' (interpreted by imperial authors as a remembrance of the expulsion of the last Roman kings at the end of the sixth century), the *Rex sacrorum* simply announced the Calends of the extra month on 24 February.[25] This, however, will have a fatal result if the months are of fixed lengths: the following year's calendar will lag behind the full moon (and all other phases of the moon) by five to six days, and there is nothing that can be done about it. Thus, in spite of maintaining the entire terminology and also the ritual apparatus, this calendar completely abandoned correspondence to the moon. The lunisolar calendar had changed into a strictly solar year, despite its clinging to what seemed to remain an intercalary month.

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[23] Rüpke, *Kalender und Öffentlichkeit*, pp. 43–44.

[24] Censorinus, *De die natali* 20.6.

[25] On flight, see Plutarch, *Roman questions* 63. Intercalation after the Terminalia: Macrobius, *Saturnalia* 1.13.19; Livy 34.11.13. See Rüpke, *Kalender und Öffentlichkeit*, pp. 292–317.

3. *Making Time and Marking Time*

The moon is a democratic clock. Anyone can easily observe its phases. Appointments made on that basis are not very exact—one can err by one or two days—but at least one is prepared. Monthly festive gatherings for the full moon do not require a newspaper, and were just as widespread in Iron Age Italy as in the Near East. The sun is more demanding. The observation of the course of the sun and the rising and setting of stars at dawn or dusk requires significantly greater observational effort, an institutionalised memory, and specialists. Accordingly, the results of solar observation are less obvious: the claim that the days are now getting longer can only be substantiated (without a clock) after a number of weeks. As a consequence, decisions on the calendar require some power of enforcement. As Elias has shown, it is a usual trick of the makers of social time to represent themselves as mere 'translators' of heavenly time. This is achieved by reference to the astronomical markers of time, legitimising social time regulations. Regulation is called measurement, not the setting of time or its construction.[26]

This leads to a surprising insight into the changes in the Roman calendar as reconstructed so far. An important motif in the reform is the abbreviation of the leap-period. The old ritual practice used to consist of announcing the shift on the sixth day before the Calends of March, by redefining the day as the sixth day before the Calends of the extra month and bypassing the flight of the king, the Regifugium (which would be performed only in the end of the intercalated month).[27] Just celebrating the Calends of the extra month was a relatively easy solution. This method also brought with it the mathematical advantage in that the shortening of the extra month suggested an intercalation every second year. The fixing of the lengths of the months was the last part of this package deal. Here again the need for decision-making and for communication was reduced, and the consequences of decisions in calendar matters were minimised. Whether the period between the

[26] See Norbert Elias, *Über die Zeit*. Arbeiten zur Wissenssoziologie 2 (Frankfurt am Main, 1988); see also Pitrim A. Sorokin and Robert K. Merton, "Social Time: A Methodological and Functional Analysis," *American Journal of Sociology* 42 (1936), 615–629.

[27] On this festival and its interpretation, see Jörg Rüpke, "'Königsflucht' und Tyrannenvertreibung. Zur Historisierung des Regifugium in augusteischer Zeit," in *Tage der Revolution-Feste der Nation*, eds. Rolf Gröschner and Wolfgang Reinhard (Tübingen, 2010), 29–42.

Nones and the Calends was five or seven days (on Roman reckoning) could now be known and it was no longer necessary to determine it anew each month.

The reduction of possible conflicts related to the calendar fits in with the larger picture of the historical situation at the end of the fourth century and the establishment of the patrician-plebeian nobility.[28] Internal trouble spots could be insulated. Traditional, group-based privileges were reduced or removed. The opportunities for persons drawn only from the patrician class in priestly positions like that of the *rex sacrorum* or *pontifices* to influence the form of the calendar were decreased. But the reform also had a foreign-policy component. The Roman solar calendar became untranslatable, being incompatible with the lunar calendars of the surrounding peoples. This is where the reform takes on its revolutionary colour. It signals concentration on the compact, urban *res publica*. It was no longer the extra-Roman contacts of noble families, but rather the internal cohesion and the coherence of the nobility which was to be decisive. The new calendar impeded external contacts. At the same time, it established a palpable differentiating mark: the Latin allies had to march to the beat of a new drummer and military operations could only be coordinated according to the Roman calendar. This makes manifest a state of feeling, a mentality, which was expressed in many institutions and political decisions of the Middle and Late Republic, namely the inability, or, even more, the unwillingness to sacrifice the image of the self-sufficient and self-determined city-state to the reality of the formation of ever larger areas of rule. It was not the last time in the history of the calendar that the system for marking time would be subordinated to the formation of a particular identity. The peculiarities of the Jewish and Islamic calendars are based, as we will see, on similar decisions.

4. *Calendar and Enscripturation*

Roman tradition unanimously states that the calendar was first published by Gnaeus Flavius.[29] We know little about him. He was a scribe of Appius Claudius Caecus, one of the most important politicians around

[28] In general, Karl Joachim Hölkeskamp, *Die Entstehung der Nobilität: Studien zur sozialen und politischen Geschichte der römischen Republik im 4. Jhdt. v. Chr.* (Stuttgart, 1987).

[29] Cicero, *ad Atticum* 6.1.8; Livy, *Ab urbe condita* 9.46.5; Macrobius, *Saturnalia* 1.15.9.

the turn from the fourth to the third century,[30] probably stemming from Praeneste.[31] Since Appius was pontiff, the post of scribe had probably been the position of *scriba pontificius*, which means Gnaeus held exactly that office to which the observation of the moon on the Calends was attached. In 304 BC, he was elected, in the face of stiff competition, as curule aedile, thus taking the most important step up the ladder in a Roman official career.

It was probably in the context of these developments that the calendar was written down with the reform of the *comitia tributa*, dated to 312 BC, offering the *terminus post quem*.[32] Such an enscripturation was new, not only for Rome, but also for the whole of Mediterranean Antiquity. In Egypt there was literature which explained whether each day of the year was good or bad, appropriate or inappropriate for particular activities.[33] This literature constituted reference works for specialists. In Greece there were "sacrificial calendars" in the form of inscriptions, open to the public, which documented which groups were financially responsible for which cults.[34] These were lists of festivals which documented obligations and contributions to the rituals of these days. They were not calendars. In contrast, at Rome a proper calendar text was published, with an overview of all the days of the years, which may have had the same form as can be found in the Late Republican wall calendar from Antium. The fact that the length of the months had been fixed and that the procedure for leap-years and months had been changed did not in itself require a written calendar. All the other users of conventional lunar months in the Mediterranean world managed without any such.

The Roman reform, however, went beyond what was customary in one respect. A continuous sequence of weeks was introduced, an uninterrupted eight-day rhythm which continued across the ends of months. Where this rhythm had previously been readjusted on the Calends and only continued from the Nones to the next Calends, a new system was made which corresponds more closely to our own present-day handling of weeks, or more precisely, the astrological and Judeo-Christian week

[30] See Humm, *Appius Claudius Caecus*, for details.

[31] See Françoise-Hélène Massa-Pairault, "Relations d'Appius Claudius Caecus avec l' Etrurie," in *Le censeur et les Samnites: sur Tite-Live, livre IX*, eds. Dominique Briquel and Jean-Paul Thuiller (Paris, 2001), pp. 97–116; see pp. 108–109 for the specific relationship with Ap. Claudius Caecus.

[32] Humm, *Appius Claudius Caecus*, p. 469.

[33] Christian Leitz, *Studien zur ägyptischen Astronomie* (Wiesbaden, 1989).

[34] Alfred North Whitehead, *Wie entsteht Religion?*, trans. Hans Günter Holl (Frankfurt am Main, 1986), pp. 185–208.

which we inherited from Rome in a form shortened by one day. As obvious as that may seem today, it must have been completely revolutionary in Rome at the end of the fourth century. Even the Greek calendars known to us used "weeks", but those were "decades" (periods of ten days) structured to give rhythm to social, political, and religious activities (although many such activities were only performed in the first decade). These were not, however, continuous. They started again at the beginning of each month, when necessary facilitated by the shortening of the last decade by one day in those months with twenty-nine days. On this point, Rome created a remarkable parallel to the Jewish Sabbath, developed during the Babylonian exile.[35]

Minority status and exile, however, were not exactly characteristic of the Roman situation. The newly established nine-day, or 'nundinal', rhythm was not determined by religion. The *nundinae* at the end of each nine-day period were primarily market days, when legal business could also be done.[36] If we are to search for a motive for the new convention, we must search in the area of the regulations of the public use of these days. What was essential to the Roman change was, in any case, that the new rhythm augmented rather than replaced the old. The old structure of monthly orienting days remained. The calendar of holidays was oriented to this structure, and this structure also determined the position of feasts and rituals.[37] The new system only had a minimal religious accent:

[35] This also was probably originally a holiday which was connected to lunar cycles, presumably the full moon and the new moon. Accordingly, an average of fourteen or fifteen days elapsed between such festivities. Only in the situation of Babylonian exile, in the sixth and fifth centuries BC did a continuous seven-day week arise out of the two-sabbaths per month. In the context of exile in Mesopotamia, as a minority, this regulation may have been aimed at constructing a strong identity as a religiously separate group. Even more than participating in particular feasts, the new structuring of everyday life must have had a distinguishing and alienating effect. This thesis is from Johannes Meinhold (1905) and is not uncontroversial. The counter-position is formulated by Andreasen (1972). See also Arnold and Daniel J. Lasker, "The Jewish Prayer for Rain in Babylonia," *Journal for the Study of Judaism in the Persian, Hellenistic and Roman Period* 15 (1984), 123–144; Bernard Goldstein and Alan Cooper, "The Festivals of Israel and Judah and the Literary History of the Pentateuch," *Journal of the American Oriental Society* 110 (1990), 20–21. On the presence of the Babylonian calendar in Egyptian Elephantine prior to the Jewish settlers, see Sascha Stern, "The Babylonian Calendar at Elephantine," *Zeitschrift für Papyrologie und Epigraphik* 130 (2000), 159–171. For the Jewish calendar in general, see Sacha Stern, *Calendar and Community: a History of the Jewish Calendar, second century BCE to tenth century CE* (Oxford, 2001).

[36] Macrobius, *Saturnalia* 1.16.28–30, quoting numerous earlier jurists.

[37] There lies the difference with the Jewish reform.

similarly to the routine rituals of the monthly structuring days, a ram was sacrificed to Jupiter in the Regia by the Flaminica Dialis, the wife of the priest of Jupiter.[38]

The apparent aim of the reform was thus the separation of social function from particular dates. We can, along with the Roman antiquarians, historians, and ethnographers like Licinianus Gracchanus, Varro, and Verrius Flaccus, assume that the monthly structuring days, as market days, brought together all manner of things. But we can also assume that, as early as the early Republican calendar, some functions were separated out. On the Nones the assembly was dominant and cult was lacking. The Ides were ruled by cult, and we have no evidence of political assemblies. The Tubilustrium, a week later, shows evidence of a two-day structure, with cult on the first day, the ninth day after the Ides, and the assembly postponed to the following day with the ominous letters *QRCF*. It was similar to the Calends.[39]

The reform completely removed the economic function of the market days from such complexities. Market day was market day, every eight days, regardless. Thus the structuring days and their rituals certainly lost something of their attraction and could only offer a different festival each. Sociologists would describe this as a process of differentiation: diverse social realms are assigned their own institutions. Rome at the end of the fourth century BC had become a major city. The decisive impulse may however have been political and should be seen in the context of the new definition of the patricio-plebeian nobility. Public space and public institutions were reassessed, and the rules of political and legal communication and decision were established or clarified. The attempt to separate politics, law, and religion from economic matters and from each other is part of this. It was not a matter of "secularisation". When religion was defined clearly in its boundaries and its relation to the gods, it offered quite new possibilities for legitimising political institutions from outside.[40] Religious specialists, recruited previously from among

[38] Macrobius, *Saturnalia* 1.16.30.

[39] To be precise, they were not made up of an assembly on the ninth day after the Tubilustria, but the assembly actually took place on the tenth. We do not know which ritual acts attached it to the previous, ninth day. We can see very well, however, in the densely commentated calendar of the *Fasti Praenestini*, that Caesar, when extending the months to their presently conventional lengths, did not insert the extra days between this ninth day and the Calends, at the end of the month, but rather directly before each last day of the month. The cultic connection between the end of the month (the ninth day) and the Calends thus remained undisrupted.

[40] See Jörg Rüpke, *The Religion of the Romans: An Introduction*, trans. Richard Gordon (Oxford, 2007).

the patricians only, now had more limited privileges, and their positions were integrated into the new nobility.[41] The year 300 BC saw the passing of an "Ogulnian plebiscite" which opened the priesthoods to the plebs as well.[42]

The juxtaposition of both calendar systems required written representation. The new nundinal system had to be derivable from the old structure. Accordingly, repetitive symbols form the framework for the entire representation of the calendar, as illustrated by the pre-Julian calendar from Latin Antium. At the beginning of the line for each day there is a letter which appears in the repeating sequence A, B, C, D, E, F, G and H. The eight-day Roman week, continuing across monthly and yearly boundaries, is characterised by these nundinal letters. The days of the week do not have names but are defined only by the *nundinae*, the market days repeating every eight days (in Roman terms, counting both the first and the last date inclusively makes nine). A new letter each year corresponded to the *nundinae*, so that a calendar could be used for several years. The letter marked the *nundinae* throughout the year, much like Sundays are often shaded in a different colour in today's calendars, but changed at the end of the year, as the dates of Sunday will change from year to year in our calendar.

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[41] The comparison with the Jewish developments is revealing. In both Mesopotamia and Rome, it was a prohibition, a radical separation in the social use of time which was the common motive for the (from a contemporary perspective) revolutionary introduction of contiguous weeks. In the one case, priestly groups, under the banner of religion, won for themselves a decisive position, in spite of the loss of their basis in the Temple in Jerusalem. In the other case, as well, the position of the priests was newly defined, but under a different banner.

[42] Ap. Claudius is given an opposing speech by Livy (10.7.1) and used by Cicero as a model of outdated conservatism; thus, David Christenson, "Unbearding Morality: Appearance and Persuasion in 'Pro Caelio,'" *Classical Journal* 100 (2004), 63. The latter might have influenced the former invention. If the authenticity of an opposition towards the plebiscite is assumed (despite the anachronistic supposition of late Republican issues by Livy, thus Rüpke, *Kalender und Öffentlichkeit*, p. 248, n. 15; see e.g. Joseph Georg Wolf, *Die literarische Überlieferung der Publikation der Fasten und Legisaktionen durch Gnaeus Flavius* (Göttingen, 1980), p. 17, n. 30), this might either be related to an opposition against specific individuals (who were to become members of the colleges of the augurs and pontiffs as a consequence) rather than plebeians as such (see Humm, *Appius Claudius Caecus*, pp. 117–121) or it is to be understood as opposition against a conservative pontifical position of securing specific prerogatives and functions (as knowing about the *fasti*) which would be strengthened by a broader patricio-plebeian basis (see Federico d'Ippolito, "Das ius Flavianum und die lex Ogulnia," *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte, romanistische Abteilung* 102 (1985), 91–128 and id., *Giuristi e sapienti in Roma arcaica* (Roma, 1986), pp. 71–103; cf. Filippo Cassola, *I gruppi politici romani nell III secolo A.C.* (Trieste, 1962), pp. 128–137).

5. *Calendar and Law*

The image of Gnaeus Flavius painted so far does not quite correspond to the evaluation in Roman tradition. Apparently he was accused by some contemporary politicians as well as by some later authors of having committed treason by publishing the calendar and thus breaking the monopoly of this knowledge so far held by the pontiffs.[43] Livy, the canonical teller of Roman history, narrates the story like this:

> In the same year, Cn. Flavius, the son of Gnaeus, a scribe and from humble origins—his father was a freedman—, but otherwise an intelligent and eloquent man, was elected as curule aedile … He made the civil law, stored in the arcanum of the pontiffs, common knowledge and set up calendars of juridical days around the forum on a whiteboard, in order to make anyone know when he could bring an action.[44]

What had happened? The Romans saw the foundation of their civil and penal law in the Laws of the Twelve Tables which were supposed to have been written down in the middle of the fifth century BC. We do not know exactly how the codification of Roman law into the form of the Twelve Tables had happened. The known fragments of this fundamental text of Roman legal history come from commentaries from the early second century BC, but it is not known how much authenticity can be ascribed to the texts they used.[45] Possibly the texts of the Twelve Tables only took on their final form in this period. Pomponius, an imperial lawyer, recounts the story in his *Handbook* thus:

> After that, to put an end to this state of affairs, it was decided that there be appointed, on the authority of the people, a commission of ten men by whom were to be studied the laws of the Greek city-states and by whom their own city was to be endowed with laws. They wrote out the laws in full on ivory tablets and put the tablets together in front of the *rostra*, to

[43] See Cicero, *Ad Atticum* 6.1.8 and in particular Cicero, *Pro Murena* 25, also Pliny the Elder, *Naturalis historia* 33.17 and Pomponius, *Digesta* 1.2.2.7 (*subreptum*); Livy, *Ab urbe condita* 9.46.1–6 (followed by Valerius Maximus, *Facta et dicta memorabilia* 2.5.2 and Macrobius, *Saturnalia* 1.15.9). Critically against the notion of 'monopoly' Jan Hendrik Valgaeren, "The Jurisdiction of the Pontiffs at the End of the Fourth Century BC," in this book, who, however, does not point to any evidence against a monopoly in calendarical definitions.

[44] Livy, *Ab urbe condita* 9.46.1–6: … (5) *civile ius, repositum in penetralibus pontificum, evolgavit fastosque circa forum in albo proposuit, ut, quando lege agi posset, sciretur*. My translation.

[45] Arguments, but no full line of argumentation against the historicity of the Twelve Tables can be found in Marie Theres Fögen, *Römische Rechtsgeschichten: über Ursprung und Evolution eines sozialen Systems* (Göttingen, 2002).

> make the laws all the more open to inspection. They were given during that year sovereign right in the *civitas*, to enable them to correct the laws, if there should be a need for that, and to interpret them without liability to any appeal such as lay from the rest of the magistracy. They themselves discovered a deficiency in that first batch of laws, and accordingly, they added two tablets to the original set. It was from this addition that the laws of the Twelve Tables got their name. Some writers have reported that the man behind the enactment of these laws by the Ten Men was one Hermodorus from Ephesus, who was then in exile in Italy.[46]

Both stories are well known—because they are stories. Whereas the first directly relates to the juridical calendar, the second does not speak about it, but only about the Twelve Tables. And yet, at least for Cicero, both stories were related. He could not imagine that the publication of the basic laws did not entail the publication of the calendar, and he is so sure that he rather doubts the priority of Flavius.[47] The enactment of Roman law was in need of time in the calendar.

An important element in legal practice, even before Flavius, was definitely the legal actions. These played a decisive role in the initiation of a trial. The actual trial only began when the object of dispute, whether that was property or an obligation to make compensation on the part of an individual, had been clearly defined and accepted by both parties. For this proceeding, formulae had been developed which gradually became more and more finely differentiated. Gaius records a formula for such a proceeding in his legal textbook from the second century AD, for the case of a *legis actio sacramento in rem*, or "regarding property":

> If it was a real action, they vindicated before the court movable and living property, which could be carried or led into the court, in this way. The claimant would hold a rod; then he would take hold of the actual property, for instance a slave and say: "I declare that this slave is mine by Quirite right in accordance with my case. As I have spoken, see, I have imposed the claim", and at the same time he laid the rod on the slave. His opponent likewise said and did the same. When each of them had made his claim the praetor would say: "Both of you let go the slave." They then let go of him. The first claimant would then say. "Inasmuch as you have claimed wrongfully, I challenge you on oath for five hundred "asses"." His opponent then said likewise: "And I you." If the property was worth less than a thousand "asses", the sworn penalty that they named would be for fifty.[48]

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[46] Pomponius, *Digesta* 1.2.2.4, translation by D.N. MacCormick in *The Digest of Justinian*, ed. A. Watson (Philadelphia, 1985).

[47] Cicero, *Ad Atticum* 6.1.8 and 18.

[48] Gaius, *Institutiones* 4.16; translated by W.M. Gordon and O.F. Robinson, *The Institutes of Gaius* (London, 1988).

This somewhat peculiar procedure came to an end when the sum in question was deposited with the pontiff. It was clear that one or both parties had sworn an oath, and that the oath was to be kept before the gods. For that purpose, the sums originally deposited were made available and the winner of the proceedings got his 'bet' back.

It was the pontiffs who at the end of the fourth century administrated these formulae and who prepared them for legal proceedings.[49] They were also the ones who determined the correct time for proceedings to be opened. Constructing legal proceedings around a conscious oath, the *sacramentum*, did allow for a procedure based on argumentation and evidence within that framework. At the same time, however, such a framework was precarious from a religious perspective, because it had to be coordinated with other religious dates, especially holidays. This was the second task of the pontiff, namely determining the days on which legal proceedings of this kind could be carried out.

Flavius intervened on both points, publishing the formulae, the *legis actiones*, as well as the *fasti*, the calendar consisting of a "list of days, or *fas*, appropriate for the opening of legal proceedings".[50] Cicero sees this publication as the result of Flavius having peeked at the documents of the pontiffs and memorised them clandestinely.[51] This is a manifestation of his historical imagination, not of his historical sense of reality.

In the context of the waning fourth century, a calendar reform must have been supported by a broad consensus among the nobility. The specifics of the decision-making process are not known to us. We know neither the pace nor the sequence with which particular elements were decided. It is highly probable that the point of departure was located in the intercalation, the rules for the leap-years and the number of days involved. Regulation of the market days was probably part of the same package, as one did not revolutionise the calendar every other year. With that regulation, however, enscripturation and publication of the calendar became unavoidable. If, however, there was some idea about a clear differentiation of social uses of time behind the separation of market days (*nundinae*) and monthly structuring days, it would have been worthwhile including just that in the representation of the calendar. One cannot

[49] For the fourth century, I follow Olga Tellegen-Couperus, "Pontiff, praetor, and iurisdictio in the Roman Republic", *Tijdschrift voor Rechtsgeschiedenis* 74 (2006), 31–44 in attributing *iurisdictio* to the pontiffs.

[50] *Dies nefasti*, accordingly, are days inappropriate for these procedures.

[51] Cicero, *Pro Murena* 25.

speak of absolute necessity at any point in this chain, and each point may have been coloured by conflicts of detail. The linking of an individual name with the publication of the *fasti* indicates that there was indeed a situation of conflict, but that is no reason to see Flavius' action either as the criminal behaviour of an individual or as a pontifical conjuration. Publication was part of the logic of the calendar reform.

Even the connection to Appius Claudius[52] (who later went blind and was given the nickname "Caecus") shows how grounded Flavius was. Claudius had been censor in 312 BC and thus had supervised the composition of the citizenry just as much as that of the Senate. Even if his expansion of the social groups represented in the Senate was rejected[53] he was equally successful in his reform of the voting units of Roman citizens, known as *tribus*. Apparently, he was aiming for a broad representation of the new nobility as well as of the expanded population in the central political committees. In sacred matters, he transferred the cult of Hercules, which had previously been maintained by specific families at the Ara maxima, an altar in the Forum Boarium, to publicly-owned slaves. Himself a priest, his resistance to the Ogulnia plebiscite on the expansion of the priesthoods, if historical, was not concerned with the defence of pontifical or patrician special interests.[54] His political orientation was more towards the impairment of secondary centres of religious power which would be in concurrence with the patricio-plebeian magistrates forming the senate. Flavius' publication fits in here. Publication was, furthermore, also to the personal liking of Claudius: he was the first to disseminate his political speeches and views in written form, probably the first Roman prose, perhaps even poetic author.[55] Another hundred years would pass before that became truly fashionable.

Flavius'—to stay with the individualized version of annalistic historiography—publication was simply the last step in a more significant process, that of enscripturation of the calendar. Regulations, which had so far

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[52] For Appius, see the comprehensive discussion of earlier research in Humm, *Appius Claudius Caecus*.

[53] For the date of the reform, probably 311 rather than 312, see John D. Muccigrosso, "The Brindisi 'Elogium' and the Rejected 'Lectio Senatus' of Appius Claudius Caecus," *Historia* 52 (2003), 496–501.

[54] See above, p. 98.

[55] Emmanuel Dupraz, "Appius Claudius Caecus comme fondateur de la littérature latine," in *Commencer et finir: débuts et fins dans les littératures grecque, latine et néolatine*, eds. B. Bureau and Ch. Nicolas (Paris, 2008), pp. 21–42.

been occasional decisions or derived from various other rules, were—this is my claim—summarized in the form of a table. That excluded footnotes and included abbreviations. Essential information was to be recorded with a minimum of different short forms.

The name which was given to the calendar—*fasti*—reveals something essential. Almost every day was categorised as either *Nefas* or *Fas*, and was marked with an N or an F. A day marked as N for *Nefas* was not available for initiating legal proceedings nor for decision-making assemblies of the people. If, on such a day, a Praetor accidentally started a trial with the formula *do, dico, addico* (I give, I say, I confirm) he was at fault, even though the trial itself was not invalidated. A similar lapse was ascribed to an official who led an assembly. The decision of the assembly was thus made vulnerable, even if it was not formally invalidated, and interestingly this case is not discussed in the antiquarian sources.

The days categorised as N also have sub-categories. The most important of these were the N holidays, marked as NP, which constituted proper *feriae*. The P stood for the word *piaculum*, or 'atoning sacrifice', which had to be offered if the official accidentally transgressed the prohibitions for that day. A deliberate transgression could not be atoned.[56] A few other days were designated EN. This stands for *Endoitio Exitio Nefas* and means that the day concerned was only Nefas in the evening and morning, but not for the main part of the day. Complicated and protracted cultic acts are the background here.[57] The finer details of pontifical considerations about the co-occurrence of oaths in legal actions and public sacrifices are revealed here, as is the loss of information resulting from condensation into table format and the use of abbreviations. Other cases could not be grouped in categories. Formulae like *Quando rex comitiavit Fas* ('as soon as the Rex sacrorum opens the Comitium Fas'), or *Quando stercus delatum Fas* ('as soon as the manure has been removed, Fas') suggest further ritual details which remain beyond our ken. In the latter case, at least, some connection to the cleaning of the temple of Vesta in the middle of June can be found.

[56] Varro, *De lingua Latina* 6.30 and 53. See on this text, Olga Tellegen-Couperus, below, pp. 158–160.

[57] Varro, ibid. 6.31; Ovid, *Fasti* 1.49–52.

6. *Tricking Time*

In some cases, the *Fasti* went too far in their systematization of time. This held especially true for the political consequences of the *Fas* regulations. The conflict, that became notorious, probably arose from the decision to classify the *nundinae*, the market days, as *nefas*.[58] This decision makes sense if the classification was done in analogy to the monthly structuring days. There was a sacrifice to Jupiter, comparable to that which took place on the Ides. On both the Tubilustria and the Calends, assemblies were very restricted or held on a second day. These factors all point toward an established status before the reform that was comparable to *nefas* rather than *fas*. In the systematized form of the *fas-nefas*-classification the resulting limitations went too far, however. A market day like the Nundines was especially convenient for the population from the surrounding area to also do their legal business. Classifying these days as *fas* would, however, have allowed decision-making assemblies of the people to take place, too. This risk was considered too great. What was to be done?

The solution was found in an additional differentiation. As with other activities, there were also days considered especially appropriate for assemblies, known as assembly-days or *dies comitiales*. These constituted just one, although significant, portion of the *dies fasti*. By adopting the abbreviation C for the schedule of *fasti* (which made up the majority of the days) the problem of the *nundinae* could be solved. They were categorised as *dies fasti*, since this allowed legal actions to be initiated, but excluded the sitting of committees and decision-making assemblies of the people.

This new regulation is recorded in the *lex Hortensia*, the law of the people's tribune Hortensius, in 287 BC which also regulated another matter. The resolutions of assemblies led by the tribunes, who had once been the revolutionary defenders of the rights of the plebs, were given equal status to the proper assemblies led by consuls. Where is the connection? The formal equivalence of the plebeian *contiones* and the actual *comitia* granted the former a higher degree of legitimacy and commitment. Resolutions of the plebs were thus binding for the entire population, including patricians.[59] At the same time, this equality made the *concilia plebis*

[58] Macrobius, *Saturnalia* 1.16.28–30.

[59] Pliny the Elder, *Naturalis Historia* 16.37; Gellius, *Noctes Atticae* 15.27.4 (Laelius Felix).

(assembly of the plebs) subject to the same conditions as the *comitia*—they could only assemble on the days newly formulated in the calendar as *dies comitiales*, or assembly days, and no longer on the Nundines. Thus the spontaneity of the assemblies was lost, and this special tool of tribunician action was integrated into the framework of rules formulated for the regular *comitia*.[60]

The Hortensian law also warns, along with the divided days, against over-estimating the precision of calendrical regulations. The process of enscripturation is connected to increased generality. What appears as a highly accurate and precise system of classifying time, it seems, was often hardly more than an image of the complicated cultic, legal, and political reality, with an inadequately small number of abbreviations and symbols. At the same time, we must not forget that this small number of different classes of calendars also achieved a systematisation which developed its own effects and created new cultic, legal, and political realities.

7. *Conclusion*

I will try to summarize my findings. Based on a few late sources and the actual text of the first century Roman calendar, recent research has produced a fairly detailed image of the process that led to some important political and juridical structures of time that were valid in the late Republic. Spatially, temporally, procedurally, and personally, Roman law had elements or aspects of ritual. These informed—and were formed by—the observed processes of systematization and enscripturation that I take to be indicative of "rationalization". This process created differentiation and new interdependencies that could be described neither as secularization nor as sacralisation. Codification, of course, changed the role of the specialists. It did not necessarily diminish it. In the third century BC, a *pontifex maximus* publicly advertised legal counselling;[61]

[60] See Rüpke, *Kalender und Öffentlichkeit*, pp. 274–283 for an extensive account, contra Karl Joachim Hölkeskamp, "Das plebiscitum Ogulnium de sacerdotibus: Überlegungen zu Authentizität und Interpretation der livianischen Überlieferung," *Rheinisches Museum* 131 (1988), 51–67.

[61] Cicero, *Pro Murena* 28; Jörg Rüpke, *Fasti sacerdotum: Die Mitglieder der Priesterschaften und das sakrale Funktionspersonal römischer, griechischer, orientalischer und jüdisch-christlicher Kulte in der Stadt Rom von 300 v.Chr. bis 499 n.Chr.*, Potsdamer altertumswissenschaftliche Beiträge 12/1–3, (Wiesbaden, 2005), pp. 1489–1491.

in the second century, a law entrusted the pontiffs with new intricacies of the intercalation, as tradition has it.[62] Of course, today we have to challenge traditional narratives constantly—and our own assumptions.

[62] Macrobius, *Saturnalia* 1.13.21; Rüpke, *Kalender und Öffentlichkeit*, pp. 289–292.

THE JURISDICTION OF THE PONTIFFS AT THE END OF THE FOURTH CENTURY BC

Jan Hendrik Valgaeren

1. *Introduction*

In modern literature, the publication in 304 BC of the *legis actiones* and the *dies fasti* by Gnaeus Flavius is often used as evidence that, at the end of the fourth century BC, the pontiffs lost their monopolistic control of civil law.[1] Until then, only the pontiffs as supervisors of litigation had had a—jealously guarded—knowledge of the *legis actiones* and the *dies fasti*. According to some authors, the publication marked the beginning of the secularization of Roman civil law; others explained the publication in the context of the factional politics that divided Rome by the end of the fourth century BC. In this connection, some authors also referred to the *lex Ogulnia* of 300 BC that opened the pontificate and the augurate to the plebeians.[2]

In my view, considerable confusion has been caused by the use of the term 'monopoly'. It is not clear what, in this connection, is meant by this term, why it was broken, and how. In the following, I shall use the publication of the *legis actiones* and *dies fasti* by Flavius in order to argue that the pontiffs did not have a monopoly, that it was not broken, and that the publication of the *legis actiones* and the *dies fasti* was only a matter of modernization of public life that took place at the end of the fourth century BC. Moreover, I shall argue that the clauses of the *lex Ogulnia* support my view that the pontiffs continued to be supervisors of litigation.

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[1] See, for instance, Gary Forsythe, *A Critical History of Early Rome. From Prehistory to the First Punic War* (Berkeley-Los Angeles-London, 2005), p. 320. According to most Romanists, the pontiffs already lost their monopoly in 367 BC, when an urban praetor was set up underneath the consuls to relieve them from civil jurisdiction. See Jacques Heurgon, *The Rise of Rome, to 264 B.C.*, trans. James Wills (London, 1973), p. 186. In the same vein: Franz Wieacker, *Römische Rechtsgeschichte*, 2 vols. (Munich, 1988), 1:429–430.

[2] For an overview, see Federico D'Ippolito, "Das Ius Flavianum und die Lex Ogulnia," *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte, romanistische Abteilung* 102 (1985), 92–128.

First, I shall deal with the publication of the *legis actiones* and *dies fasti* by Flavius; then, I shall focus on the *Lex Ogulnia* and its connection with the publication by Flavius.

2. *The Publication of the* Legis Actiones *and* Dies Fasti *by Gnaeus Flavius*

2.1. *Sources*

Nine sources inform us on the publication by Flavius, but they differ as to what Flavius actually published. Some relate that Flavius published the *legis actiones*.[3] According to other sources, Flavius published the *dies fasti*.[4] Again other sources tell us that Flavius published both the *legis actiones* and the *dies fasti*.[5] The most reliable source seems to be a letter written by Cicero to his friend T. Pomponius Atticus. In this letter of 22 February 50 BC, Cicero refers to a question Atticus had asked in one of his previous letters, insinuating that Flavius lived in the fifth century BC. Cicero's answer runs as follows:

> Cicero, *Ad Atticum* 6.1.8.:[6]
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> *E quibus unum ἱστορικὸν requiris de Cn. Flavio, Anni filio. Ille vero ante decemviros non fuit, quippe qui aedilis curulis fuerit, qui magistratus multis annis post decemviros institutus est. Quid ergo profecit, quod protulit fastos? Occultatam putant quodam tempore istam tabulam, ut dies agendi peterentur a paucis; nec vero pauci sunt auctores Cn. Flavium scribam fastos protulisse actionesque composuisse, ne me hoc vel potius Africanum (is enim loquitur) commentum putes.*
>
> You raise a historical query in one of them concerning Cn. Flavius, son of Annius. He did not live before the Decemvirs, for he became Curule Aedile, an office created long after their time. So what did he achieve by publishing the *fasti*? The answer is that at one time the list is supposed to have been kept a secret so that business days could only be known by application to a few persons. There are plenty of authorities for

[3] Cicero, *De oratore* 1.186; Pomponius, *Digesta* 1.2.2.7.

[4] Cicero, *Pro Murena* 25; Pliny the Elder, *Naturalis Historia* 33.17–18; Macrobius, *Saturnalia* 1.15.9.

[5] Cicero, *Ad Atticum* 6.1.8; Valerius Maximus, *Facta et dicta memorabilia* 2.5.2; Livy, *Ab urbe condita* 9.46.1–6.

[6] Text and translation by David Roy Shackleton Bailey, *Cicero, Letters to Atticus*, Loeb Classical Library (London-Cambridge, Mass., 1999), pp. 114–115.

> the statement that Cn. Flavius the Secretary published the *fasti* and drew up a list of the *formulae* of judicial procedure, so you need not think that I, or rather Africanus[7] since he is talking, made this up.

On the basis of this letter, it is now generally assumed that Flavius published both the *dies fasti* and the *legis actiones* and not only one or the other of them.[8] What this letter and the other sources do not tell is just what it was that Flavius actually published. Yet, that information may help us to understand the effects of the publication of the *legis actiones* and *dies fasti* by Flavius.

Knowledge of the *legis actiones* became available only in 1816, when the *Institutes* of the classical jurist Gaius (second century AD) were discovered by Niebuhr.[9] According to Gaius, the *legis actiones* (literally the actions based on the law), were oral formulas that were used to start a private lawsuit.[10] There were only four *legis actiones* in Flavius' days. A fifth one was added in the third century BC. The *legis actio* procedure was the oldest procedure for civil law claims. It consisted of two phases: the first phase took place before the pontiff and the second one before a *iudex*. The plaintiff set the proceeding in motion by pronouncing his claim in a set form of words prescribed for the case in question. The defendant, then, had to reply also in prescribed phrases, and, finally, the pontiff intervened, again by means of specific formulas so the case might be sent for trial before the *iudex*. The judge, who was a private citizen appointed

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[7] Publius Cornelius Aemilianus Scipio Africanus. Cicero corresponds with Atticus about his new book *De republica*, in the form of a dialogue between several famous persons like Rutilius Rufus, Tubero, Mucius Scaevola and Scipio Africanus. Unfortunately, the passage of *De republica* in which Atticus is mentioned is lost. See P.G. Walsh, *Cicero, Selected Letters* (Oxford, 2008), p. 313.

[8] Thus, for instance, Richard E. Mitchell, "Roman History, Roman Law, and Roman Priests: The Common Ground," *University of Illinois Law Review* 62 (1984), 553; Alan Watson, *International Law in Archaic Rome: War and Religion* (Baltimore-London, 1993), p. 83; Michel Humm, *Appius Claudius Caecus, La République accomplie* (Rome, 2005), p. 45; Michael C. Alexander, "Law in the Roman Republic," in *A Companion to the Roman Republic*, eds. Nathan Stewart Rosenstein and Robert Morstein-Marx (Oxford, 2006), p. 240.

[9] Wieacker, *Römische Rechtsgeschichte*, 1: 255–257, 296, and 435–437.

[10] Gaius, *Institutes* 4.10–30. The *legis actio* procedure was rather formalistic: in Gaius, *Institutes* 4.11, Gaius tells the story of a man who lost his case because he used the word 'vines' in a *legis actio* procedure. He ought to have used the word 'trees', because the Twelve Tables under which the action for cutting down vines was available spoke in general terms about cutting down trees.

by both the pontiff and the parties, pronounced the judgment.[11] In the late Republic, the pontiff's duties were entrusted to a magistrate, usually the praetor.[12]

The *dies fasti* were also relevant for civil procedure. Our knowledge of them is even more recent than our knowledge of the *legis actiones*. In 1915 several fragments of the only pre-Julian calendar, the so-called *fasti* of Antium (ca. 60 BC) were discovered at the site of Nero's villa in modern Anzio (province of Lazio). Other calendars, of which the *fasti Praenestini* (ca. AD 8) must have been the largest, date from the time of Augustus and Tiberius. Altogether, more than forty calendars survive, some almost complete, others only in fragments.[13] The calendar of Antium indicated among other things the *dies fasti* and the *dies nefasti*.

Courts of law could only be held on specific days, *dies fasti*. No legal activities were allowed on the *dies nefasti*, which were considered to be inappropriate for these procedures.[14] It was one of the pontiffs' duties to determine which days would be *fasti* and which ones *nefasti*. People who had a legal problem and wanted to start a civil procedure relied on the pontiffs to tell them when this procedure could take place. The publication of the *dies fasti* and *legis actiones* by Flavius made citizens less dependent on the pontiffs.

2.2. *Modern Interpretation of the Sources*

Several questions regarding the publication of the *legis actiones* and *dies fasti* by Flavius have been discussed by modern scholars. It has been asked, first of all, just how Flavius was able to gather the information necessary to compile and publish the *legis actiones* and *dies fasti*.[15] Perhaps Flavius was *scriba* to Appius Claudius who may have been a

[11] Max Kaser and Karl Hackl, *Das römische Zivilprozessrecht*, 2nd ed. (Munich, 1996), p. 40.

[12] Luigi Capogrossi Colognesi, *Diritto e potere nella storia di Roma* (Naples, 2007), pp. 119–121.

[13] Encrica Sciarrino, "A Temple for the Professional Muse: The *Aedes Herculis Musarum* and Cultural Shifts in Second-Century BC Rome," in *Rituals in Ink: a conference on Religion and Literary Production*, eds. Alessandro Barchiesi, Jörg Rüpke, and Susan Stephens (Stuttgart, 2004), p. 33.

[14] Simon R.F. Price and Alexander Hugh McDonald, "Fasti," in *The Oxford Classical Dictionary*, eds. Simon Hornblower and Antony Spawforth, 3rd ed. (Oxford-New York, 2003), p. 588; Jörg Rüpke, *The Roman Calendar from Numa to Constantine: Time, History, and the Fasti*, trans. David M.B. Richardson (Oxford, 2011), pp. 46–52.

[15] Less important questions are whether Flavius published the *legis actiones* and *dies*

pontiff;[16] or maybe Flavius himself was a *scriba pontificus*, i.e., a *pontifex minor*?[17] In either case, Flavius would have had direct access to the *legis actiones* and the *dies fasti*. However, the sources do not say that Appius or Flavius held the office of pontiff.[18] Therefore, Flavius' ability to publish the *legis actiones* and the *dies fasti* must be explained in another way.

Draper has suggested that the *legis actiones* and *dies fasti* could only have been published with the help of the pontiffs.[19] His argument *e silentio* is that no attempt of the pontiffs to keep Flavius from publishing the *legis actiones* can be found in the sources. Could it be that the publication of the *legis actiones* and *dies fasti* was deliberately planned by the pontiffs? This brings us to the second question regarding the publication by Flavius: why *did* he publish the *legis actiones* and *dies fasti*?

Although the sources do not give a reason for Flavius' activities, at least three explanations have been put forward. Almost thirty years ago, two scholars independently put the problem in a political and socio-economic context.

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fasti before or after he became *curule aedile* and whether Flavius was a clerk of Appius Claudius or not. Because the sources are conflicting, it is not possible to answer these questions.

[16] D'Ippolito, "Das Ius Flavianum und die Lex Ogulnia," pp. 97–100; Jörg Rüpke, *Fasti Sacerdotum, Die Mitglieder der Priesterschaften und das sakrale Funktionspersonal römischer, griechischer, orientalischer und jüdisch-christlicher Kulte in der Stadt Rom von 300 v. Chr. bis 499 n. Chr.*, 3 vols. (Munich, 2005), 1:50.

[17] Ettore Pais, *Richerche sulla storia e sul diritto publico di Roma* (Rome, 1915–1918), pp. 221–222; Wolfgang Kunkel, *Römische Rechtsgeschichte*, 5th ed. (Cologne, 1967), p. 46; Richard E. Mitchell, *Patricians and Plebeians. The Origin of the Roman State* (New York-London, 1990), p. 233; Rüpke, *Fasti Sacerdotum*, p. 50, Jörg Rüpke, "Rationalizing Religious Practices: the Pontifical Calendar and the Law," in this volume, p. 95.

[18] Regarding Flavius, I follow Schulz and Humm. Fritz Schulz, *History of Roman Legal Science* (1946; repr. Oxford, 1963), p. 10; Humm, *Appius Claudius Caecus*, p. 445. Contra, Rüpke "Rationalizing Religious Practices," p. 95. Regarding Appius, I follow Richard Draper, *The Role of the Pontifex Maximus and its Influence in Roman Religion and Politics* (Brigham, 1998), p. 201; Schulz, *Roman Legal Science*, p. 10; Richard A. Bauman, *Lawyers in Roman Republican Politics. A Study of the Roman Jurists in their Political Setting, 316–82 BC* (Munich, 1983), pp. 48–49 and 72; Humm, *Appius Claudius Caecus*, p. 445. Appius was the first person in Roman history about whom a great deal is known. See T.P. Wiseman, *Clio's Cosmetics: Three Studies in Greco-Roman Literature* (Leicester, 1979), pp. 85–88. If Appius Claudius really had been a pontiff, the sources would probably have mentioned it. Even the most relevant source for the life of Appius Claudius, his *Elogium* (*C.I.L.*, I.1^2, p. 192; Attilio Degrassi, *Inscriptiones Italiae* (Rome, 1963), n. 12 and 79; Hermann Dessau, *Inscriptiones Latinae Selectae*, 3rd ed., 3 vols. (1892–1914; repr. Berlin, 1962–1974) nr. 54) which lists all his offices, does not mention the office of pontiff.

[19] Draper, *The Role of the Pontifex Maximus*, p. 203.

Bauman describes Appius Claudius as 'a patrician at odds with his peers but no friend of the plebeian nobility'.[20] At the end of the fourth century BC, Appius Claudius' political group—his *factio*—to which Flavius belonged, wanted to gain power. They were primarily interested in commerce and wanted to revise the archaic and formal *ius civile*.[21] Bauman argues that the pontiffs were involved in this process and that they wanted to safeguard their position as guardians of the *ius civile*.[22] He assumes that the publication of the *legis actiones* and *dies fasti* by Flavius was not meant to break the pontifical monopoly but that that came about incidentally.

D'Ippolito likewise places the problem in a socio-political and cultural context. He argues that Appius' political group wanted to abolish the monopolistic jurisdiction of the pontiffs and introduce a secular legal science, together with other cultural changes.[23] In D'Ippolito's opinion, Appius was the driving force behind Flavius' activities and he must have known that the publication would weaken the pontiffs' position. D'Ippolito concludes that Appius deliberately provoked the pontiffs because of his anti-pontifical political program.[24]

More recently, a different explanation has been offered by Alexander. In his view, the publication originated in the new economic situation after the end of the second Samnite war (326–304 BC), when Rome had more than doubled its territory. Roman citizens who lived far away and had to travel to Rome to attend legal business did not want to discover that a series of *dies nefasti* rendered their trip useless.[25] Therefore the *dies fasti* and, less importantly, the *legis actiones* were published by Gnaeus Flavius.

A third and different reason has been offered by Rüpke and Humm.[26] They argue that, after the Romans had introduced the solar calendar, they realized that it was incompatible with the lunar calendars of the surrounding peoples. Therefore the Romans also introduced the same calendar to their Latin allies with the purpose of obliging them "to march

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[20] Bauman, *Lawyers*, p. 21.
[21] Bauman, *Lawyers*, pp. 32–44.
[22] Bauman, *Lawyers*, pp. 28, 40, and 43.
[23] D'Ippolito, "Das Ius Flavianum und die Lex Ogulnia," p. 109, p. 111. One of the other cultural changes was the reform of the alphabet.
[24] D'Ippolito, "Das Ius Flavianum und die Lex Ogulnia," p. 110.
[25] Alexander, "Law in the Roman Republic," p. 240.
[26] Humm, *Appius Claudius Caecus*, pp. 465–480; Rüpke, "Rationalizing Religious Practices," pp. 89–93.

to the beat of a new drummer" and in that way, to coordinate military operations according to the Roman calendar.[27] Publication of the *legis actiones* and *dies fasti* was part of the logic of the calendar reform, and Flavius' activities were simply the last steps in a more significant process, that of writing down the calendar.[28]

In my view, the explanation offered by Bauman and D'Ippolito is least convincing. Their reconstruction of the factional politics for the years 304–300 BC is rather hypothetical and the whole approach is simply out-of-date.[29] Moreover, the sources do not mention any attempt of Appius Claudius to revise, update, or secularize the *ius civile* and, after the publication by Flavius, the *ius civile* remained as formal and archaic as it had been before.

Alexander's explanation is more convincing: the economic situation may have been one reason for publishing the *dies fasti* and, in their wake, the *legis actiones*. As argued, the population of the Roman territory increased rapidly and the economy was booming after the Latin (340–388 BC) and the two Samnite wars (343/341 and 326/304 BC). New public works were constructed: the first Roman aqueduct (the Appia) and the first main road (the Via Appia) from Rome to Campania.

Finally, Rüpke's and Humm's explanation links up well with that offered by Alexander. It is even more convincing because it puts the publication of the *legis actiones* and *dies fasti* by Flavius in a broader context, that of the change from a lunar to a solar calendar and the ensuing need to publish it.

2.3. *The Consequences of the Publication of the* Legis Actiones *and* Dies Fasti *for the Jurisdiction of the Pontiffs*

If it can be assumed that Flavius published the *dies fasti* and *legis actiones* as a consequence of the introduction of a solar calendar, the question remains whether this publication affected the position of the pontiffs as supervisors of civil procedure. As far as the *legis actiones* are concerned, the position of the pontiffs did not change. The *legis actiones* had never

[27] Rüpke, "Rationalizing Religious Practices," p. 94.
[28] Rüpke, "Rationalizing Religious Practices," p. 100.
[29] The subject is hotly debated. Forsythe, *Early Rome*, p. 322: "Attempting to reconstruct the factional politics for the years 304–300 BC has as much chance of succeeding as attempting an accurate and detailed account of the military events of the Second Samnite War."

previously been a secret.[30] The actual wordings could be learned and written down by any Roman citizen attending court sessions.[31] Therefore, their publication did not change civil procedure nor the position of the pontiffs as being responsible for the first phase of this procedure.

On the other hand, the publication of the *dies fasti* may have been more significant. Hitherto, it must have been very difficult to know which days would be *fasti* and which ones *nefasti*. Publication of the *dies fasti* meant that the dates on which a case could be brought to court were now publicly known.[32] As a result, people could now more easily undertake legal actions. This development may have even resulted in an increase in the number of lawsuits. It did not change the position of the pontiffs who were responsible for these lawsuits, and it will not have made them any less important, on the contrary.

Now it also becomes clear that the term 'monopoly' is inappropriate for use in connection with the pontiffs. It is a term used in commerce to indicate a complete control of something, especially an area of business, so that others have no share. In the Roman sources, it is only used in the sense of having the exclusive right to trade.[33] Supervising litigation belonged to the duties of the pontiffs; around 200 BC, they were probably taken over by the praetor. So far, no one has ever accused the praetor of having been a monopolist in jurisdiction. My conclusion is that there is no reason to assume that the pontifical monopoly on jurisdiction ended at the end of the fourth century BC: they did not have a monopoly and so they could not lose it. They continued to supervise litigation as they had done before.

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[30] Some scholars argue the opposite on the basis of Livy's words: *civile ius, repositum in penetralibus pontificum* (9.46.5). They believe that the *legis actiones* and the *dies fasti* were real secrets. For instance, Alan Watson, *The State, Law and Religion. Pagan Rome* (Athens, Georgia-London, 1992), p. 83; Claudia Moatti, "Experts, mémoire et pouvoir à Rome à la fin de la République," *Revue Historique* 2 (2003), 303–325, 309.

[31] Schulz, *Roman Legal Science*, p. 10.

[32] Agnes Kirsopp Michels, *The Calendar of the Roman Republic* (1967; repr. Princeton, 1978), p. 110. Michels believes that the publication of the *legis actiones* and *dies fasti* by Flavius was a considerable improvement on the calendar published in the Laws of the Twelve Tables. However, I believe that Michels may well be mistaken because there is no indication that the Laws of the Twelve Tables contained a calendar with *dies fasti* and *nefasti*. See also Jörg Rüpke, *Kalender und Offentlichkeit: Die Geschichte der Repräsentation und religiösen Qualifikation von Zeit in Rome* (Berlin-New York, 1995), pp. 245–274; Humm, *Appius Claudius Caecus*, p. 456.

[33] In sources of Roman law, for instance, in Justinian, *Codex* 4.59.

3. *The Lex Ogulnia*

The *Lex Ogulnia*[34] which was passed in 300 BC raised the number of pontiffs and augurs and allowed plebeians to become members of these austere colleges. In my view, this law may support my theory that the publication of the *legis actiones* and *dies fasti* by Flavius did not end the so-called pontiffs' monopoly on jurisdiction.

3.1. *Sources*

The actual wording of the law is not preserved, and it is only known because Livy refers to it twice. For this paper, only the first reference is relevant. In the tenth book of his *Ab urbe condita*, Livy describes the events of the year 300 BC. He writes that the foreign relations of Rome were fairly peaceful. The Etruscans were kept quiet and the Samnites had not wearied as yet of a new covenant.[35] However, two plebeian tribunes, Quintus and Gnaeus Ogulnius stirred up a quarrel by proposing a new law.[36]

> Livy, *Ab urbe condita* 10.6.3–6:[37]
>
> *Tamen ne undique tranquillae res essent, certamen iniectum inter primores civitates, patricios plebeiosque, ab tribunis plebis Q. et Cn. Ogulniis.* [...] *Rogationem ergo promulgarunt ut, cum quattuor augures, quattuor pontifices ea tempestate essent placeretque augeri sacerdotum numerum, quattuor pontifices, quinque augures, de plebe omnes, adlegeruntur.*
>
> Nevertheless, that tranquility might not be found everywhere, the plebeian tribunes Quintus and Gnaeus Ogulnius stirred up a quarrel among the first men of the state, both patrician and plebeian. [...] The Ogulnii accordingly proposed a law that whereas there were then four augurs and four pontiffs and it was desired to augment the number of priests, four pontiffs and five augurs should be added, and should all be taken from the *plebs*.

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[34] This *lex* was actually a plebiscite, because it was proposed by plebeian tribunes. Other examples are the *Lex Canuleia* of 445 BC and the *Leges Liciniae Sextiae* of 367 BC. See Tim J. Cornell, *The Beginnings of Rome. Italy and Rome from the Bronze Age to the Punic Wars (c. 1000–264 BC)* (London, 1995), p. 344. Most scholars refer to it as the *Lex Ogulnia*, only S.P. Oakley, *A Commentary on Livy Books VI–X* (Oxford, 1997) calls it, correctly, the Ogulnian plebiscite.

[35] Livy, *Ab urbe condita* 10.6.2.

[36] On the *gens Ogulnia*, see D'Ippolito, "Das Ius Flavianum und die Lex Ogulnia," pp. 112–113.

[37] Text and translation by B.O. Foster, *Livy, History of Rome, Books VIII–X*, (Loeb Classical Library) 191 (1926; repr. London-Cambridge, Mass., 2006).

The content of the bill is clear. Firstly, the law was to raise the number of pontiffs from four to eight and the number of augurs from four to nine. Secondly, it would allow plebeians to become pontiffs and augurs. Livy explains the second provision of this bill in the context of the so-called Struggle of the Orders.[38] However, it is doubtful whether this explanation holds: it seems that, by 300 BC, the struggle between patrician and plebeian nobles was almost at its end and that it was useless to prevent plebeians from becoming pontiffs.[39]

For this paper, the first provision of the bill is particularly relevant. Livy does explain the increase in number of augurs from four to nine, but not the doubling of the number of pontiffs. He only writes that it was decided to augment the number of priests (*placeretque augeri sacerdotum numerum* 10.6.6).

3.2. *Modern Interpretation*

One of the few modern authors who have discussed the *Lex Ogulnia* is Federico D'Ippolito. In his view, the *Lex Ogulnia* was a reaction to the publication of the so-called *ius Flavianum* and the *dies fasti* by Flavius. D'Ippolito uses the term *ius Flavianum* as a synonym for *legis actiones*.[40] He thinks that the *Lex Ogulnia* was meant to stabilize the pontiffs' monopoly on jurisdiction and that it did not weaken the jurisdictional position of the pontiffs, but rather strengthened it.[41]

As he did for the publication of the *legis actiones* and *dies fasti* by Flavius, D'Ippolito bases his view of the *Lex Ogulnia* on a model of factional politics in the late fourth century BC. He thinks that Appius Claudius, by his radical reform, wanted to break the pontiffs' monopoly on jurisdiction. To achieve this, his straw man Gnaeus Flavius published the *legis actiones* and *dies fasti*. However, Appius' enemies, the Ogulnii prevented the pontiffs from losing their jurisdictional monopoly by voting a law which strengthened their position. The Ogulnian bill was supported by conservative members of the plebeian nobility. Livy mentions

[38] Livy, *Ab urbe condita* 10.6.9. Followed by Watson, *International Law in Archaic Rome*, p. 84; H.H. Scullard, *A History of the Roman World, 753 to 146 BC*, 4th ed. (1980, repr. London-New York, 2007), p. 398; Franco Vallocchia, *Collegi Sacerdotali ed Assemblee Populari nella Repubblica Romana* (Turin, 2008), p. 35.

[39] Thus Bauman, *Lawyers*, p. 36; Draper, *The Role of the Pontifex Maximus*, p. 205; Mitchell, *Patricians and Plebeians*, p. 233; Eric M. Orlin, *Temples, Religion and Politics in the Roman Republic* (Leiden, 1997), pp. 163–166.

[40] The term *Ius Flavianum* is only attested in Pomponius, *Digesta* 1.2.2.7.

[41] D'Ippolito, "Das Ius Flavianum und die Lex Ogulnia," p. 92, p. 126.

the names of the plebeians who became pontiffs and augurs as a result of the law.[42] According to D'Ippolito, they were the same persons who had supported the law. Of course, Appius Claudius voted against it, but in vain. D'Ippolito concludes that the *Lex Ogulnia* guaranteed the continuity of the pontiff's monopoly on jurisdiction for a hundred years.[43]

In my view, D'Ippolito's interpretation is not convincing. It is interesting that he has identified the plebeians, who, in 300 BC, were included in the pontifical college. However, his use of the word 'monopoly', in connection with the pontiff's jurisdiction and his explanation of the *Lex Ogulnia* in terms of the factional politics of the fourth century BC undermine his argument that the *Lex Ogulnia* strengthened the position of the pontiffs.[44]

3.3. *The Publication of the* Legis Actiones *and* Dies Fasti *by Flavius and the* Lex Ogulnia

Is there any connection between the *Lex Ogulnia* of 300 BC and the fact that, in 304 BC, Flavius had published the *dies fasti* and the *legis actiones*? If the publication by Flavius ended the pontiffs' monopoly on jurisdiction, as is argued by historians, why was it necessary to raise their numbers? As I have argued above, I think that the pontiffs did not have a monopoly and that the publication by Flavius did not decrease their importance: it at least stayed at the same level and it may have even increased—which, in my opinion, is more plausible. As a result of the publication in 304 BC—which was necessary because of the new economic situation and the increasing number of citizens in the late fourth century BC—more people were bringing cases to court.

An alternative explanation may be that the pontiffs became responsible for more religious tasks instead of jurisdictional tasks and that therefore their number was increased. Anyway, the small time interval between 304 and 300 BC suggests that there may have been a link between the publication of the *legis actiones* and *dies fasti* by Flavius and the *Lex Ogulnia*.

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[42] Livy, *Ab urbe condita* 10.9.2.: Pontiffs: Publius Decius Mus, Publius Sempronius Sophus, Gaius Marcius Rutulus, Marcus Livius Denter; Augurs: Gaius Genucius, Publius Aelius Paetus, Marcus Minucius Faesus, Gaius Marcius, Titus Publius.

[43] D'Ippolito, "Das Ius Flavianum und die Lex Ogulnia," p. 92, p. 126.

[44] As already argued, Roman factional politics is a subject which is of little concern, here. Forsythe, *Early Rome*, p. 323.

Unfortunately, it is impossible to find out how many of the eight pontiffs were involved in jurisdiction, because the only source which provides us with information on the topic is a passage of Pomponius, who described the situation following the publication of the Laws of the Twelve Tables (451 BC) until about a hundred years later, 367 BC.[45] According to Pomponius, one pontiff was appointed each year to supervise litigation. It is just possible that later, in the third century BC, two pontiffs were appointed for this purpose so that they could cope with the increasing number of lawsuits.

4. *Conclusion*

The publication by Gnaeus Flavius in 304 BC of both the *legis actiones* and the *dies fasti* may have been prompted by the doubling of Roman territory and the change from the lunar to the solar calendar in the fourth century. As a result, the Roman people now knew exactly on which days a case could be brought before court (*dies fasti*) and which words (*legis actiones*) had to be used. In my opinion, this may have led to an increase in the numbers of lawsuits. The fact that the *Lex Ogulnia* of 300 BC raised the number of pontiffs from four to eight seems to support this theory.

Therefore, there is no reason to assume that the pontiffs lost their 'monopoly' on jurisdiction at the end of the fourth century BC, as has been argued by many historians. Maybe the *Lex Ogulnia* changed the patricians' position in that the bill made it possible for plebeians also to become pontiffs, but it certainly did not end the pontiffs' role in supervising litigation. On the contrary, they were more involved in jurisdiction than ever before, which demonstrates the close connection between priests and law.

[45] Pomponius, *Digesta* 1.2.2.6: *Omnium tamen harum et interpretandi scientia et actiones apud collegium erant, ex quibus constituebatur quis quoquo anno praeesset privatis. Et fere populus annis propre centum hac consuetudine usus est* ('In relation to all these statutes, however, knowledge of interpretation and the conduct of the actions belonged to the College of Priests [pontiffs], one of whom was appointed each year to preside over the private citizens. The people followed this practice for nearly a hundred years'). See Olga Tellegen-Couperus, "Pontiff, Praetor and Iurisdictio in the Roman Republic," *Tijdschrift voor Rechtgeschiedenis* 74 (2006), 31–44.

THE LONGEVITY OF THE FETIAL COLLEGE

Linda Zollschan

> *. . . supremus ille dies non nostri extinctionem sed commutationem affert loci*
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> Cicero, *Tusculanae Disputationes* 1.46.117.

The view that the Fetials died out and were revived by Augustus still commands general agreement and has distinguished antecedents reaching back to Stuss' work of 1757.[1] A modern representative of this view would be John Scheid who in 1990 wrote:

> . . . fétiaux, abandonnés ou en tout cas disparus de la scène publique depuis l'année 136 avant notre ère, et remis en vigeur en 32 avant notre ère par le futur Auguste . . .[2]

Since the 19th century there has been a small, but not insignificant, band of scholars who have raised their voice against the consensus that the Fetials died out; among them are to be found Fusinato in 1884, Hoffman Lewis in 1954, Wiedemann in 1986, Broughton in 1993, Ferrary in 1995[3] and most recently Santangelo.[4] The purpose of this paper is to add further evidence and arguments in support of these earlier works.

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[1] J. Chr. Stuss, *Gedanken von den Fetialen des alten Roms* (Göttingen-Leipzig, 1757).

[2] John Scheid, *Romulus et ses frères. Le collège des frères Arvales, modèle du culte public dans la Rome des empereurs*. Bibliothèque des Écoles Françaises d'Athènes et de Rome 275 (Rome, 1990), p. 680.

[3] G. Fusinato, "Dei feziali e del diritto feziale. Contributa alla storia del diritto pubblico (romano) esterno," *Memorie della classe di scienze morali, stoiche e filologiche (Accademia nazionale dei Lincei)* 3.13 (1884), 583; Martha W. Hoffman Lewis, *The Official Priests of Rome under the Julio-Claudians* (Rome, 1954), p. 114; T. Wiedemann, "The *Fetiales*: A Reconsideration," *Classical Quarterly* 36 (1986), 481–483; Jean-Louis Ferrary, "*Ius Fetiale* et diplomatie," in *Relations Internationales*: Actes du Colloque de Strasbourg 15–17 Juin 1993, eds. E. Frézouls and A. Jacquemin, Travaux du Centre de recherche sur le Proche-Orient et la Grèce antique 13 (Paris, 1995), pp. 411–433. T. Robert S. Broughton, "Mistreatment of Foreign Legates and the Fetial Priests: Three Roman Cases," *Phoenix* 43 (1993), 59 said ". . . it would be a mistake to say that the Fetials became obsolete."

[4] Federico Santangelo, "The Fetials and their *ius*," *Bulletin of the Institute of Classical Studies* 51 (2008), 1–49. I had been working on this paper for some time when I became aware of a pre-publication version of Santangelo's article.

This study begins with the origin of the view that the Fetial priesthood died out and proposes a reason that would explain the persistence of this view. The case is made that one ought to distinguish lapses in Fetial practice with regard to declarations of war from their continuance in the renewal and conclusion of treaties. In particular, I hope to show that the Fetial priests took part in annual (if not regularly) occurring rites and ceremonies by introducing some new numismatic research. In addition, I show that inscriptional evidence for the Fetial priests does not indicate that their college only existed from the Augustan period, merely that the evidence, such as it is, falls within the chronological framework one would expect from what is known as the epigraphic habit.

An analysis of the *communis opinio* reveals that the hypothesis denying the continuity and longevity of the Fetials is not uniformly expressed and, in fact, may contain a combination of the following five basic components:

1. That the Fetials ceased to function after 201 BC;
2. That their functions of declaring war and acting as envoys (*legati*) were usurped by the senate;
3. That the Fetial priesthood was revived in 136 BC for the express purpose of handing Mancinus over to the Numantines;
4. That there had been no Fetial college until the Augustan Principate, and
5. That they were revived by Augustus in 32 BC.

1. *Fetial Priests in the Second and First Centuries BC*

The first component is that the Fetials ceased to function after 201 BC; however, the precise date when the Fetials were supposed to have become obsolete varies. No actual consensus exists. Some consider they faded away at the end of the war with Pyrrhus or at the end of the First Punic War with most opting for the end of the 3rd century BC.[5] Most scholars

[5] Views seem to range from the end of the war with Pyrrhus or the end of the First Punic war until Octavian, as Fetial, declared war against Cleopatra. Representative of the range would be the following: Walbank in A.H. MacDonald & F.W. Walbank, "The Origins of the Second Macedonian War," *Journal of Roman Studies* 27 (1937), 193–195 considers that the Fetial priesthood died out in the middle of third century; Werner Dahlheim, *Deditio und societas: Untersuchungen zur Entwicklung der römischen Aussenpolitik in der Blütezeit der Republik*, Diss. (Munich, 1965), p. 181 at the end of the First Punic War; Jörg Rüpke, *Domi militiae. Die religiöse Konstruktion des Krieges in Rom* (Stuttgart, 1990), p. 116 at the end of the third century.

would certainly consider that the Fetials were not in operation between 200 and 32 BC. Naturally, warnings of the perils of arguing *ex silentio* have been sounded by Rawson and Ferrary.[6] However, in these years of presumed abandonment, many and varied references to the Fetials do occur in the literary and epigraphic record that show their contemporary activity and continued relevance. There is no silence.

The loss of Livy's Books 46 to 142 has deprived us of three quarters of his total work that covered 167 to 9 BC.[7] Livy included materials on the Fetials more than any other author, especially extensive quotations of the words of their ceremonies.[8] Consequently, a major source for the Fetials after 167 BC has been lost, so any apparent silence is due to the state of the evidence.

1.1. *The Fetials and Treaty Making*

A marked prominence in modern literature[9] has been accorded to the decline in the use of the Fetials for declarations of war; so much so, that it has led to the neglect of the Fetials' other duties with the result that a widespread impression remains that the Fetial law itself fell entirely into disuse after 200 BC. Varro made a differentiation between functions of the Fetials that had ceased and those that continued in use; so that the Fetials, while they may no longer have been declaring war in Varro's day, were still making treaties.[10]

The Fetials' role in the conclusion of treaties has generally been overlooked in considering the time-span during which they were active. This neglect is a legacy of 18th century scholarship written before the first

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[6] Elizabeth C. Rawson, "Scipio, Laelius, Furius and the Ancestral Religion," *Journal of Roman Studies* 63 (1973), 168; Ferrary, *Ius Fetiale*, p. 417.

[7] P.A. Stadter, "The Structure of Livy's History," *Historia* 21 (1972), 287–307.

[8] Treaty ceremony: Livy, *Ab urbe condita* 1.24.4–9; declaration of war: Livy, *Ab urbe condita* 1.32.6–14.

[9] Stuss, *Gedanken*, pp. 46–47; J.M. Heinze, *Gedanken von den Fetialen des alten Roms* (Leipzig, 1783), pp. 221–226; Theodor Mommsen, *Römisches Staatsrecht*, 3 vols. (Leipzig, 1887–1888), 3:1158; André Weiss, *Le droit fétial et les fétiaux à Rome. Étude de droit international* (Paris, 1883), pp. 44–45; Georg Wissowa, *Religion und Kultus der Römer*, 2nd ed. (Munich, 1912), p. 554; L. Matthaei, "On the Classification of Roman Allies," *The Classical Quarterly* 1 (1907) 182 ff.; MacDonald and Walbank, *Origins*, p. 193; F.W. Walbank, "Roman Declaration of War in the Third and Second Centuries," *Classical Philology* 44 / 1 (1949), 16; R.M. Ogilvie, *A Commentary on Livy Books 1–5* (Oxford,1965), pp. 110, 128; Rawson, *Scipio*, p. 346; A. Watson, *International Law in Archaic Rome: War and Religion* (Baltimore-London, 1993), p. 57.

[10] Varro, *De lingua Latina* 5.86. Mommsen, *Staatsrecht*, 1:252; J. Linderski, "Ambassadors go to Rome," in *Relations Internationales*, p. 460.

treaties on stone were discovered. Reference, therefore, to Roman treaties of the second and first centuries BC is absent from Stuss and Heinze, who became the authorities for the view that the Fetials fell into disuse.[11] Consequently, while the recovery of Roman treaty texts continued to grow and they came to constitute an important body of evidence, they failed to attract the attention they deserved. To understand why the view has persisted that the Fetial priests died out, one has to go back to its origins. Back in the 18th century only one treaty inscription had been discovered, namely, the Roman treaty with Astypalaia, and it was not published until 1834.[12] To date, a total of ten Roman treaty inscriptions have now been discovered with only three of them approaching anything like completion.[13]

The Roman State treaty (*foedus*) was distinguished from other forms of Roman diplomatic relations by two features: it was permanent and it was sealed by mutual oath taking.[14] Neither consuls nor other magistrates could conclude treaties. Their competence extended to *sponsiones* but not to the Roman State permanent treaty.[15] In the Roman treaty with the Alban people, the Roman king held *imperium* and he authorized the Fetial to perform the ceremony.[16] The Fetial priest swore the oath as the representative of the Roman king. With the arrival of the Republic, a magistrate took the place of the king and a Fetial priest continued to take the oath, a ritual he executed on the order of the magistrate who was present and who presided over the oath.[17] A praetor authorized the ceremony for the treaty to end the Second Punic War and a consul in

[11] Heinze, *Gedanken von den Fetialen*, pp. 221–228.

[12] Federicus G. Osann, *Sylloge Inscriptionum Antiquarum Graecarum et Latinarum* (Leipzig, 1834), pp. 388–391.

[13] The treaties with Maroneia (*IG* X, No. 823), Astypalaia (*IG* XII, 3, No. 173). For the treaty between Rome and Lycia, see S. Mitchell, "The Treaty between Rome and Lycia of 46 BC (MS 2070)," *Papyrologica Florentina* 35 (2005), 164–259.

[14] Oath central to the *foedus*: K.-H. Ziegler, "Das Völkerrecht der römischen Republik," *Aufstieg und Niedergang der römischen Welt*, 1.2 (Berlin, 1972), p. 90.

[15] Andreas Zack, *Studien zum "Römischen Völkerrecht". Kriegserklärung, Kriegsbeschluss, Beeidung und Ratification zwischenstaatlicher Verträge, internationale Freundschaft und Feindschaft während der römischen Republik bis zum Beginn des Prinzipats* (Göttingen, 2007), p. 57 nn. 225 and 256. The examples given either were not permanent treaties or were agreements made but never ratified in Rome. See Arthur M. Eckstein, *Senate and General. Individual Decision Making and Roman Foreign Relations, 264–194 B.C.* (Berkeley-London, 1987), pp. 214–215, 222, 226.

[16] Livy, *Ab urbe condita* 1.24.4; Eugen Täubler, *Imperium Romanum: Studien zur Entwicklungsgeschichte des römischen Reichs* (Leipzig-Berlin, 1913), p. 130.

[17] Täubler, *Imperium Romanum*, pp. 130, 352.

the treaty with Aphrodisias.[18] The public nature and responsibility of the execration oath on behalf of the Roman people meant that the state considered this role was the exclusive duty of priests. Oaths sworn on behalf of the Roman people were sworn by priests and the Fetials were the guardians of the correct form of words for the oath.[19]

Six treaties contain extant references to oaths: Kibyra, Methymna, Astypalaia from the 2nd century and Lycia, Aphrodisias and Cnidus from the last half of the 1st century BC. Two Greek copies of Roman treaties, those with Lycia and Cnidus, actually have the title τὰ ὅρκια—'the oaths', as an indication that inscribed on the stone below is the text of a treaty thereby showing how central the oath was to defining a *foedus*.[20] All the inscriptions that are extant at this section refer to oaths.[21] Their inclusion is easy to understand when one considers that the oath was central to a treaty.[22]

The treaty with Lycia furnishes evidence for the continued use of the Fetial treaty ceremony.[23] Two Romans took the oath and conducted the sacrifice, acts that constituted the conclusion of a treaty. The sacrifice was carried out in accordance with the Fetial ritual where the throat of the animal is cut with the flint knife (*silex*), as indicated by the Greek verb τέμνο, meaning 'to cut the neck'.[24] The rituals echo those of the Fetial ceremony, recorded by Livy, for a treaty between the Roman and the Alban people.[25]

The Lycian treaty confirms another detail known to Livy, namely, that a treaty was signed by two Fetials. Livy states that the two Fetials who

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[18] Carthaginian treaty: Livy, *Ab urbe condita* 30.43.9; Aphrodisias: Joyce Reynolds, *Aphrodisias and Rome* (London, 1982), pp. 89–90.

[19] Livy, *Ab urbe condita* 31.17.9; Pliny the Elder, *Naturalis Historia* 28.3.12 (a private oath, yet it illustrates that the priests were the sole repository of the correct form of the words).

[20] Lycia: Mitchell, *Treaty between Rome and Lycia*, pp. 167–172, and Cnidus: text in Täubler, *Imperium Romanum*, pp. 450–451. On the Cnidus treaty, see also A. Jardé, "Un traité entre Cnide et Rome," in R. Cagnat, *Mélanges Cagnat. Recueil de Mémoires concernant l'épigraphie et les antiquités romaines* (Paris, 1912), pp. 51–58, and C. Cichorius, "Ein Bündnisvertrag zwischen Rom und Knidos," *Rheinisches Museum für Philologie* 76 (1927), 327–329.

[21] Kibyra: (*OGIS* 762) line 5; Methymna: (*SIG*^{2} 693) line 15; Astypalaia: (*IG* XII 3.173) line 43; Aphrodisias: Reynolds, *Aphrodisias*, Doc.8 pp. 60, 89, line 85; Lycia in Mitchell, *Treaty between Rome and Lycia*, pp. 167–172, lines 1, 5, 67, 69, 71, 73, 75; Cnidus: Täubler, *Imperium Romanum*, pp. 450–451, A. lines 1,2; B lines 6, 7, 8, 10.

[22] Ziegler, *Völkerrecht*, p. 90.

[23] Lines 74–78.

[24] Mitchell, *Treaty between Rome and Lycia*, p. 238.

[25] Livy, *Ab urbe condita* 1.24.4–9.

took part in the ceremony signed their names at the bottom of the text.[26] In fact, Livy was so sure of the practice that, in this passage, he used Fetial signatures as a criterion to distinguish between a *sponsio* and a treaty. Livy reports that the treaty with Ardea also had two signatures affixed to the bottom of the document.[27]

Well before 32 BC, the date of the assumed Augustan restoration, two Romans were present when two additional treaties were concluded—the treaty with Cnidus in 45 BC and the treaty with Aphrodisias in 39 BC. The text from Cnidus breaks off well before the end of the document, at the place where the treaty ceremony is recorded in the Lycian inscription. The treaty with Cnidus states that a certain Cn. Domitius Calvinus and Cn. Pompeius or Pomponius Rufus represented Rome. Their presence can be explained by the necessity to conduct the treaty ceremony (with the oaths and a sacrifice) and to affix both their signatures to the treaty text, where two signatures of Fetials were required.

The treaty with Aphrodisias in 39 BC, according to Reynolds' restoration,[28] records that the two consuls were instructed by the senate to arrange for the θεμιστῆρες, whom she considers to be Fetials to conduct the swearing of the oath. Clearly, the consuls only ordered the ceremony of the oath and did not conduct the oath swearing ceremony themselves.[29] Three hundred odd senators are listed as being present for the oath, so they did not conduct the ceremony either. This treaty text suggests that the role of the Fetials in treaty making did not fall into disuse.[30] These various inscribed treaty texts surely verify what Varro wrote, namely that the Fetials were still concluding treaties in his own day: *per hos etiam nunc fit foedus*.[31]

1.2. *Regularly Recurring Activities*

Additionally, each year the treaty between Rome and Lavinium was renewed.[32] The reason for this unusual renewal is given by Livy as the need to bind two communities where wrongs with severe religious repercussions had been committed on both sides. Kinsmen of Titius Tatius

[26] Livy, *Ab urbe condita* 9.5.4. See also Fusinato, *Dei feziali*, pp. 526, 534.
[27] Livy, *Ab urbe condita* 4.7.12. Fusinato, *Dei feziali*, p. 534.
[28] Reynolds, *Aphrodisias*, l. 85 pp. 60, 63, 89–90.
[29] Reynolds, *Aphrodisias*, pp. 89–90.
[30] Acknowledged by Ogilvie, *Commentary*, p. 110 and Watson, *International Law*, pp. 58–59.
[31] Varro, *De lingua Latina* 5.86.
[32] Livy, *Ab urbe condita* 8.11.15.

were said to have mistreated envoys from Lavinium and, when Tatius went to their city to celebrate the annual sacrifice, he was murdered.[33] Livy attests that the annual renewal was still being performed in the fourth century BC.[34] An inscription found in Pompeii from the Claudian period records that the treaty renewal ceremony was performed by a *pater patratus*, the Fetial in charge of the ceremony, from Lavinium.[35] Thus, the annual treaty renewal ceremony was still being performed by the Fetials, into the mid-first century.[36] The date when this ceremony was held was nine days after the *feriae Latinae*.[37] The Lavinium treaty is evidence for the continued use of Fetial priests. Even those who would like to assert that the Fetials became obsolete do concede that they continued to exist if only for the purpose of renewing this treaty annually.[38] The possibility exists that this was not the only treaty that needed to be renewed annually. Scheid suggests that other treaties with Rome were also renewed annually, such as those between Rome and Gabii and between Rome and Caenina.[39]

In addition to annual treaty renewals, the possibility of often held games to Juppiter Feretrius may imply another regularly recurring activity for the Fetial priests. Tertullian in his work against pagan public spectacles reports that Romulus established games in honour of Juppiter Feretrius on the Tarpeian hill.[40] His immediate source was Suetonius, who in writing on Roman spectacles quoted the historian, L. Calpurnius Frugi.[41] In this fragment, it is reported that Piso called the games both the *ludi Tarpeii* and the *ludi Capitolini*. The nomenclature is a crucial point.

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[33] Livy, *Ab urbe condita* 1.14.

[34] A.A. Boyce, "The Development of the Decemviri Sacris Faciundis," *Transactions of the American Philological Association* 69 (1938), 173.

[35] *CIL* X. 797= *ILS* 5004 = *AE* 2000, 243.

[36] The numismatic record is not helpful in testifying to treaty ceremonies before 32 BC since the many oath scenes (also on engraved gems) may represent the formation not of a treaty but of a *coniuratio*. See Linda T. Zollschan, "The Ritual Garb of the Fetial Priests," *Museum Helveticum* 68 (2011), 47–67. Cf. J.H. Richardson, "The Pater Patratus on a Roman Gold Stater: A Reading of RAC No-s 28/1–2 and 29/1–2," *Hermes* 136 (2008), 415–425.

[37] See A. Grandazzi, "Lavinium, Alba Longa, Roma: à quoi sert un paysage religieux?," *Revue de l'histoire des religions* 227 (2010), 583 n. 34. For the *feriae Latinae*, see Livy, *Ab urbe condita* 8.11.15.

[38] Rawson, *Scipio*, p. 168.

[39] John Scheid, "Auguste et le passé. Restauration et histoire au début du principat," in *Événement, récit, histoire officielle*, eds. Nicolas Grimal and Michel Baud (Paris, 2003), p. 256.

[40] Tertullian, *De spectaculis* 5.8.

[41] Gary Forsythe, *The Historian L. Calpurnius Piso Frugi and the Roman Annalistic Tradition* (Lanham, 1994), p. 178.

A scholia on Vergil's Georgics (2.384) quotes Ennius' *Annales* on these games where the origin of the games is placed at the feet of Romulus at the time of his dedication of a temple to Juppiter Feretrius; no name, however, is given for these games in this passage.

Late republican antiquarians assigned the origin of these games to the senate in c. 390 BC.[42] According to Livy, the *ludi Capitolini* were established to Jupiter Optimus Maximus in thanks for the withdrawal of the Gauls from the city of Rome.[43] The question is whether the *ludi Capitolini* are the same games as the *ludi Tarpeii*.

Forsythe conjectures that a writer before Piso's time nominated Romulus as the one who instituted the games who then called them anachronistically the *ludi Capitolini* and Piso corrected the name to *ludi Tarpeii*. He further suggests that Livy's account is an attempt to retain the term *ludi Capitolini* by setting the games in a period when it was correct to use this term. On the other hand, the word order in the fragment of Piso suggests that the original name was *ludi Tarpeii* because they began on the Tarpeian hill and that Piso supplied an addendum that they were called the *ludi Capitolini* as well.[44]

Another problem is whether the games that were known under two different names began at the time of Romulus or in c. 390 B.C, or that the archaic games were reformed after the Gallic invasion of Rome. Whether the evidence in Livy 5.52.11 (*Capitolinos ludos sollemnibus aliis addidimus*) is strong enough to support the view of Bernstein that Livy is referring to a reform and not the creation of a new set of games is a matter of judgment.[45]

Generally, it is common to find in the literature that the games on the Capitol are called either under both names or under one of the names; but, whatever the nomenclature, writers are essentially referring to the same games.[46] I am inclined to accept the Romulean tradition on the basis

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[42] Plutarch, *Quaestiones Romanae* 53; Festus, *Sardi uenales* 430L. See Ogilvie (1965) 740.

[43] Livy, *Ab urbe condita* 5.50.4.

[44] Tertullian, *De spectaculis* 5.8: *De hinc idem Romulus Iovi Feretrio ludos instituit in Tarpeio, quos Tarpeios dictos et Capitolinos Piso traduit*.

[45] F. Bernstein, *Ludi Publici. Untersuchungen zur Entstehung und Entwicklung der öffentlichen Spiele im republikanischen Rom* (Stuttgart, 1998), p. 105. Andreas Alföldi, G. Manganaro, and J.G. Szilágy, *Römische Frühgeschichte. Kritik und Forschung seit 1964* (Heidelberg, 1976), pp. 49, 115 argues for a new set of games instituted by Camillus in 390 BC.

[46] Wissowa, *Religion*, p. 117; E. Habel, "Ludi Capitolini," in *Pauly's Realencyclopädie der classischen Altertumswissenschaft*, Suppl. 5 (1931), cols. 607–608; H.H. Scullard, *Festivals*

of both the association with the temple of Juppiter Feretrius, which was the only temple to Jupiter in existence at the time of Romulus[47] and on the antiquity of the curious rites that formed the basis of the games that was noticed by Piganiol.[48]

The games were held each year on the Ides of October.[49] Palmer suggests that the games were held only on an occasional basis to celebrate the dedication of *spolia opima* in the Temple of Juppiter Feretrius.[50] If this were the case the games would have been held only three times: once for Romulus, a second time for Cornelius Cossus, and a third time for M. Claudius Marcellus.[51] Forsythe, in my view, provides the correct solution that the games were instituted to celebrate Romulus' victory over Veii which was celebrated on 15th October.[52] Plutarch implies that because of this victory the games continued to be celebrated on the Ides of October.[53] According to Livy, the organization of the games was put on a more regular footing with the creation of a *collegium* of priests to supervise and manage the games.[54] The members were drawn from those

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and Ceremonies of the Roman Republic (London-Ithaca NY, 1981), p. 194; Bernstein, *Ludi Publici*, p. 103, n. 458; T.P. Wiseman, "The Games of Hercules," in *Religion in Archaic and Republican Rome and Italy: Evidence and Experience*, eds. Edward Bispham and Christopher Smith (Edinburgh, 2000), p. 110.

[47] Forsythe, *Piso*, p. 179. The Romans acknowledged that Juppiter Feretrius pre-dated Jupiter Optimus Maximus. See J.R. Fears, "The Cult of Jupiter and Roman Imperial Ideology," in *Aufstieg und Niedergang der römischen Welt*, 2.17.1 (Berlin, 1981), p. 24.

[48] For a description of the rites, see Ennius, Frg. 51 Skutsch. For the antiquity of the rites, see André Piganiol, *Recherches sur les Jeux Romains: notes d'archéologie et d'histoire religieuse* (Strasbourg, 1923), p. 135. O. Skutsch, *The Annals of Q. Ennius*, 2nd ed. (Oxford, 1986), p. 242 provides evidence of boxing in the sixth century BC.

[49] Plutarch, *Romulus* 25. See Habel, *Ludi Capitolini*, col. 608; Carl Thulin, "Iuppiter," in *Pauly's Realencyclopädie der classischen Altertumswissenschaft* 10 (1917), col. 1128.

[50] Robert E.A. Palmer, *Roman Religion and Roman Empire; Five Essays* (Philadelphia 1974), p. 140.

[51] For Cossus, see Livy, *Ab urbe condita* 4. 19–20; Propertius, *Elegiae* 4.10; Dionysius Halicarnassus, *Roman Antiquities* 12.5; Festus, *De verborum significatu* 204L; Valerius Maximus, *Facta et dicta memorabilia* 3.2.4. For Marcellus, see Polybius, *Histories* 2.34.5–9; Cicero, *Tusculanae Disputationes* 4.49; Livy, *Periochae* 20; Vergilius, *Aeneis* 6.855–859; Propertius, 4.10; Plutarch, *Romulus* 16.7–8; Plutarch, *Marcellus* 7–8; Valerius Maximus, *Facta et dicta memorabilia* 3.2.5; Festus, *De verborum significatu* 405L. The literature on the *spolia opima* is vast. For the history of scholarship, see J.W. Rich, "Augustus and the spolia opima," *Chiron* 26 (1996), 85–127. More recently, see Harriet I. Flower, "The Tradition of the *Spolia Opima*: M. Claudius Marcellus and Augustus," *Classical Antiquity* 19 (2000), 34–64 and Dylan Sailor, "Dirty Linen, Fabrication, and the Authorities of Livy and Augustus," *Transactions of the American Philological Association* 136 (2006), 329–388.

[52] Forsythe, *Piso*, p. 178.

[53] Plutarch, *Romulus*, 25.

[54] Livy, *Ab urbe condita* 5.50.2.

who lived on the Capitol and Arx. The Temple of Juppiter Feretrius was located on the Capitol and so its personnel would have been included in the college tasked with organizing the games. This *collegium* is attested in the late republic and the time of Augustus, and Plutarch reports that they continued to be held in his day.[55] The evidence from Livy and Plutarch would suggest that the games were not held on an infrequent basis but rather on a regular schedule. Thulin and Habel state that the games were held annually.[56]

After having examined the evidence for the games, the next step is to discuss how it is possible to see a connection between these games and the Fetial priests. The nexus between the Fetial priests and the Temple of Juppiter Feretrius is undeniable. L. Cornelius Piso Frugi and Varro had information that still connected the games with the Temple of Juppiter Feretrius and in this temple the Fetial priests kept their sacred implements, the *silex* (the flint stone knife which they used in treaty formation ceremonies) and the scepter (which represented Juppiter).[57] No other priests are mentioned in the sources associated with the Temple of Juppiter Feretrius except the Fetial priests. This temple like many others in Rome was not open to all, only to priests.[58] Cassola's study on the Temple of Juppiter Feretrius shows that this temple also was inaccessible to all except its priests.[59] This raises the question whether the Fetial priests were priests of Juppiter Feretrius. There is no evidence for such a priesthood in the ancient sources. Rüpke does suggest that the Fetial priests became priests of Juppiter Feretrius.[60] When our sources speak of games instituted for Juppiter Feretrius and at the same time say that Romulus dedicated this temple, we have only information that connects Fetial priests with this temple.

An objection might be raised that the Temple of Juppiter Feretrius, dedicated by Romulus, predates the institution of the Fetial Priesthood in Rome. According to Dionysius of Halicarnassus and Plutarch, the Fetial priesthood was introduced by Numa Pompilius, whereas Cicero

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[55] For the late republic, see Cicero, *Ad Quintum fratrem* 2.5.2. For the Augustan period, see *CIL* 1.805 = 10.6488 and *CIL* 14.2105.

[56] Thulin, "Iuppiter", col. 1128; Habel, *Ludi Capitolini*, p. 608.

[57] For the *silex*, see Livy, *Ab urbe condita* 1.24.9; Festus, *De verborum significatu* 81L. For the scepter, see Zollschan, "The ritual Garb," p. 66.

[58] Isidorus, *Origines* 15.4.2.

[59] F. Cassola, "Livio, il tempio di Giove Feretrio e la inaccessibilità dei sanctuari in Roma," *Rivista Storica Italiana* 82 (1970), 26–27.

[60] Rüpke, *Domi*, p. 116.

attributes their foundation in Rome to Tullus Hostilius.[61] When Romulus founded the temple Livy tells us that he marked off a sacred area beneath a tree. Livy says this was a *templum* which could mean merely a sacred enclosure and not necessarily a building as such.[62] Livy says that Ancus Marcius built an *aedes* for Juppiter Feretrius which is simply an area walled in by stone.[63] Springer concludes that no temple was built until the end of the regal period.[64] In this way, it is possible to reconcile the seemingly contradictory statements that Romulus dedicated a temple to Juppiter Feretrius but the Fetial priesthood had not yet been introduced to Rome.

A summary of the above material, in my view, makes it possible to say with a strong degree of certainty that the games (whether we call them the *ludi Tarpeii* or the *ludi Capitolini*) go back to the time of Romulus, that the Fetial priests were involved in some fashion, and that the games continued at some regular interval whether annually or not. The priestly college in charge of the games is attested to in the late republic and the Augustan period and would have included those involved with the temples on the Capitol, which included the Temple of Juppiter Feretrius. The participation of the Fetial priests in these games on a regular basis is a strong possibility and this contention may be added as another recurring activity in which the Fetial priests participated.

These Games have been incorrectly identified as games to Jupiter Optimus Maximus on the basis of an image of a temple on the reverse of a denarius minted by M. Volteius in 78 BC.[65]

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[61] Dionysius Halicarnassus, *Roman Antiquities* 2.72; Plutarch, *Numa* 12; *Camillus* 18; Cicero, *De republica* 2.17 [31]. For a discussion of the evidence for the introduction of the Fetial priests into Rome, see R.J. Penella, "War, Peace, and the ius fetiale in Livy 1," *Classical Philology* 82 (1987), 233–237.

[62] Livy, *Ab urbe condita* 1.10.6. Cf. Dionysius Halicarnassus, *Roman Antiquities* 2.34.4.

[63] Livy, *Ab urbe condita* 1.33.9.

[64] L.A. Springer, "The Cult and Temple of Jupiter Feretrius," *Classical Journal* 50 (1954), 28–29.

[65] Ernest Babelon, *Description historique et chronologique des monnaies de la République Romaine* (Paris, 1885–1886), pp. 1–5, see Volteia; Th. Mommsen, *Die Geschichte des römischen Münzwesens* (1860; repr. Graz, 1956), pp. 619–621; H. Grueber, *Coins of the Roman Republic in the British Museum* (London, 1910), Rome 3154; M.H. Crawford, *Roman Republican Coinage*, 1 (Cambridge, 1974), p. 385, I. 399, Pl. XLIX 385 / 1. Misidentification: T.P. Wiseman, "The Games of Hercules," p. 109.

Denarius of M. Volteius, 78 BCE, *RRC* 385.
Courtesy of the Classical Numismatic Group.

In that year, Volteius issued a series of denarii, each representing one of the *ludi Romani*. Games to Jupiter are indicated by a denarius with a head of Jupiter on the obverse and a temple on the reverse. This coin signifies games to Jupiter but the question is to which Jupiter. The answer lies in the image on the reverse of a small temple, which has four columns in Doric style with a winged thunderbolt in the pediment. The Temple of Jupiter Optimus Maximus did not have this architectural style. Descriptions by Cicero of the Temple of Jupiter Optimus Maximus before its destruction by fire in 83 BC mention that it had two rows of six columns with a bronze quadriga of Jupiter placed on the apex of the pediment.[66] The new temple dedicated in 69 BC was still a hexastyle temple. The temple of Jupiter Optimus Maximus on the reverse of the denarius of Petillius in 43 BC still depicts a hexastyle temple with decorations hanging vertically between the central four columns. In the pediment a figure is shown and the roof is decorated with statues of horses and horsemen.

Denarius of Petillius Capitolinus, 43 BCE, *RRC* 487/1.
Courtesy of the Classical Numismatic Group.

[66] Cicero, *De divinatione* 1.10.16. See also Augustine, *De civitate dei* 4.23.

The temple on the denarius of Volteius does not match the visual and literary depictions of the Temple of Jupiter Optimus Maximus; however, his temple does bear a remarkable resemblance to the Temple of Juppiter Feretrius on the denarius of P. Cornelius Lentulus Marcellinus in c. 50 BC, which depicts M. Claudius Marcellus in 222 BC dedicating the *spolia opima* to the Temple of Juppiter Feretrius.[67]

Denarius of Cn. Cornelius Lentulus Marcellinus, c. 50 BCE, *RRC* 439/1. Courtesy of the Classical Numismatic Group.

On this coin, the temple of Jupiter Feretrius is shown as tetrastyle with the same roof decorations as that on the Volteius coin. Neither the denarius of Volteius nor that of Marcellinus shows any quadriga or any human figures. The temple on the Volteius coin may with surety be identified as that of Jupiter Feretrius and not that of Jupiter Optimus Maximus. The denarius of Volteius was minted to commemorate the Games to Juppiter Feretrius. These games were not public games and, so, do not appear in the Fasti.[68] They were still being held in 78 BC as evidenced by the Volteius denarius and a letter Cicero wrote to his brother shows that they continued to be held into Cicero's day.[69]

The Fetial priesthood remained an active body throughout the Republic because their duties required them to renew treaties each year and to participate in the annual Games to Juppiter Feretrius. Such annual activities belie the notion that the Fetials were only called together on an *ad hoc* basis or that they had died out.

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[67] Babelon, *Description*, p. 69, see Cornelia; Edward A. Sydenham, *The Coinage of the Roman Republic* (London, 1952), p. 1147; Grueber, *Coins*, Rome 4206; Crawford, *Coinage*, 439/1; Götz Lahusen, *Die Bildnismünzen der römischen Republik* (Munich, 1989), p. 21; John P.C. Kent, *Roman Coins* (London, 1978), p. 75.

[68] Scullard, *Festivals*, p. 194.

[69] Cicero, *Ad Quintum fratrem* 2.5.

1.3. *More Literary Evidence*

A brief survey of the literary evidence indicates the continued activity by the Fetial priests from 200 to 32 BC.

In 191 BC, the Fetials were asked to advise the senate on the correct procedure to declare war on Antiochus.[70] In 188 BC, the Fetials handed over to Carthage two Romans who were accused of physically assaulting Carthaginian ambassadors.[71] In the same year, several youths were accused of the same offence against envoys from Apollonia and they too were handed over by the Fetials.[72]

In 187 BC, complaints were laid against Cn. Manlius Vulso, to the effect that he had led his army against the Galatians without a declaration of war authorized by the senate or people.[73] In other words, they charged that he had gone to war without any consideration for the law of nations (*nullo gentium iure*).[74] Livy records his two accusers as asking: "Do you wish the formalities to be violated and thrown into confusion, the Fetial laws to be done away with and the Fetials themselves abolished?"[75] The accusation against Vulso that he wanted to abolish the Fetials flies in the face of the supposition that they already had been abolished 14 years earlier. There can be no clearer evidence that the Fetials continued to exist after 201 BC and that their Fetial law remained relevant in 187 BC.

In 136 BC, C. Hostilius Mancinus was forced to retreat from Numantia, surrender and swear a truce and terms of peace.[76] He was recalled to Rome and the senate refused to ratify what was considered a disgraceful treaty.[77] The senate voted to hand over Mancinus, as the man responsible for the debacle, to the enemy. Velleius tells us that the Fetial priests conducted the actual handover of Mancinus to the Numantines.[78]

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[70] Livy, *Ab urbe condita* 36.3.7–12. See Walbank, *Roman Declaration of War*, pp. 17–18 and J.W. Rich, *Declaring War in the Roman Republic in the Period of Transmarine Expansion*, (Brussels, 1976), pp. 56–61.

[71] Livy, *Ab urbe condita* 38.42.7; Valerius Maximus, *Facta et dicta memorabilia* 6.6.3.

[72] Valerius Maximus, *Facta et dicta memorabilia* 6.6.5.

[73] Livy *Ab urbe condita* 38.45.4.

[74] Livy *Ab urbe condita* 38.45.11.

[75] Livy *Ab urbe condita* 38.46.11.

[76] Plutarch, *Tiberius Gracchus* 5.2.

[77] Plutarch, *Tiberius Gracchus* 7.1; Appian, *The Iberian War* 83.

[78] Velleius Paterculus, *Historiae romanae* 2.1.5. See on these events, T. Robert S. Broughton, *The Magistrates of the Roman Republic*, 3 vols. (New York, 1951–1960), 1:484–485; A.E. Astin, *Scipio Aemilianus* (Oxford 1967), pp. 131–133; Nathan Rosenstein, *Imperatores Victi. Military Defeat and Aristocratic Competition in the Middle and*

In 111 BC, it is reported by Valerius Maximus that Scipio Nasica *bellum indixit* which raised the possibility, according to Oost, that he may have been a Fetial and that in this capacity he made the declaration of war against Jugurtha.[79]

In 102 or 101 BC, Saturninus was accused of a crime that constituted a breach of the Fetial law.[80] According to Diodorus, it was alleged he had mistreated foreign envoys sent to Rome by Mithridates:

> Envoys of King Mithridates arrived in Rome, bringing with them a large sum of money with which to bribe the senate. Saturninus, thinking that this gave him a point of attack on the senate, behaved with great insolence towards the embassy. At the instigation of senators, who promised to lend their support, the outraged envoys preferred charges against Saturninus for his insulting treatment. The trial, held in public, was of great import because of the inviolability attaching to ambassadors and the Romans' habitual detestation of any wrongdoing where embassies were concerned; it was therefore a capital charge of which Saturninus stood accused, and since his prosecutors were men of senatorial rank, and it was the senate that judges such cases, he was thrown into great fear and danger.[81]

It is to be regretted that this passage constitutes our only evidence for this trial because it lacks many details about the legal framework and mechanisms used to bring Saturninus to trial. Too frequently there is evidence only about the juries because they make the legal decision and in only 1/6th of the trials that are known to us do the sources provide the name of the president of the court.[82]

The charges against Saturninus of breaching the inviolability of ambassadors arose from circumstances that differ greatly from previously

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Late Republic (Berkeley-Los Angeles-Oxford, 1990), p. 190; Nathan Rosenstein, "*Imperatores Victi*: The Case of C. Hostilius Mancinus," *Classical Antiquity*, 5 (1986), 230–252.

[79] Valerius Maximus, *Facta et dicta memorabilia* 7.5.2. See S.I. Oost, "The Fetial Law and the Outbreak of the Jugurthine War," *American Journal of Philology* 75 (1954), 157 n. 24. Also: Jérome J. Carcopino and Gustave Bloch, *La république romaine de 133 à 44 avant J.-C.*, 2nd ed. (Paris, 1940), p. 299 n. 108.

[80] Accepted as historical: H. Last, "The Enfranchisement of Italy," in *The Cambridge Ancient History* 9, *The Roman Republic 133–44 BC*, eds. S.A. Cook, F.E. Adcock, and M.P. Charlesworth (Cambridge, 1932), pp. 167–168.

[81] Diodorus Siculus, *Bibliotheca historica* 36.15.1–2. Translation: F.R. Walton, *Diodorus of Sicily*, vol. 12 Loeb Classical Library (Cambridge, Mass.-London, 1967), p. 179.

[82] T. Corey Brennan, *The Praetorship in the Roman Republic, 2, 122 to 49 B.C.* (Oxford, 2000), p. 367.

known cases in 188 and 187 BC against ambassadors from Carthage and Apollonia where actual physical assault had been alleged. Saturninus' crime was one of verbal assault, that is, insulting the envoys. The question that arose was whether the act of insulting envoys constituted a breach of their inviolability and hence of the *ius gentium*.[83] To determine whether the inviolability of envoys could be negated by mere speech and without physical violence required expert opinion and the Fetial priests had been involved in previous cases in 188 BC. A suggestion has been made that what occurred in this case was similar to the process in the Bona Dea trial where first the college of the pontiffs was asked to judge whether the religious rites had been violated and following their advice the senate and the people set up a *quaestio extraordinaria* to try Clodius.[84] The Fetials did act in an advisory capacity to the senate[85] and the crime was one that fell under their jurisdiction. If priests were consulted, the Fetial priests were the ones most competent to rule whether the *ius fetiale* had been violated and hence if a crime had been committed. The fact that the punishment was to be death was unusual.[86] In previous cases, such as in 188 and 187 BC, the penalty had been to hand over the guilty party to the state of the envoys.

Diodorus reports that the senate judged such cases. This need not mean that the trial was actually held in the senate house itself. Such an anachronism is untenable as the senate did not become a court of law until the Principate.[87] That the senate judged such cases is a reference to the jury composed of senators. This appears to be an anomaly because jurors at this time would have been a mix of senators and equestrians or equestrians alone.[88]

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[83] For this reason, Mommsen's use of Tatius and the murder of the envoys from Lavinium (Livy, *Ab urbe condita* 1.14.1–2; Dionysius Halicarnassus, *Roman Antiquities* 2.51–21) as a precedent is not valid. See Mommsen, *Staatsrecht*, 2:112.

[84] Broughton, "Mistreatment," p. 58.

[85] Mommsen, *Staatsrecht*, 2:113.

[86] Death penalty, see Justinian, *Institutes* 4.18.8.

[87] Richard A. Bauman, "The *Leges Iudiciorum Publicorum* and their Interpretation in the Republic, Principate and Later Empire," in *Aufstieg und Niedergang der römischen Welt*, 2.13 (Berlin, 1980), pp. 145–153.

[88] The Lex Servilia of Caepio in 106 BC introduced mixed juries: J.L. Strachan-Davidson, *The Problems of Roman Criminal Law*, 2 (Oxford, 1912), p. 80, n. 2. The Lex Servilia Glaucia (variously dated between 108–101 BC) introduced all equestrian juries: A.H.M. Jones, *The Criminal Courts of the Roman Republic and Principate* (Oxford, 1972), p. 53.

Diodorus states that the trial was held in public. His words led Mommsen to think of a *iudicium publicum*.[89] This term may have a non-technical sense of 'a trial in the public interest'.[90] Such a trial could be set up using the authority of a *senatus consultum*.[91]

Broughton considers the trial to have been a *iudicium publicum* with judges comprised of Fetials.[92] Dionysius, Varro and Cicero all mention the duty of the Fetials with regard to crimes against ambassadors.[93] Varro, in particular, gives them a role as *iudices*.[94] By whatever legal mechanism, the senatorial judges are most likely to have consisted of Fetial priests. The jurors needed to be experts in the *ius gentium* and in this case, the whole college of twenty priests may have served as the jurors and since at this time no plebeians are recorded as ever having been co-opted into the Fetial College, these jurors would all have been senators.[95] The presence of the Fetial priests gave rise to the claim that senatorial judges were acting as Saturninus' prosecutors. The involvement of the Fetial priests in this trial places them in a period when they are thought to have died out.

The Fetials are mentioned in the course of another trial. When Cicero prosecuted Verres in 70 BC, one of the charges was that he had breached the treaty between Rome and Messana. Cicero enquired sarcastically whether Verres was an authority on treaty law, even whether he had perhaps been educated as a Fetial.[96] Cicero's irony would have been wasted and, indeed, completely ineffective had the Fetials been inactive for the past 130 years. Cicero's reference to Fetial education may push the references to the Fetials even further back. If we consider that Verres was

[89] Mommsen, *Staatsrecht*, 2:112, n. 3.

[90] A.W. Lintott, *Judicial Reform and Land Reform in the Roman Republic* (Cambridge, 1992), p. 115; A.W. Lintott, "Provocatio. From the Struggle of the Orders to the Principate," in *Aufstieg und Niedergang der römischen Welt*, 1.2 (Berlin, 1972), pp. 247–248.

[91] *Digesta* 47.13.2.

[92] Broughton, "*Mistreatment*", pp. 56–58. See also Michael C. Alexander, *Trials in the Late Roman Republic, 149 to 50 BC*. (Toronto, 1990), p. 39, Trial no. 74; J.L. Beness, "The Urban Unpopularity of Saturninus," *Antichthon* 25 (1991), 40 n. 36 and Corey Brennan, *The Praetorship*, 2:387.

[93] Dionysius Halicarnassus, *Roman Antiquities* 22.72.4; Varro, *in Nonius* 850 L; Cicero, *De legibus* 2.21. On the latter passage, see G. Nenci, "Feziali ed aruspici in Cicerone (*de leg.* II 9,21)," *La Parola del Passato* 13 (1958), 134–143.

[94] Varro, *De vita populi romani* 3.8.

[95] See Zollschan (forthcoming) "The Entry of Plebeians into the Fetial College".

[96] Cicero, *In Verrem* 2.5.49–50.

born in 115 BC he could have been educated as Fetial as early as 90 BC.[97] This passage fixes a date for the continuation of the Fetials for a period of approximately twenty years from c. 90 to 70 BC.

In 55 BC, a punishment under the Fetial law was still being invoked, this time by Cato who wanted Caesar handed over to two Gallic tribes in an act of *deditio* for having waged a *bellum iniustum*. Caesar was charged with having made war while a truce was in effect. Cato invoked the danger of religious pollution and the curse that would fall on the City and wanted Caesar treated as Mancinus had been.[98]

Later, in c. 46 BC, Cicero gave the Fetial priests a prominent role in his ideal state. They were to be responsible for the humane conduct of war. He refers to the already existing Fetial laws thus: "As for war, humane laws touching it are drawn up in the Fetial code of the Roman people under all the guarantees of religion;".[99] This suggests that there was no need to re-invent or revive the Fetial law, a code of law still well-known and current.

From this brief survey of the literary sources, it would be unwise to announce the death of the Fetial priesthood and equally to proclaim that they were not in operation throughout the second and first centuries BC.[100]

2. *Compatibility between Senators and Fetial Priests*

A second variant of the theory that the Fetials disappeared surmises that their functions were usurped by the senate. This view goes back to 1694 when Zamoscius held that there was an incompatibility between being a senator and a Fetial priest.[101] His view was based on a misreading of a passage of Livy where the Senate asked the Fetials for advice on the correct procedure to make a declaration of war against Philip. Livy states that, after the Fetials had tendered their advice, "… the consul was permitted by the senate to send anyone he chose, other than a senator [*extra senatum*], to declare war …".[102]

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[97] J. Bartels, "C. Verres", in *Brill's New Pauly* 12.2 (Leiden-Boston, 2003), col. 78.
[98] Plutarch, *Caesar* 22.1–3; *Cato Minor* 51.1.
[99] Cicero, *De officiis* 1.36.
[100] Broughton, "*Mistreatment*," p. 59.
[101] J. Zamoyski / Zamoscius, "*De senatu romano*," in J.G. Graevius, *Thesaurus antiquitatum romanorum*, 1 (Ludg.-Batavor, 1694), p. 1090E.
[102] Livy, *Ab urbe condita* 31.8.3–4.

Much ink has been spilt over this passage, in particular, whether M. Aemilius Lepidus was a senator at this time. As Rich notes, the identity of the one chosen is not known and it may not have been Lepidus after all.[103] I would point out that there is also no evidence that the man chosen by the consul was a Fetial priest.

A second question is whether an envoy had to be a senator. Rich considers that *legati* had to be drawn from the senate even though there is no rule to be found in the sources.[104] In my view, there actually was no rule and therefore the senate made a decision for each occasion as to the type of envoy they wanted.[105] In 204 BC, the senate decreed that the consuls should choose ten *legati* at their discretion from the senate and again in 171 BC that the praetor should choose three envoys from among the senators.[106] The Livian passage above shows that the senate could decide occasionally to send an envoy not from the senate.[107] This conclusion is the correct one to draw from this passage. It tells us nothing about Fetial priests being chosen and cannot be brought forward as any evidence for an incompatibility between being a member of the senate and simultaneously being a member of the Fetial college. In fact, the Roman state knew no incompatibility between holding priesthoods and holding other offices,[108] with a few exceptions, such as, the *rex sacrorum*, for example. Originally, the *patres* in the senate may have consisted entirely of priests, as Mitchell has suggested.[109] Stuss also thought that Fetials were not senators arguing that, since the Fetial college was not one of the four main colleges, its members never attained senatorial rank.[110] Yet, in the republic, all the known names of Fetial priests were of men of

[103] See Rich, *Declaring War*, p. 87.

[104] Rich, *Declaring War*, p. 128.

[105] Regarding the senate's prerogative to make the choice, see Cicero, *In Vatinium* 35 and *Pro Sestio* 33.

[106] 204 BC: Livy, *Ab urbe condita* 29.20.4; 171 BC: Livy, *Ab urbe condita* 43.1.10.

[107] The sending of an "unofficial" representative carries certain advantages. E. Badian, *Foreign Clientelae, 264–70 B.C.* (Oxford, 1958), p. 193 provides examples to show that it was a regular practice to send an *adulescens* for unofficial types of diplomacy. Many scholars have read into this passage the desire of the senate to be distanced from the actions of the *legatus*. See Walbank in MacDonald and Walbank, *Origins*, pp. 195–197; R. Werner, "Das Problem des Imperialismus und die römische Ostpolitik im zweiten Jahrhundert v. Chr.," in *Aufstieg und Niedergang der römischen Welt*, 1.1 (Berlin, 1972) p. 547 n. 159.

[108] Cicero, *Pro domo sua* 1.1.

[109] Richard E. Mitchell, "The Definition of *patres* and *plebs*: An End to the Struggle of the Orders," in *Social Struggles in Archaic Rome. New Perspectives on the Conflict of the Orders*, ed. Kurt A. Raaflaub, 2nd ed. (Malden, MA, 2005), pp. 129–134, 145–146.

[110] Stuss, *Gedanken*, pp. 47–49.

consular or praetorian rank and thus senators.[111] In short, there was no bar to being both a senator and a Fetial. Indeed senators and Fetials were drawn from the same elite body of men.

In the absence of any unequivocal evidence that being both a senator and a Fetial were mutually exclusive, it must be asked whether the notion that the senate 'usurped' the powers of the Fetials as envoys can be sustained. The question arises whether our sources in the second and first centuries BC would necessarily inform us that an envoy was a Fetial if it were tautologous to do so in cases where the senator was also a Fetial priest.[112]

3. *No Revival in 136 BC*

The third argument is that the Fetial law had become obsolete but was reintroduced for the express purpose of handing over Mancinus to the Numantines.[113] This opinion is grounded principally on the decline in the role of the Fetials in declaring war.[114] As proof that the Fetial law was no longer operative, Ogilvie cited Polybius 13.3.7 to prove that "… only a bare trace of the original procedure survived in his [Polybius'] day." However, a very different subject is being discussed by Polybius; not the Roman method of declaring war, but the Romans' use of honourable battle tactics in combat.[115] Polybius' account is as follows:

> Some slight traces, however, of the ancient principles of warfare survive among the Romans. For they make declaration of war, they very seldom use ambuscades and they fight hand-to-hand at close quarters.[116]

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[111] Examples include A. Cornelius Cossus Arvina, C. Papirius, Furius Philus, Scipio Nasica, L. Billienus, L. Fabricius, Cn. Domitius Calvinus, Cn. Pompeius/Pomponius Rufus and Octavian. For full documentation, see Zollschan (forthcoming) *The Fetial Priests*, Part C.

[112] *Legatus* has four meanings. Here it is used in the sense of 'envoy' and should not be confused with its meaning during the Empire as a permanent representative of a promagistrate, for example *legatus Augusti pro praetore*. During the Empire, Fetial priests are attested as both fetials and *legati* but in the latter sense, for example L. Aemilius Honoratus, *CIL* 12. 3164. On the meaning of *legatus*, see P. Kehne, "Legatus," in *Brill's New Pauly* 7 (Leiden-Boston, 2005), cols 354–355.

[113] John A. North, *Roman Religion*, Greece and Rome. New Surveys in the Classics 30 (Oxford, 2000), p. 58.

[114] Ogilvie, *Commentary*, p. 128; Rawson, *Scipio*, p. 346.

[115] Polybius, *Histories* 13.3.7. See also Walbank, "Roman Declaration of War," pp. 17–18.

[116] Translation W.R. Paton, *The Histories of Polybius*, vol. 4 Loeb Classical Library (Cambridge, Mass., 1925), p. 415.

No ancient evidence testifies to a revival of the Fetial priesthood and indeed, as seen above, they continued to be needed to renew treaties each year and to take part in the annual games to Juppiter Feretrius. A theory advocating a revival of the Fetial priesthood in 137 BC is unnecessary and without foundation.

4. *The Fetial College until the Principate*

The fourth argument is that no Fetial college had existed until the Principate. So sweeping a judgment cannot be maintained. Saulnier contends that only under Augustus was a Fetial college formed and she bases her conclusion on the appearance of names of individual Fetial priests only at the end of the Principate.[117] Testimony for names of most Roman priests commences only from the Principate. For the Republic, the overall quantity of names extant is very low with, for example, only two names known for the minor *flamines* and until 60 BC only the name of one *Lupercus*.[118] Based on the paucity of records for the Republic, Saulnier asserts there was no Fetial college until names began appearing in the epigraphic record towards the end of the Principate. She considers that their number peaked in the reigns of Hadrian, Antoninus and M. Aurelius.[119] Her study was based on a list of twenty datable inscriptions.[120] Her conclusions, however, ignore the limitations of inscriptional evidence.

Mrozek, MacMullen, and Woolf have all shown that the number of inscriptions in both the western and eastern parts of the Roman Empire increased from the Principate of Augustus.[121] There was an explosion in the custom of inscribing on stone at the end of the first century BC in what Alföldy calls a *furor epigraphicus*.[122] The quantity peaked in the reign of

[117] C. Saulnier, "Le rôle des prêtres fétiaux et l' application du 'ius fetiale' à Rome," *Revue historique de droit français et étranger* 58 (1980), 171, 174, 178, especially p. 171, where she states that the epigraphic evidence permits us to think that the Fetial priests were not organized into a stable college until the Augustan restoration.

[118] Jörg Rüpke, "Roman Religion," in *The Cambridge Companion to the Roman Republic*, ed. Harriet I. Flower (Cambridge, 2004), p. 189.

[119] Saulnier, "*Le rôle*," p. 179.

[120] Saulnier, "*Le rôle*," pp. 194–199.

[121] S. Mrozek, "À propos de la repartition chronologique des inscriptions latines dans le Haut-Empire," *Epigraphica* 35 (1973), 113–118. R. MacMullen, "The Epigraphic Habit in the Roman Empire," *American Journal of Philology* 103 (1982) 233–246. G. Woolf, "Monumental Writing and the Expansion of Roman Society in the Early Empire," *Journal of Roman Studies* 86 (1996) 22–39.

[122] Geza Alföldy, "Augustus und die Inschriften: Tradition und Innovation. Die Geburt der imperialen Epigraphik," *Gymnasium* 98 (1991) 292.

Septimius Severus and fell noticeably in the mid third century AD.[123] This rise and fall is simply a curve that reflects nothing more than the rise and fall of the 'epigraphic habit'.

This pattern occurs for all aspects of Roman society where the evidence is obtained only from inscriptions. The same curve can be seen for the names of senators, the names of priests of Dionysus, the names of Roman patrons of Greek cities, and the names of *curatores rei publicae*.[124] The methodology of using the amount of inscriptions to show the rise and fall of certain institutions in the Roman state has become standard. This argument has been used, for example, to prove that the Dionysiac cult flourished between 140 and 220 AD.[125] Such conclusions are erroneous because they do not take into account the restrictions of inscriptional evidence. According to Eilers:

> The rise and fall of any epigraphically attested phenomenon must be considered in the context of increasing or decreasing numbers of inscriptions. … Just as care must be taken when trying to infer the decline of institutions, so too an increase in their number does not necessarily imply that the phenomenon was becoming more common.[126]

According to MacMullen, historical conclusions based on the frequency of inscriptional evidence will be in error unless the rise and fall of the epigraphic habit is taken into consideration.[127] MacMullen has called for Roman religious history to be rewritten because of its reliance on inscriptional evidence.[128]

There are 65 datable inscriptions that mention Fetial priests. Not all inscriptions may be dated with sufficient accuracy to the reign of individual emperors. For this reason, Mrozek assigned individual inscriptions into periods broader than the reign of a single emperor using half centuries. If one groups datable inscriptions that mention a *fetialis* into half centuries, following the system of Mrozek, the following pattern occurs:

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[123] Mrozek, "*La repartition chronologique*," p. 114 and for the East: MacMullen, "*The Epigraphic Habit*," p. 238; Woolf, "*Monumental Writing*," p. 22.

[124] R. Duthoy, "*Curatores rei publicae* en Occident durant le Principat," *Ancient Society* 10 (1979), 171–238.

[125] Mrozek, *La repartition chronologique*, p. 115, n. 3 referring to the work of A. Bruhl, *Liber Pater, origine et expansion du culte dionysiaque à Rome et dans le monde romain* (Paris, 1953), p. 133.

[126] Claude Eilers, *Roman Patrons of Greek Cities* (Oxford, 2002) p. 168.

[127] MacMullen, "*The Epigraphic Habit*," p. 244.

[128] MacMullen, "*The Epigraphic Habit*," p. 244, n. 17 for several examples of false assumptions arising from disregard of the epigraphic habit when using data drawn from inscriptions.

Table: Datable Inscriptions Mentioning Fetial Priests

1st ½ 1st AD	2nd ½ 1st c. AD	1st ½ 2nd c. AD	2nd ½ 2nd c. AD	1st ½ 3rd c. AD	2nd ½ 3rd c. AD
No. of Inscriptions 7	No. of Inscriptions 13*	No. of Inscriptions 10	No. of Inscriptions 16	No. of Inscriptions 19	No. of Inscriptions 0
AE 2000, 465	*CIL* 6.913	*AE* 1995, 355	*CIL* 14.2405	*CIL* 14.4238	
CIL 11.7553	*CIL* 8.7058	*CIL* 10.6658	*CIL* 8.7059	*CIL* 6.41146	
CIL 3/2, pp. 774–775 [= *RGDA* 7]	*CIL* 8.11002	*AE* 1955,123 [= *AE* 1968, 554]	*CIL* 8.7060	*AE* 1963, 42	
	CIL 8.19492		*AE* 1893, 88	*CIL* 6.1556 [= *CIL* 10.6663]	
CIL 3.248	*IRT* 273	*AE* 1926, 123	*AE* 1914, 281	*CIL* 10.6665	
CIL 5.4329	*AE* 1951, 85	*CIL* 11.1833	*CIL* 6.1517	*CIL* 10.8292	
CIL 15/1.796 [= *AE* 1974, 381]	*AE* 1987, 989	*CIL* 6.1462	*CIL* 6.41140	*AE* 1975, 795	
	ILAlg. 2.550	*ILAfr.* 43	*ILAlg.* 2.3446	*AE* 1948, 241	
CIL 9.2845	*CIL* 6.31755	*CIL* 12.3164	*ILAlg.* 2.3605	*CIL* 10.6567	
	AE 1973, 200	*CIL* 12.5896	*AE* 1954, 138	*CIL* 10.6764	
	CIL 10.797	*CIL* 3.6818	*CIL* 3.11933	*CIL* 6.1450	
	CIL 11.5211		*CIL* 3.7794	*AE* 1955, 188	
	IRT 528		*IRT* 541	*CIL* 6.2318	
			CIL 14.3592	*CIL* 14.2941	
			AE 1946, 131	*CIL* 13.6749	
			AE 1954, 58	*CIL* 2/5.718	
				AE 1952, 115	
				AE 1965, 240	
				AE 1965, 241	

* Large number because one individual is responsible for 7 inscriptions

Inscriptions that mention Fetials begin to appear in the Principate, peak in the second half of the second century and cease after AD 240. The rise and fall in the number of inscriptions mirrors the pattern of the rise and fall of the epigraphic habit. The inscriptional evidence permits us to extrapolate nothing more from the numbers alone. Any attempts to conclude that the Fetials existed or did not exist from this data would be unsound.

5. *Augustan 'Revival' of the Fetial College*

The fifth argument concerns an assumed revival of the Fetial priesthood by Augustus. The assumption that the Fetials by this time had died out has taken such a hold, despite the many references to their activity between 136 and 32 BC, that when they are mentioned in 32 BC an assumption is

made that they must have been revived. Most recently this view has been expressed by Scheid in 2005 who wrote:

> He [Augustus] also showed interest in the revival of the old religious functions and rituals. In 32 BC, he declared war on Cleopatra according to the rituals of the *Fetiales* …; the restoration of this forgotten priesthood *must be dated* [my emphasis] to these years.[129]

Cassius Dio's report of the declaration of war against Cleopatra, where Octavian, as Fetial, performed the ritual, says it was done κατὰ τὸ νομιζόμενον, 'in the customary fashion'.[130] This phrase appears to refer to a pre-existing rite. The widespread acceptance that the Fetials were not in use prior to 32 BC has led to assertions that Augustus revived or even invented a spear throwing ritual.[131] This view was challenged by Fusinato in 1884 who considered that the phrase 'in the customary fashion' suggested that the ritual had not been forgotten and indeed not revived.[132]

The whole question of Augustus' revival of religion has been put under the microscope. Brunt was convinced that one should not take too literally the accounts of Augustus restoring religion.[133] Warde Fowler almost a century ago suggested that the revival may have only meant that the prestige of the Fetial College was confirmed when Augustus became a

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[129] John Scheid, "Augustus and Roman Religion: Continuity, Conservatism, and Innovation," in *The Cambridge Companion to the Age of Augustus*, ed. K. Galinsky (Cambridge, 2005), p. 180.

[130] Cassius Dio, *Roman History* 50.4.4–5. "Customary" refers here to the period that Dio was describing, not to his own time in the third century. See Santangelo, "*The Fetials and their Ius*," pp. 87–88; H. Volkmann, *Cleopatra. A Study in Politics and Propaganda*, trans T.J. Cadoux (London, 1958), p. 170; cf. Rüpke, *Domi*, pp. 106–107; Rich, *Declaring War*, p. 106.

[131] Saulnier, "*Le rôle*," p. 193; Wiedemann, "A Reconsideration," pp. 482–483; Rüpke, *Domi*, pp. 105–107; R.A. Kearsley, "Octavian in the Year 32 BC: The *S.C. de Aphrodisiensibus*," *Rheinisches Museum für Philologie* 142 (1999), pp. 58–59; F. Fontana, "Fetialis fui," *Annali dell'istituto italiano per gli studi storici* 11 (1989–1990), 71–72; his view that Livy invented the ritual is wholly unconvincing; Ernesto Bianchi, *Fictio Iuris. Richerche sulla finzione in diritto romano dal periodo arcaico all'epoca augustea* (Padua, 1997) pp. 125–127; Geoffrey S. Sumi, *Ceremony and Power: Performing Politics in Rome between Republic and Empire* (Ann Arbor, 2005), pp. 210–213. Cf. Rich, *Declaring War*, p. 106; Santangelo, "*The Fetials and their Ius*," p. 87.

[132] Fusinato, *Dei feziali*, p. 584. Broughton, "*Mistreatment*," p. 60 was of the view that in such an historic moment Octavian would have ensured that he was acting in the most proper and correct manner. For innovation by Octavian: Fontana, "*Fetialis fui*," p. 76. Ferrary, *Ius fetiali*, p. 421 rejects any innovation by Octavian. Wiedemann, *Reconsideration*, pp. 482–484 and Rüpke, *Domi*, pp. 106–107 consider the ritual a fiction.

[133] P.A. Brunt, "The Senate in the Augustan Regime," *Classical Quarterly* 34/2 (1984), p. 437.

member.[134] Jocelyn had this to say: "We have no means of telling whether … many of the priesthoods had lain unoccupied for centuries."[135] The only direct information on Augustus' religious revivals, however, is found in Suetonius where he states that the ancient rites that had gradually fallen into disuse and merited revival were the augury of Salus, the office of the Flamen Dialis, the Lupercalia, the Saecular Games and the festival of the Compitalia.[136] Absent from this list are the Fetials. Therefore, there is no reason to assume that Augustus revived the Fetial priesthood.

6. *Conclusion*

The theory that the Fetial priesthood did not function in the second and first centuries BC rests on five foundations, which individually and collectively can offer no support for this proposition. The over-emphasis on the decline in Fetial participation in declarations of war has left a legacy that has influenced scholarship to the detriment of understanding the full range of the functions of the Fetial priesthood. The duration of their longevity may now be confirmed as extending into the middle and late Republic.

When the Fetials priests, in fact, ceased to exist is not known. It cannot be taken as certain that the last Fetial attested from inscriptions was L. Roscius Aelianus Paculus Salvius Iulianus in c. AD 240 and that this date marks their disappearance. AD 240 merely coincides with the decline of the epigraphic habit.[137] The last reference to them is in AD 359 when Ammianus reports that the Fetial spear throwing ceremony was used to declare war.[138] The answer as to when in fact they died out must await further discoveries.

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[134] William Warde Fowler, *The Religious Experience of the Roman People from the Earliest Times to the Age of Augustus* (1911; repr. New York, 1971), p. 434. Indeed, Wissowa notes that Augustus was not just a fetial priest but the *pater patratus*. See Wissowa, *Religion*, p. 554.

[135] H.D. Jocelyn, "The Roman Nobility and the Religion of the Republican State," *The Journal of Religious History* 4 (1966–1967), p. 96.

[136] Suetonius, *Augustus* 31.4.

[137] Cf. H. Sidebottom, "International Relations" in *The Cambridge History of Greek and Roman Warfare 2, Rome from the Late Republic to the Late Empire*, eds. Philip Sabin, Hans van Wees, and Michael Whitby (Cambridge, 2007), p. 14 who states that the Fetials were last heard of in the third century AD, citing *AE* 1948, 241. This inscription relates to Catius Lepidus; whereas the last attested Fetial is probably L. Aelianus Paculus Salvius Rufus Iulianus known from *AE* 1952, 115.

[138] Ammianus Marcellinus, *Res gestae* 19.2.4.

The longevity of the fetial college reinforces some perceptions of Roman religion that it was innately conservative and respected its traditions that stretched back to the archaic period. The continuance of the fetial priesthood into the imperial period shows the value Romans placed on the maintenance of the forms of the ancient religion. Much of this was due to the determination of emperors to follow the precedent set by Augustus. The fetial priesthood resisted change and moved from the late republic into the empire as a college into which the Roman elites desired entry. The fetial law gave ritual to many aspects of Rome's foreign policy and was not discontinued. This intertwining of religion and law was a feature that was a dominant aspect of the Roman political and cultural ethos. The fetial law was just one example of this phenomenon.

PART III

SACRED LAW, CIVIL LAW, AND THE CITIZEN

SACRED LAW AND CIVIL LAW

Olga Tellegen-Couperus

1. *The Connection between Sacred and Civil Law*

In the summer of 47 BC, two prominent Roman senators met on the island of Samos, off the coast of Asia Minor: Marcus Iunius Brutus and Servius Sulpicius Rufus. Brutus is best known as a politician and as one of the murderers of C. Iulius Caesar, Rufus as the top jurist of his time. In the previous year, both had been supporters of Pompey and both had fled to the East after the battle of Pharsalos when Pompey had been beaten by Caesar. Rufus had withdrawn to the island of Samos, where he awaited the pardon of and reconciliation with Caesar. Brutus had already been pardoned and was on his way back from Asia to Rome. He made a stop on the island of Samos, and there the two met. According to Cicero who described this meeting, they talked about law: Brutus asked Rufus many questions about the extent to which pontifical law is connected to civil law.[1] Unfortunately, Cicero does not provide any details about the specific questions Brutus asked, let alone Rufus' answers, but it is clear that the issue was regarded as relevant by both Brutus and Rufus.

This story is remarkable in that it seems to contradict the commonly held view that, already in the course of the Republic, civil law had become separated from pontifical law, i.e., from religion. Early secularisation is even regarded as one of the characteristics of Roman law.[2] The story cannot be discarded as the odd one out, because in other places Cicero also quotes leading Roman jurists who stress the importance of being well acquainted with pontifical law.[3] However, verifying the story is difficult because our knowledge of early civil law is limited and that of pontifical law problematical.

In the middle of the nineteenth century, Niebuhr suggested that, of old, the pontiffs as keepers of law and time used to record major events

[1] Cicero, *Brutus* 42.156.

[2] Franz Wieacker, *Römische Rechtsgeschichte, I Einleitung, Quellenkunde, Frühzeit und Republik* (Munich, 1988), p. 361 with bibliography.

[3] Cicero, *De oratore* 3.134; *De legibus* 2.47 and 2.52–53.

and decisions.[4] Although Niebuhr does not mention any source, he may have been inspired by Livy's story about King Numa who was said to have entrusted written directions for performing the rites of worship to the newly appointed pontiff Numa Marcius.[5] Niebuhr's suggestion triggered numerous attempts to reconstruct the so-called *Priesterbücher*, and as many critical comments on these attempts.[6]

Recently, John Scheid has qualified this phenomenon as "the modern myth of the *Priesterbücher*" and has suggested that Roman religious tradition was mainly oral. In his view, it "consisted in the combination of two elements: on the one hand, a ritual savoir-faire, orally transmitted from father to son, from public officer to public officer, relying on written formulas of prayer and an orally enacted calendar; on the other, isolated decisions adapting these ritual rules to new situations."[7] Focussing on the pontiffs, Scheid suggests that they recorded these decisions or *regulae* in their *commentarii*. The *regulae* were never collected or systematized into a corpus. According to Scheid, they must have been comparable to the opinions given by the jurists on problems of civil law.

Referring to Magdelain's research on the early development of civil law, Scheid suggests that the procedures used by Roman priests can be reconstructed with the help of civil law procedures.[8] One of the procedures in which the pontiffs were involved was the punishment of religious offences. How did they set to work? According to Scheid, the main rule was that someone who had intentionally offended a god must be surrendered to that god for the sake of vengeance. The procedure that could lead to surrender consisted of two elements: the designation of the guilty person and the establishment of guilt. Scheid reconstructs the first

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[4] B.G. Niebuhr, *Historische und philologische Vorträge über römische Geschichte an der Universität zu Bonn gehalten*, 1 (Berlin, 1846), pp. 4–10.

[5] Livy, *Ab urbe condita* 1.20.5–7.

[6] It was particularly Georg Wissowa, *Religion und Kultus der Römer*, 2nd ed. (Munich, 1912) who stimulated this kind of work. Thus, Jörg Rüpke, *Fasti Sacerdotum, Die Mitglieder der Priesterschaften und das sakrale Funktionspersonal römischer, griechischer, orientalischer und jüdisch- christlicher Kulte in der Stadt Rom von 300 v. Chr. bis 499 n. Chr.*, 3 (Wiesbaden, 2005), pp. 1547–1566. For an overview of the problems involved in these reconstructions, see John North, "The Books of the Pontifices," in *La memoire perdue. Recherches sur l'administration romaine*, Collection de l'École française de Rome 243 (Rome 1998), pp. 45–63, with bibliography.

[7] John Scheid, "Oral Tradition and Written Tradition in the Formation of Sacred Law in Rome," in *Religion and Law in Classical and Christian Rome*, eds. Clifford Ando and Jörg Rüpke (Stuttgart, 2006), pp. 14–33, particularly pp. 15–18, with bibliography.

[8] Scheid, "Oral Tradition," p. 20. André Magdelain, *De la royauté et du droit de Romulus à Sabinus* (Rome, 1995), pp. 73–75.

element by comparing it with *noxae deditio* (noxal surrender) in civil law and international law. For the second element, Scheid refers to a *regula* of Q. Mucius Scaevola the Pontifex in which a distinction is made between an impiety committed intentionally and one committed unintentionally. Here, Scheid does not compare guilt in sacred law with guilt in civil law although that would have been possible.

Scheid seems to combine two aspects of pontifical law and civil law: the way in which opinions were recorded and the content of both sets of law. The first aspect is not problematical. In the first three centuries of the Republic, the pontiffs were the experts in sacred law as well as in civil law. Subsequently, also senators who were not pontiffs started to become involved in civil law; they are now known as jurists.[9] As from the third century BC, the jurists wrote down and collected their opinions; however, the oldest texts we know date from the end of the second century BC.[10] They have been preserved because, in the first two centuries AD, jurists referred to them in their commentaries and opinions, and because, in the sixth century, Emperor Justinian ordered a selection and collection to be made of the works of the classical jurists, a compendium which is called the *Digest*. It is not surprising that, in the *Digest*, most texts stem from the late classical jurists Ulpian and Paul (AD 180–220); only a limited number of texts have their origin in the Roman Republic. It is more than likely that the early jurists recorded their opinions in the same way as the pontiffs had theirs; in fact, the jurists of the late Republic often were also pontiffs.

The second aspect of Scheid's reconstruction, however, is very problematical. Did pontifical law and civil law share content? If they did, it may be possible to reconstruct pontifical law with the help of civil and international law. However, if they did not, it does not mean that there was no connection between pontifical law and civil law. The interaction between both sets of law may have taken place on a different level. Therefore, the question is whether the method applied by Scheid is adequate for the problem he tackled.

In the following, I shall study Scheid's reconstruction from the point-of-view of Roman law. First, I shall deal with the comparison of *noxae*

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[9] See, for instance, Richard A. Bauman, *Lawyers in Roman Republican Politics. A Study of the Roman Jurists in their Political Setting, 316–82 BC* (Munich, 1983).

[10] See Cicero, *De oratore* 2.142 about the custom of jurists to record opinions. The earliest known jurists to do so are M. Porcius Cato Licinianus and Manius Manilius, both living in the middle of the second century. The oldest known texts stem from Sex. Aelius Catus, even though they are only indirect allusions. On this jurist, see Federico D'Ippolito, "Sex. Aelius Catus," *Labeo* 17 (1971), 271–283 and Bauman, *Lawyers*, pp. 123–126.

deditio in sacred, civil, and international law. Then, I shall compare Scaevola's *regula* on impiety with a *responsum* that the same Scaevola gave in a (civil law) case of unlawful damage.

2. Noxae Deditio *in Sacred, Civil, and International Law*

Scheid reconstructs the designation of the guilty person in sacred law with the help of *noxae deditio* in civil and international law. He assumes that, in the later Republic, *noxae deditio* was applied in all three areas of law. First, Scheid summarily describes the *noxae deditio* in civil and international law, and then he compares it with that in sacred law.

In civil law, *noxae deditio* is a well known concept. Unfortunately, its early history is shrouded in mist. Scheid refers to the reconstruction by the Belgian Romanist Fernand de Visscher. In his book entitled "Le régime de la noxalité en droit romain" which was published in 1947, De Visscher distinguished two phases (I shall quote Scheid's translation of this passage): "the first phase begins as soon as the crime is committed. During this phase, the *deditio noxae* is only the right or the means of the group for escaping the impending vengeance. During this period the group can be freed by the exile or *dimissio*, the repudiation or the denial of the guilty person as well as by any other act implying the ending of social contact with him. The second phase starts with the summons by the victim or his parents. The group of the guilty person now is forced to hand him over. From now on, the group can only be freed by a *noxae deditio* to the victim or the victim's group."[11] According to De Visscher, the obligation of *noxae deditio* was never sanctioned by a civil action, but only by the coercive means of the magistrate: public authority simply substituted collective vengeance.[12] Scheid concludes that *deditio noxae* always remained part of public law; it was political rather than juridical.[13]

For *noxae deditio* in international law, Scheid also refers to De Visscher. According to the latter, international *deditio* is closely related to that of civil law.[14] It shows (again, I quote Scheid's translation) that "if, in circumstances in which the international customs consider it effica-

[11] Scheid, "Oral Tradition," p. 28 referring to Fernand de Visscher, *Le régime romain de la noxalité. De la vengeance collective à la responsabilité individuelle* (Brussels, 1947) pp. 50–51.

[12] De Visscher, *Noxalité*, p. 53.

[13] Scheid, "Oral Tradition," p. 30.

[14] De Visscher, *Noxalité*, p. 137.

cious, the offered *deditio* is refused by the offended state, it will be sufficient to free the state of the guilty person from every guilt, even if its response is limited only to the expulsion of the guilty person from the city." Scheid illustrates this statement with the famous case of the consul Hostilius Mancinus who, in 137 BC, had been surrendered by the Romans to the Iberian city of Numantia but had not been accepted.[15] In the Senate, P. Mucius Scaevola argued that the *deditio* was a deed of sovereignty of the Roman people that was independent from the *receptio*. Scheid concludes that the Roman authorities, by publicly recognizing the offence and its author, carried out the *derelictio* and ended the social contact with the guilty party.

Now let us turn to sacred law. According to Scheid, in archaic Rome, the *deditio noxae* as described by De Visscher also applied in the case of a divine offence. The guilty person became *impius* and was excluded from public and religious life. The community would hand him over to the offended god who could take vengeance if he so chose.[16] In this way, the community could free itself from every responsibility.[17] The *impius*, however, could not expiate himself.

According to Mommsen and Wissowa, the second century BC saw a softening of the traditional sternness of Roman religion.[18] On the basis of three inscriptions of the time—two containing regulations for sacred groves near Spoleto and Luceria and one containing a law for the Jupiter temple in Furfo, all located in Central or South Italy—they assumed that the penalties for all religious offences were relaxed.[19] According to Scheid, however, the regulations only show that a guilty person could expiate an unintentional offence by offering a sacrifice; he could also pay a fine for having violated a public regulation and then a priest should

[15] Scheid, "Oral Tradition," p. 28. On the *causa Mancina*, see below, pp. 155–158.

[16] Scheid, "Oral Tradition," p. 29. In this connection, he distinguishes *deditio noxae* from *sacratio* of criminals, as studied recently by Roberto Fiori, *Homo sacer. Dinamica politico-costituzionale di una sanzione giuridico-religiosa* (Naples, 1996).

[17] Scheid, "Oral Tradition," p. 27. In n. 56, he mentions the case of the Crotonians who complained before the Roman senate about the Roman general Pleminius for violation of Hera Lacinia's grove, and he refers to Livy, *Ab urbe condita*, 29.18.9. However, this section forms part of Livy's story about the Locrians who, in 204 BC, complained before the Roman senate about the outrages committed by the same general Pleminius against their temple of Proserpina. They beg the senators to atone for this crime before undertaking any action in Italy or Africa in order to prevent public disaster.

[18] On these documents, see Scheid, "Oral Tradition," pp. 23–26.

[19] Theodor Mommsen, *Römisches Strafrecht* (1899, repr. Graz, 1955), p. 811; Wissowa, *Religion und Kultus*, pp. 392–393.

expiate the offence by offering a *piaculum*. The intentional offences remained inexpiable.[20] Around 100 BC, the jurist and pontifex maximus Q. Mucius Scaevola confirmed these rules; the only innovation he introduced was to make it possible for the unintentional offender to repair the damage done and to expiate his deed himself. The sanction for an intentional offence remained surrender to the injured party, i.e., to the offended god, in order that the god be permitted to take vengeance on the offender. According to Scheid, this *noxae deditio* of sacred law survived until the end of the first century AD, when the emperor's intrusion into civil life limited the scope of vengeance.[21] He concludes that the divine right to take vengeance, as acknowledged by the *deditio* of the intentional *impius*, should not be regarded as only an archaic institution.

Whereas De Visscher considered *noxae deditio* as a remnant of a period when the settlement of conflicts between more or less independent groups was realized by agreements on specific details rather than by legal solutions founded on a common norm, Scheid extends this interpretation to historical times.[22] He suggests that *noxae deditio* can be considered simply as a form of political settlement that allowed private or international vengeance to be taken. The question is, however, whether *noxae deditio* in civil law is comparable to *deditio* in international and sacred law. I will first consider *noxae deditio* in civil law and then deal in more detail with the *deditio* of Mancinus and international law.

2.1. Noxae Deditio *in Civil Law*

When a modern law student consults a textbook on Roman private law, he is bound to find a description of *noxae deditio* that is very different from that of Scheid. In the latter case, it is always connected with vengeance, in the former it is treated in the context of the liability

[20] Cicero, *De legibus* 2.22. On this distinction, see Scheid, "Oral Tradition," pp. 23–26.

[21] Thus Scheid, "Oral Tradition," p. 29. He refers to Yan Thomas, "Se venger au forum. Solidarité familiale et procès criminel à Rome (Premier siècle av.-deuxième siècle ap. J.C.)," in *La Vengeance, Études d'ethnologie, d'histoire et de philosophie, 3. Vengeance, pouvoirs et idéologies dans quelques civilisations de l'Antiquité*, ed. Raymond Verdier (Paris, 1984), pp. 65–100, particularly p. 67. Thomas, p. 65, turns against the distinction that is commonly drawn between (archaic) vengeance and (modern) justice: he rather sees justice as offering the means to take vengeance. It is evident that penalties always have an element of vengeance, but, in my view, vengeance is basically different from justice in that it is not necessarily proportional to the original crime.

[22] Scheid, "Oral Tradition," p. 30.

of a *pater familias* or a *dominus* for a delict committed by his son or slave. In his *Institutes*, Gaius describes it in the following way:

> Gai. *Inst*. 4.75
>
> *Ex maleficiis filiorum familias servorumque, veluti si furtum fecerint aut iniuriam commiserint, noxales actiones proditae sunt, uti liceret patri dominove aut litis aestimationem suffere aut noxae dedere. Erat enim iniquum nequitiam eorum ultra ipsorum corpora parentibus dominisve damnosam esse*.
>
> Wrongdoing by sons or slaves, as where they have been guilty of theft or outrage, has given rise to noxal actions, the nature of which is that the father or master is allowed either to bear the damages awarded or to surrender the offender. For it would be inequitable that their misconduct should involve their parents or masters in loss beyond that of their persons.[23]

In classical Roman law, the *pater familias* or *dominus* would be held liable for delicts committed by his son or slave, but he could limit his responsibility by surrendering the son or slave to the injured party. What is crucial is that the choice between paying the fine or surrendering the son or slave was up to the defendant. The praetor would include this choice in the *formula*. If the defendant opted for *noxae deditio*, because paying the damage would cost him much more than the value of the slave, the slave (or son) had to be handed over by means of a formal act, the *mancipatio* or the *in iure cessio*.

Next to nothing is known about the rules of *noxae deditio* in earlier law.[24] The reconstruction by De Visscher discussed above is well-known, but not generally accepted.[25] Moreover, his reconstruction comprises more than Scheid wants us to believe. In fact, De Visscher distinguishes four different procedures in Roman law. The earliest procedure was (1) the pre-legal one; it was soon followed by (2) the legal system of noxality;

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[23] Translation based on F. de Zulueta, *The Institutes of Gaius. Text with critical notes and translation*, 1 (Oxford, 1946), p. 267.

[24] All we know is that, according to Gaius, *Institutes* 4.76, the Law of the Twelve Tables established a noxal action for theft.

[25] See the critical reviews by G.I. Luzzatto, *Studia et Documenta Historiae et Iuris* 13/14 (1947/1948), 412–422 and M. Sargenti, *IURA* 1 (1950), 447–452. See also Max Kaser, *Das römische Privatrecht*, 1, 2nd ed. (Munich, 1971), pp. 163–165, and H.F. Jolowicz and Barry Nicholas, *Historical Introduction to the Study of Roman Law*, 3rd ed. (Cambridge, 1972), pp. 172–174. Recently, Carlos Felipe Amunátegui Perello, "Lucretia and the Historical System of Noxality," *Revue Internationale des Droits de l'Antiquité* 55 (2008) 67–81compared the older theory of P.F. Girard, "Les actions noxales," *Nouvelle Revue Historique* 11 (1887), 409–449 with that of De Visscher.

in early classical Roman law, the system of noxal actions (3) was developed, whereas in postclassical law, the regime of noxality underwent (4) deformations. De Visscher assumed that the older, pre-legal procedure was not displaced by the younger, legal ones but continued to exist.[26] In the second stage (i.e., that of the legal system of noxality), the victim's side had a right to demand the surrender of the wrongdoer, but the group sheltering the latter was allowed to buy them off by offering compensation. At some quite early date, when the *legis actio* procedure was still dominant, the system of *actiones noxales* was introduced: now the wrongdoer or his group was obliged to pay compensation but they were allowed to surrender the wrongdoer to the victim.

It is particularly the first procedure as proposed by De Visscher that has been rejected by other Romanists. Several other attempts at reconstruction have been made.[27] Max Kaser, for instance, developed another theory based on *Noxalhaftung*: the idea that noxal liability was created by the delict itself.[28] The problem is—as usual—that there are hardly any sources for archaic Roman law so that it is impossible to know anything about the origin of this special form of liability with any amount of certainty.[29]

Scheid only refers to the first procedure described by De Visscher, i.e., to the pre-legal phase about which nothing is known. If, one day, De Visscher's reconstruction will turn out to be correct, Scheid's comparison will hold for the early Roman Republic. However, the *noxae deditio* of classical Roman law belongs to the third procedure described by De Visscher. It was used for different offences (e.g., theft, damage to property), for different persons (not for those who were free and *sui iuris*), and for a different purpose (limitation of liability of a *pater familias* or *dominus* for delicts committed by a son or slave). Moreover, Roman criminal law did not know *noxae deditio* as a way of punishment either.[30] Therefore, the *noxae deditio* in civil law does not seem to have any connection with *deditio* in sacred law.

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[26] See the review of De Visscher's book by A.H. Campbell in *Journal of Roman Studies* 39 (1949), 162–164 for a useful summary.

[27] For literature, see Max Kaser and Karl Hackl, *Das römische Zivilprozessrecht*, 2nd ed. (Munich, 1996), p. 88 n. 15.

[28] Max Kaser, *Das altrömische Jus. Studien zur Rechtsvorstellung und Rechtsgeschichte der Römer* (Göttingen, 1949), pp. 225–232.

[29] Cf. Dieter Nörr, *Aspekte des römischen Völkerrechts. Die Bronzetafel von Alcántara* (Munich, 1989), p. 81.

[30] O.F. Robinson, *Penal Practice and Penal Policy in Ancient Rome* (London, 2007), pp. 181–182 does not include vengeance as one of the purposes of punishment nor (184–187) does she mention *noxae dedito* as a penalty for particular crimes.

2.2. Noxae Deditio *in International Law*

For noxal surrender in an international context, Scheid mentions the famous case of Mancinus. The story behind it has come down to us in several sources: it has been told by historians like Appian and Plutarch,[31] but the *deditio* aspect has been described most extensively by Cicero. In the first book of his *De oratore*, he makes Crassus tell the story of Mancinus as an example of important cases where actions involving civil rights turn upon points of law.

> Cicero, *De oratore* 1.181
>
> *Etenim sic C. Mancinum, nobilissimum atque optimum virum, ac consularem, cum eum propter invidiam Numantini foederis pater patratus ex S.C. Numantinis dedidisset, eumque illi non recepissent, posteaque Mancinus domum revenisset, neque in senatum introire dubitasset; P. Rutilius, M. filius tribunus plebis, de senatu iussit educi, quod eum civem negaret esse; quia memoria sic esset proditum, quem pater suus, aut populus vendidisset, aut pater patratus dedidisset, ei nullum esse postliminium*.
>
> For in truth such was the experience of Gaius Mancinus, a man of the highest rank and character and a past consul, who under a decree of the Senate had been delivered up to the Numantines by the *pater patratus*, for concluding an unpopular treaty with their nation, and whose surrender they had refused to accept, whereupon he returned home and unhesitating commons, ordered him to be removed, affirming that he was no citizen in view of the traditional rule that a man sold by his father or by the people, or delivered up by the *pater patratus*, had no right of restoration.[32]

From the other sources we know that, in 137 BC, the consul C. Hostilius Mancinus had been defeated in several battles by the Numantines, in Hispania Citerior, and that finally his army had been encircled by them. A peace treaty was made, but our sources differ as to the person who represented Rome. According to Appian, it was Mancinus who bound himself by an oath to this agreement.[33] Plutarch, however, states that

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[31] Appian, *The Iberian War* 80 and 83; Plutarch, *Tiberius Gracchus* 5–7. For a complete overview of the sources, see Giuliano Crifò, "Sul caso di C. Ostilio Mancino," in *Studies in Roman Law in Memory of A. Arthur Schiller*, eds. R. Bagnall and W.V. Harris (Leiden, 1986), p. 19, n. 1. See also the sources and literature regarding the *causa Mancina* mentioned by Linda Zollschan in this volume, p. 132.

[32] Translation by E.W. Sutton and H. Rackam for Loeb Classical Library (1942). For the extensive literature on this case, see Bauman, *Lawyers*, p. 237 note 93. See also J. Arias Ramos, "Apostillas juridicas a un episodio Numantino," *Revista de Estudios Politicos* 68 (1953), 33–49, not mentioned by Bauman.

[33] Appian, *The Iberian War* 80.

Mancinus' quaestor Tiberius Gracchus made the treaty thereby saving the lives of some 20,000 Roman citizens.[34] At Rome, the treaty was considered humiliating, and it was denounced as a disaster and as a disgrace to the name of Rome. The people decided that the consul Mancinus should be delivered up to the Numantines, but for Tiberius' sake all the other officers were spared.[35]

Mancinus was taken back to Spain by the *pater patratus*, the head of the fetial priests.[36] He was left before the gate of Numantia, stripped and in chains. However the Numantines refused to accept him and, at night fall, he was taken back to the Roman camp.

Mancinus returned to Rome. He wanted to enter the Senate-house again but was ordered out by the tribune of the people P. Rutilius. Comparing the surrender of Mancinus by the *pater patratus* with the case of the man who was sold by his father or by the people, Rutilius stated that he had no right of restoration. From other sources, we know that his case was hotly debated in the Senate: P. Mucius Scaevola took the side of Rutilius and maintained that Mancinus was no longer a citizen. He was like an exile; he could only be restored in his rights as a citizen when the Roman people would "receive" him again.[37] M. Iunius Brutus, on the other hand, argued that Mancinus had never lost his citizenship because like a gift, a *deditio* was not complete until it had been accepted.[38] Rutilius and Scaevola won the day, but a year later, the Roman people restored Mancinus as citizen and senator, and even elected him as praetor.

Following De Visscher (and, indirectly, Rutilius and Scaevola), Scheid considers the *deditio* of Mancinus as a deed of sovereignty on the Roman side that was independent from the reception, the formal acceptance, by the injured city. Both De Visscher and Scheid assume that Mancinus had committed perjury and that his *deditio noxae* was considered an expiation that would free the Roman people of the responsibility for this perjury. Scheid suggests that, when one transposes this case into a

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[34] Plutarch, *Tiberius Gracchus* 5.4

[35] Thus Plutarch, *Tiberius Gracchus* 7.1

[36] According to Appian, *The Iberian War* 83, Mancinus was taken to Spain by L. Furius Philus.

[37] P. Mucius' argument is described by Pomponius, *Digesta* 50.7.18. On this text and the vast amount of literature, see Crifò, "Mancino," pp. 19–32.

[38] We know from Modestinus, *Digesta* 49.15.4 that, in this debate, Scaevola was opposed by Brutus. It is not certain that Brutus used the argument mentioned above, but he may have because it is the argument that, according to Cicero in *Topica* 37, could be used against Scaevola in the Mancinus case.

religious situation, one could say that, by recognizing the status of an inexpiable *impius* as that of the author of a crime against the gods, the Roman people freed itself from every responsibility.[39]

I do not agree with this analysis. First, I do not think that Mancinus had committed perjury: it seems it was Tiberius Gracchus and not Mancinus who had made the treaty with the Numantines and, moreover, it was not Mancinus but the Roman people that broke the treaty. Consequently, the Romans were unfair both against Mancinus and against the Numantines. It seems they used the *deditio* in order to expiate a perjury they themselves committed. Therefore, in terms of the *noxae deditio* of civil law, there was no damage committed by a subordinate person.

Second, I doubt whether *deditio* can be considered as a deed of sovereignty of the Roman people. Sometimes it will have worked like that, for instance in 188 BC, when Lucius Minucius Myrtilus and Lucius Manlius were said to have beaten Carthaginian ambassadors and were delivered by the fetials to the ambassadors and taken to Carthage.[40] If they would have been refused by the Carthaginians, Livy—who mentions this event—would have told us so. In other cases, however, the *dediti* were refused, for instance by the Samnites (in 321 BC, after the battle at the Caudine Forks) and by the Numantines.[41]

In my view, *deditio* was a religious concept that could be used for political ends.[42] Its effect was determined by political power. It is striking indeed that no case of *deditio* is known to have taken place after 137 BC. Only once, in 55 BC, the subject came up for discussion again, when Cato wanted Caesar to be handed over to two Gallic tribes for having violated a truce.[43] The decline of *deditio* can very well be explained by the rise of

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[39] Scheid, "Oral Tradition," p. 28.

[40] Thus, Livy, 38.42.7.

[41] In this connection, it is interesting to mention a theory put forward by Jacques-Henri Michel, in "L'extradition du général en droit romain," *Latomus* 39 (1980), 681–693, particularly 688. He thinks that, originally, the Roman jurists used to analyse *deditio* as a bilateral act, comparable to *emancipatio*, for which the cooperation of the enemy was necessary. However, by the end of the second century BC, some jurists tended to regard *deditio* as a unilateral act, comparable to *devotio*. The latter word refers to a general who, before a battle, dedicates the enemy and himself to the gods of the underworld in order to secure victory for the Roman people. It is attested three times by Livy: for the years 340, 295, and 279 BC. Michel suggests that, by the end of the second century BC, the rise of this new theory shows that *deditio* underwent a crisis.

[42] In the same vein, Claire Lovisi, *Contribution à l'étude de la peine de mort sous la République romaine (509–149 av. J.-C.)* (Paris, 1999), pp. 50–51.

[43] Plutarch, *Caesar* 22.1–3; *Cato Minor* 51.1. See also Linda Zollschan on this case, above, p. 136.

Rome's political power. The fact that it is political power that determines who decides whether the *deditus* will be accepted shows that international *deditio* is basically different from the *noxae deditio* of civil law.

Third, there is an even more important reason that makes me doubt whether, in the case of Mancinus, it is right to speak of *noxae deditio*.[44] In the sources, only the words *dedere*, *deditus*, and *deditio* are used.[45] In the other cases of surrender of a general, the word *noxa* is not used in combination with *deditio* either.[46]

In my view, the Mancinus case does not confirm the existence of a *noxae deditio* in international law. It only shows that *deditio* in international law resembles *deditio* in sacred law. My conclusion, therefore, must be that there is not one and the same *noxae deditio* in civil, international, and religious law. *Noxae deditio* was part of civil law and implied restriction of liability for damage done by one's son or slave. It had nothing to do with *deditio* in religious and international law.

3. *The* Regula *of Q. Mucius Scaevola*

The second example of the close connection between civil law and pontifical law mentioned by Scheid is the so-called *regula* of Q. Mucius Scaevola. It has come down to us via Varro (116–27 BC) and Macrobius (fifth century AD). I will quote both texts.

> Varro, *De lingua Latina* 6.30
>
> *Praetor qui tum fatus est, si imprudens fecit, piaculari hostia facta piatur, si prudens dixit, Q. Mucius aiebat eum expiari ut impium non posse.*
>
> The praetor who has spoken at such a time, purifies himself by the sacrifice of an atoning victim, if he did it unknowingly; but if he spoke knowingly, Q. Mucius said that he could not atone for his offence, being *impius*.

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[44] According to Arias Ramos, "Apostillas," p. 43, the international *deditio* offers a perfect parallel to the *noxae datio* of civil law. However, he only mentions the surrender aspect, not the full context.

[45] Cicero, *Topica* 37 (*deditio*); *pro Caecina* 34 (*deditus*); *De oratore* 1.181(*dedidisset*); Modestinus, *Digesta* 49.15.4 (*deduntur*, *deditus*); Pomponius, *Digesta* 50.7.18 (*dedi*, *deditus*). According to Michel, "L'extradition," p. 681 n. 22, it seems that Rudolf von Jhering, *Der Geist des römischen Rechts* 1, 9th ed. (1890; repr. Aalen, 1968), pp. 215–216 was the first to identify *noxae deditio* and international *deditio*. However, Jhering does not refer to *noxae deditio* there at all.

[46] See, for instance, Valerius Maximus, *Facta et dicta memorabilia* 6.6.3: "per fetiales dedendos"; idem, 6.6.5: "per fetiales legatis dedidit." Livy, *Ab urbe condita* 38,42,7: "… per fetiales traditi sunt et Carthaginem avecti."

Macrobius, *Saturnalia* 1.16.9–11

Adfirmabant autem sacerdotes pollui ferias, si indictis conceptisque opus aliquod fieret. Praeterea regem sacrorum flaminesque non licebat videre feriis opus fieri, et ideo per praeconem denuntiabant, ne quid tale ageretur: et praecepti neglegens multabatur. 10. Praeter multam vero adfirmabatur eum, qui talibus diebus (i.e. festis) imprudens aliquid egisset, porco piaculum dare debere. Prudentem expiari non posse Scaevola pontifex adseverabat, sed Umbro negat eum pollui, qui opus vel ad deos pertinens sacrorumque causa fecisset vel aliquid ad urgentem vitae utilitatem respiciens actitasset. 11. Scaevola denique consultus, quod feriis agi liceret, respondit: quod praetermissum noceret ....

[9] The priests used to maintain that a rest day was desecrated if, after it had been duly promulgated and proclaimed, any work was done on it. Furthermore, the *rex sacrorum* and the *flamines* might not see work in progress on a rest day, and for this reason they would give public warning by a herald that nothing of the sort should be done. Neglect of the command was punished by a fine, [10] and it was said that he who had unknowingly done any work on such days, had—in addition to the fine—to make atonement by the sacrifice of a pig. For work done knowingly no atonement could be made, according to the pontiff Scaevola, but Umbro says that to have done work that concerns the gods or is connected with a religious ceremony, or any work of urgent and vital importance does not defile the doer. [11] Scaevola, in fact, when asked what might be done on a rest day replied that anything might be done which it would be harmful to have left undone. ...[47]

Varro's text is the oldest one. A praetor had done official business on a *dies fastus*. By doing so, he had committed sacrilege. When his mistake was discovered, he wanted to make atonement. He may have turned to the *pontifices* for advice. One of them, identified as Q. Mucius, distinguished between the case of the praetor having intentionally violated religious rules and the case of his doing so unintentionally: in the latter case, he could expiate himself by the sacrifice of an atoning victim, in the former case he could not.

From Macrobius' text, it can be deduced that the Q. Mucius mentioned by Varro must have been the pontiff Q. Mucius Scaevola. It is not clear who the other advisor, Umbro, may have been. Scheid calls both Scaevola and Umbro jurists but no jurist of the name Umbro is referred to in the sources. He may just as easily have been another pontiff. The case as described by Macrobius differs in two ways from the one described

[47] Translation based on that by P.V. Davies in *Macrobius, The Saturnalia* (New York and London 1969), pp. 106–107.

by Varro: first, the person committing the sacrilege is not specified as a praetor, and second, the consequences of the sacrilege are less severe in that both Umbro and Scaevola toned down Scaevola's original advice by allowing exceptions for work connected to religious ceremonies and other important work. It is not clear whether these differences are based on a different view in Macrobius' day or whether they are just accidental.

In both texts, the words *prudens* and *imprudens* are used to qualify the way in which the sacrilege had been committed. They are adjectives connected with the noun *prudentia*, all words deriving from *pro-videre*. It is clear that *providentia* is coterminous with *divinatio*, as Santangelo remarks elsewhere in this volume. He describes the word *prudens* as follows: "The word *prudens* is very suitable to convey the concept of a deliberate action: it indicates the conduct of someone who is aware of the implications of an action, and can foresee its consequences."[48] In other words, *prudens* is not an equivalent of *dolo* ('to have the intention to commit sacrilege') but has a broader meaning. By using this word, Scaevola (and Umbro) were able to allow exceptions to the rule that someone who works on a *dies fastus* commits sacrilege.[49]

It is striking that the *regula* of Scaevola is well-known among the students of Roman religion whereas students of Roman law will hardly know of its existence.[50] On the other hand, it seems that students of Roman religion do not realize that the same Q. Mucius Scaevola introduced a similar distinction into civil law, namely between intentionally and unintentionally committing a delict.[51] Students of Roman law, and particularly of the Roman law of obligations, are quite familiar with this distinction.

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[48] Federico Santangelo, "Law and Divination in the Late Roman Republic," above, p. 49.

[49] The formulation of general rules is usually regarded as a first step towards the development of a science. See on this subject, recently, Claudia Moatti, "Experts, mémoire et pouvoir à Rome à la fin de la République," *Revue historique* 309/2 (2003), 303–325, particularly 311–315, with bibliography.

[50] The *regula* is mentioned by Kurt Latte, *Römische Religionsgeschichte*, 2nd ed. (Munich, 1967), p. 203 n. 4, but not by Kaser, *Privatrecht*. It is referred to in books on the rise of Roman legal science, but only in the context of jurists formulating general clauses: Fritz Schulz, *History of Roman Legal Science* (1946; repr. Oxford, 1963), p. 65; Wieacker, *Römische Rechtsgeschichte*, p. 579 n. 39. Alan Watson, *The State, Law and Religion: Pagan Rome* (Athens, Georgia-London, 1992), pp. 10–12 refers to this *regula* to draw attention to the fact that the offence, no matter how deliberate, did not disturb the secular legal validity of the act.

[51] In case of murder, this distinction was made already in the Law of the Twelve Tables: in 8 24, it is stated that, 'if the weapon sped from his hand rather than was thrown by him', then a sacrificial ram was substituted. See Jolowicz-Nicholas, *Roman Law*, p. 174.

In Roman law, a delict was a source of obligation for which the praetor would grant an action against the guilty person or his *pater familias / dominus*. In the Laws of the Twelve Tables, the delicts *furtum* (theft) and *iniuria* (physical injury) are mentioned; there was only theft or injury when it had been committed with *dolus* (intentionally). The *lex Aquilia* of 286 BC introduced the delict of *damnum iniuria datum* (damage to property). We do not know how, originally, the word *iniuria* in this delict was interpreted. According to Jolowicz and Nicholas, it meant *non iure*, "in the sense that once it was proved that the defendant had caused the damage (in the appropriate way) he was liable unless he could show a recognised justification, such as self-defence."[52]

The earliest jurist known to have interpreted this word was Q. Mucius Scaevola. His opinion is quoted in a famous text of the jurist Paul on a tree-lopper who threw branches on the ground and thereby killed a slave. Scaevola compared a number of situations, each time indicating whether the tree-lopper was liable under the *lex Aquilia*:

> Paul, *Digesta* 9.2.31
>
> *Si putator ex arbore ramum cum deiceret vel machinarius hominempraetereuntem occidit, ita tenetur, si is in publicum decidat nec ille proclamavit, ut casus eius evitari possit. Sed Mucius etiam dixit, si in privato idem accidisset, posse de culpa agi: culpam autem esse, quod cum a diligente provideri poterit, non esset provisum aut tum denuntiatum esset, cum periculum evitari non possit. Secundum quam rationem non multum refert, per publicum an per privatum iter fieret, cum plerumque per private loca volgo iter fiat. Quod si nullum iter erit, dolum dumtaxat praestare debet, ne immittat in eum, quem viderit transeuntem: nam culpa ab eo exigenda non est, dum divinare non potuerit, an per eum locum aliquis transiturus sit.*
>
> If a pruner threw down a branch from a tree and killed a slave passing underneath (the same applies to a man working on a scaffold), he is liable only if it falls down in a public place and he failed to shout a warning so that the accident could be avoided. But Mucius says that even if the accident occurred in a private place, an action can be brought if his conduct is blameworthy; and he thinks there is fault when what could have been foreseen by a diligent person, was not foreseen or when a warning was shouted too late for the danger to be avoided. Following the same reasoning, it does not matter much whether the deceased was making his way through a public or a private place, as the general public often make their way across private places. But if there is no path, the defendant should be liable only for positive wrongdoing, so he should not throw anything at

[52] Jolowicz-Nicholas, *Roman Law*, p. 275.

> someone he sees passing by; but, on the other hand, he is not to be deemed blameworthy when he could not have guessed that someone was about to pass through that place.[53]

It is striking that Scaevola does not use the word *iniuria* but, instead, *culpa* to qualify the causing of damage. His description of *culpa*: "there is fault when what could have been foreseen by a diligent person but was not foreseen" has become standard, in modern as well as Roman times. In this case, the tree-lopper was liable for killing the slave when he could have foreseen that someone would walk underneath the tree he was lopping and yet did not shout a warning. Only when there was no path and when there was no reason to expect someone to walk by did he not need to shout. But, of course, he would be liable if he would intentionally throw a branch at someone passing by: then he would be acting with *dolus*.

It is generally assumed that this interpretation of *iniuria* as *culpa* was new, and that, from then on, persons who not intentionally but through negligence caused damage to someone else's property were liable to pay a penalty. In this way, Scaevola considerably increased liability under the *lex Aquilia*.

Both in his legal *responsum* and in his pontifical *regula*, Q. Mucius Scaevola distinguished between intentional and unintentional behaviour, but he did so using different concepts and aiming at different effects. In pontifical law, he used the word *prudens* in a sense that is reminiscent of the derivation of *pro-videre*, i.e. being able to foresee the consequences of an action and so behaving in a well-considered way. He thereby introduced a more lenient criterion for deciding whether sacrilege had been committed or not. For civil law, however, Scaevola did the reverse: by interpreting *iniuria* in the sense of *culpa*, he extended liability under the *lex Aquilia*. From now on, not only was someone who intentionally caused damage to someone else's property liable, but so too was someone who did not intend to do so, but could have foreseen the consequences of his behaviour. *Providere*, to foresee, is the keyword, but its meaning vis-à-vis the gods is different from that vis-à-vis human property.

Both rules have come down to us, but in very different ways. The *responsum* on *iniuria* has been preserved in the *Digest* of Justinian, in a text by the jurist Paul (turn of the third century). It came to form part of a legal literature that expanded along with the Empire. But it is only

[53] Text and translation by Colin Kolbert, *The Digest of Justinian*, ed. Alan Watson (Philadelphia, 1985), p. 288.

thanks to Justinian that we know this along with so many other *responsa* from the classical jurists; if it were not for him, we would have known only a handful of texts through fourth and fifth century collections such as the *Pauli Sententiae*, the *Fragmenta Vaticana*, and the *lex Romana Visigothorum*.

We know the *regula* on *impietas* thanks to Varro and Macrobius. It did not form part of a pontifical literature for, as Scheid points out, both authors were scholars and antiquarians, not priests.[54] In his view, there has never been a pontifical literature. Augustus may have tried to reconstruct the rules regarding religious institutions that had been abandoned and neglected for two or three generations, but his attempt came too late. All sorts of religions had been and were introduced in Rome during the expansion of the Empire; Roman religion was only one among many, even though it was a very important one. The rise of Christianity put an end to all that.

That Justinian as emperor of the Greek speaking Eastern Roman Empire in the sixth century ordered the *Digest*—a collection of Latin texts from the first two centuries AD—to be put together, may in itself be hard to understand. However, it does make sense that, as head of the Christian Church, he did not order the pontifical decisions of pagan Rome to be collected and codified.

4. *Conclusion*

The central question in this contribution is the extent to which pontifical law was connected with civil law. According to Scheid, they had enough in common to allow us to reconstruct procedures of pontifical law with the help of civil law procedures. By way of example, he reconstructed the punishment of a religious offence. For the first element of this procedure, the designation of the guilty person, he used the *noxae deditio* in civil and international law to explain *deditio* in sacral law. However, from the point-of-view of Roman law, this comparison does not hold. The *deditio* in sacred and international law cannot be identified with *noxae deditio* in civil law, for they were two basically different concepts.

For the second element, the establishment of guilt, Scheid used a *regula* of the jurist and pontiff Q. Mucius Scaevola who modified the existing

[54] Scheid, "Oral Tradition," p. 3.

distinction between intentional and unintentional wrongdoing in sacred law in order to relax the rules. The same Scaevola introduced the same distinction in civil law, but in order to harden the rules.

The conclusion must be that there is only a parallel in procedures in a non-technical sense. In the Roman republic, sacred law and civil law were closely linked because they were created and interpreted by the same persons using the same methods. However, they differed as to subject matter and purpose and therefore they remained two separate sets of law. To what extent there was interaction between pontifical law and civil law at the level of substantive law remains to be seen.

CONTROL OF THE SACRED IN ROMAN LAW*

James Rives

Although the surviving writings of the Roman jurists contain relatively little that touches on religion, we are fortunate that one of the few significant exceptions concerns an issue of fundamental importance: the terms that were used to describe the category of the "sacred." Non-technical writers tend to employ the words *sacer*, *sanctus*, and *religiosus* in fairly loose and overlapping ways, but experts in the Roman legal tradition assigned them very specific meanings. On the surface, this would seem to be merely a particular example of the general concern with terminological precision that characterizes so much of the jurists' work. But there is more to it than that. Implicit in any claim to define a term is a claim to some authority over the area of human experience to which that term pertains, and such was the case, I would argue, in the present instance. In this paper I will reconsider the juristic treatment of the words *sacer*, *sanctus*, and *religiosus*, and suggest that underlying the extant discussions we can uncover traces of an ongoing attempt by the elite, especially in their capacity as religious and legal experts, to exercise control over the category of the sacred in Roman society.

For the purposes of my argument, I will employ a distinction between the sacred as defined by human authority and the sacred as more or less spontaneously perceived. By the latter, I have in mind the tendency, apparent in a number of cultures, for people to identify certain places or objects as sacred simply because of some inherent feature; in many cultures, for example, mountains and springs are associated with the divine. In other cases, some person or group whose authority is generally acknowledged within the community performs an action that renders a

* A much earlier version of this paper was delivered at a conference on sacred space at Florida State University in 1994; I owe thanks for James Zetzel for his comments on that earlier version. I must also thank Olga Tellegen-Couperus for her invitation to present my research anew at the conference on law and religion at Tilburg University and for her helpful comments on the final draft of this paper, as well as the conference audience for their comments and suggestions. All translations are my own, except where otherwise noted.

particular place or object sacred. These two types of the sacred are not of course exclusive of one another, nor do they by any means constitute a comprehensive taxonomy. My only claim for this distinction is that I have found it useful for tracing out a particular dynamic in Roman culture.

My argument will of necessity be rather speculative, since the evidence on which we must rely largely reflects the final stages of the process that I will postulate. My procedure will thus be to begin with the latest and fullest evidence, the writings of the imperial jurists, and then move backward in time. To adopt an archaeological metaphor, I will try to excavate this material, beginning with the most recent layers and then removing them as carefully as possible to reveal the somewhat different situation underneath. Absolute dating is possible for the most part only as far back as the late Republic. For developments prior to that time I will attempt only relative dates, by noting, for example, cases where underneath the datable evidence we can discern traces of an earlier situation. But even though my argument will be speculative, I hope that it will call attention to particular patterns in the evidence that I think deserve further consideration.

1. Res Divini Iuris

The fullest and most clearly organized extant discussion of the category "sacred" in Roman law is found in the *Institutiones* of Gaius, near the beginning of the book that deals with the law of *res*. *Res*, Gaius says, can be divided into two classes: those subject to *ius divinum*, and those subject to *ius humanum* (2.2). Although by far the greatest part of the book is concerned with the latter category, Gaius begins with a brief exposition of the former:

> 3. Subject to divine right are *res sacrae* and *res religiosae*. 4. *Res sacrae* are those consecrated to the gods above; *res religiosae* are those dedicated to the gods below. 5. That alone is considered *sacrum* which has been consecrated under the authority of the Roman people, for instance by *lex* or *senatus consultum* passed to that effect. 6. On the other hand, a thing is made *religiosum* by the act of a private person, when he buries a corpse in his own land, provided that the dead man's funeral is his affair. 7. In the provinces, however, the general opinion is that land does not become *religiosum*, because the ownership of provincial land belongs to the Roman people or to the emperor, and individuals have only possession and enjoyment of it. Still, even if it be not *religiosum*, it is considered as such. 7a. Again, though a thing consecrated in the provinces otherwise than under

> the authority of the Roman people is not strictly *sacrum*, it is nevertheless considered as such. 8. Moreover *res sanctae*, such as the walls and gates of a city, are in a manner subject to divine right.[1]

Taken as a whole, Gaius' category of *res divini iuris* corresponds well enough to what modern scholars usually mean by "sacred," in that it comprises things that belong primarily to the superhuman rather than the human sphere. Goods in this category were the property of no one, *nullius in bonis* (Gaius, *Institutiones* 2.9). They were not subject to normal legal transactions affecting property, such as contracts for purchase and sale, *usucapio*, or *servitutes*.[2] The same was true of public property, *res publicae*, but the jurists of the imperial period were generally careful to distinguish the two; according to Ulpian, "we do not regard as being 'public' those things that are *sacer* or *religiosus* or designed for public use, but those things that are, as it were, the property of communities."[3] Property that was *divini iuris* was thus something else; in legal terms, it had been removed from the human sphere altogether.

If we accept that *res divini iuris* constituted the closest equivalent in Roman law to the modern category of "sacred," we must also note that as such it exhibits some distinctive features. First, Gaius makes it clear that things became *sacrae* or *religiosae* as the result of particular human actions, and other jurists indicate that they could likewise lose this status as the result of other human actions. Pomponius, for example, was of the opinion that "when a place is captured by an enemy, it always ceases to be

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[1] Gaius, *Institutiones* 2.3–8, ed. and trans. Francis de Zulueta (Oxford, 1946): (3) *Divini iuris sunt veluti res sacrae et religiosae. (4) Sacrae sunt quae diis superis consecratae sunt, religiosae quae diis Manibus relictae sunt. (5) Sed sacrum quidem hoc solum existimatur quod ex auctoritate populi Romani consecratum est, veluti lege de ea re lata aut senatusconsulto facto. (6) Religiosum vero nostra voluntate facimus mortuum inferentes in locum nostrum, si modo eius mortui funus ad nos pertineat. (7) Sed in provinciali solo placet plerisque solum religiosum non fieri, quia in eo solo dominium populi Romani est vel Caesaris, nos autem possessionem tantum vel usumfructum habere videmur. Utique tamen, etiamsi non sit religiosum, pro religioso habetur. (7a) Item quod in provinciis non ex auctoritate populi Romani consecratum est, proprie sacrum non est, tamen pro sacro habetur. (8) Sanctae quoque res, velut muri et portae, quodammodo divini iuris sunt*. I use de Zulueta's translation, slightly adapted.

[2] Sale: Ulpian, *Digesta* 18.1.22; *usucapio*: Gaius, *Digesta* 41.3.9; *servitutes*: Paulus, *Digesta* 39.3.17.3.

[3] *Digesta* 50.16.17.pr.: *Inter 'publica' habemus non sacra nec religiosa nec quae publicis usibus destinata sunt, sed si qua sunt civitatium velut bona*. In Republican times, the two categories seem to have been less sharply distinguished: see Michael Crawford, "Aut sacrom aut poublicom," in *New Perspectives on the Roman Law of Property: Essays for Barry Nicholas*, ed. Peter Birks (Oxford, 1989), pp. 93–98.

religiosus or *sacer* (just as free men become slaves in the circumstances)."[4] These qualities thus existed only in relation to the Roman legal system, and were not absolute. In other words, *res divini iuris* were dependent on human authority acting within a specific cultural tradition rather than being defined by a spontaneous perception of the sacred.

Second, *res divini iuris* did not constitute a single homogeneous category, but were instead divided into three subcategories designated by the adjectives *sacer*, *religiosus*, and *sanctus*. Gaius sets out clearly the technical meanings that the terms *sacer* and *religiosus* had in his day, distinguishing them in two different ways. One difference has to do with the divine spheres to which they refer: *sacer* relates to the *di superi*, the gods above, but *religiosus* to the *di Manes*, the dead. The other difference concerns the processes used to place items in one or the other category: only the Roman people have the authority to render property *sacer*, while in the right circumstances any individual can make it *religiosus*. *Sacer* then is correlated with the gods and with the public sphere, *religiosus* with the dead and with the private sphere. Gaius includes the third term, *sanctus*, almost as an afterthought, and seems rather uncertain about its exact significance. He indicates neither the divine sphere to which it relates nor the human actions that imparted this particular quality, but instead simply provides an illustration of what the category includes, that is, city walls and gates. Moreover, although he includes *res sanctae* within the general category of *res divini iuris*, it is only with the qualifying adverb *quodammodo*, 'in a manner'.

Gaius was not alone in his uncertainty about *res sanctae*, for the extant writings of the other jurists do not suggest that they knew much more about the exact meaning of *sanctus* than he did. I would suggest that the only reason they discussed the term at all was that it formed part, along with *sacer* and *religiosus*, of a tripartite distinction of *res divini iuris* that they had inherited from earlier scholars of Roman law and that they maintained in their own writings.[5] The antiquity of this

[4] *Digesta* 11.7.36: *Cum loca capta sunt ab hostibus, omnia desinunt religiosa vel sacra esse, sicut homines liberi in servitutem perveniunt*. Cf. Paulus, *Digesta* 45.1.83.5: *Nam et cum quis rem profanam aut Stichum dare promisit, liberatur, si sine facto eius res sacra esse coeperit aut Stichus ad libertatem pervenerit, nec revocantur in obligationem, si rursus lege aliqua et res sacra profana esse coeperit et Stichus ex libero servus effectus sit*.

[5] In addition to the passage of Gaius quoted above, see also the very similar exposition that Marcian included in his own *Institutiones* (*Digesta* 1.8.6.2–5). The threefold distinction is invoked in passing elsewhere, e.g., in Ulpian's definition of a *purus locus* as one *qui neque sacer neque sanctus est neque religiosus, sed ab omnibus huiusmodi nominibus vacare videtur* (*Digesta* 11.7.2.4).

distinction, however, cannot be determined with any precision. In the fifth century AD, Macrobius claimed that "in pontifical decrees this is a particular point of inquiry: what is *sacer*, what *profanus*, what *sanctus*, and what *religiosus*."[6] Although the reference here to pontifical decrees might suggest that this threefold division goes back to the earliest stages of Roman legal and religious thought, it is important to note that the extant evidence for it begins only in the late Republic. Even the texts that Macrobius himself goes on to cite are not actual pontifical decrees, but rather the writings of the late Republican jurists Ser. Sulpicius Rufus and C. Trebatius Testa, particularly the latter's treatise *De religionibus*.[7] Festus refers to a similar discussion by another scholar of probably late Republican date, Aelius Gallus, who "very elegantly renders the differences between *sacer* and *sanctus* and *religiosus*: he says that it is generally agreed that *sacer* is a building consecrated to a god; *sanctus* is a wall around a town; *religiosus* is a tomb where a dead person has been entombed or buried."[8] Before deciding on the antiquity of this tripartite division of the sacred, then, we should dig below the level of the imperial jurists and examine the situation during the Republic.

2. Res Sacrae et Sanctae

Of the three subcategories of the sacred, *res sacrae* are the easiest to pin down. As Gaius explained, these were things that had been consecrated to the gods on the authority of the Roman people. Marcian was, if anything, even more emphatic on this point: "*Res sacrae* are those which have been consecrated by an act of the whole people, not by anyone in his private capacity. Therefore, if someone makes a thing *sacer* for himself, acting

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[6] Macrobius, *Saturnalia* 3.3.1: *inter decreta pontificum hoc maxime quaeritur: quid sacrum, quid profanum, quid sanctum, quid religiosum*.

[7] Trebatius: Macrobius, *Saturnalia* 3.3.2, 4, and 5; Sulpicius: Macrobius, *Saturnalia* 3.3.8.

[8] Festus, *De verborum significatu* 348–350L.: *Inter sacrum autem et sanctum et religiosum differentias bellisime refert: sacrum aedificium, consecratum deo; sanctum murum, qui sit circum oppidum; religiosum sepulcrum, ubi mortuus sepultus aut humatus sit, satis constare ait*. This is undoubtedly the C. Aelius Gallus who wrote a treatise in two books *de significatione verborum quae ad ius civile pertinent* (Aulus Gellius, *Noctes Atticae* 16.5.3), cited more than twenty times by Festus. It is generally assumed that Festus took over these citations from Verrius Flaccus, and that Gallus was accordingly active no later than the late first century BC; for full evidence and discussion, see F.P. Bremer, *Iurisprudentiae antehadrianae quae supersunt. Pars prior: Liberae rei publicae iuris consulti* (Leipzig, 1896), pp. 245–252.

in a private capacity, the thing is not *sacer* but profane."[9] That is, *res sacrae* were things that had undergone the specific ritual of consecration, carried out on public authority. In normal circumstances, only a Roman magistrate acting under the guidance of a pontifex could perform a consecration. The priest, who was responsible for the necessary technical knowledge, would recite the proper formulae which the magistrate would then pronounce; at the conclusion, both men would touch the doorpost of the building (if it were a shrine being consecrated), which would then become a *res sacra*.[10] As our sources indicate, the *pontifices* were the ones who both defined the term *sacer* as meaning "consecrated by a particular ritual" and controlled the knowledge necessary to perform that ritual.

Res sacrae thus represent a very clear example of "the sacred" as defined and controlled by human authority. The nature of *res sanctae*, on the other hand, is rather more obscure. As I suggested above, the imperial jurists used this category only because it was a traditional subdivision of *res divini iuris*. Most of them apparently understood *sanctus* simply to mean "protected by a sanction", the common meaning of the word. Ulpian, for example, explains that "properly speaking, we use the term *sanctus* of objects that are neither sacred nor profane, but that are confirmed by some sort of sanction. Thus laws are *sanctus*, for they are supported by a kind of sanction. Anything that is supported by some kind of sanction is *sanctus*, even if it is not consecrated to a god."[11] City walls were *sancti* because they could not be altered without imperial permission, and so, like *res sacrae*, seemed to belong to the public realm.[12]

But if *res sanctae* were simply things protected by a sanction, why were they classed as *res divini iuris*? On this point the jurists were at a loss, since their general understanding of the category clearly did not

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[9] *Digesta* 1.8.6.3: *Sacrae autem res sunt hae, quae publice consecratae sunt, non private: si quis ergo privatim sibi sacrum constituerit, sacrum non est, sed profanum*. Cf. Ulpian, *Digesta* 1.8.9.pr.-1: *Sacra loca ea sunt, quae publice sunt dedicata, sive in civitate sint sive in agro. Sciendum est locum publicum tunc sacrum fieri posse, cum princeps eum dedicavit vel dedicandi dedit potestatem*.

[10] Georg Wissowa, "Consecratio," *Pauly's Realencyclopädie der classischen Altertumswissenschaft* 4 (1901), columns 896–902; see also H. Bardon, "La naissance d'un temple," *Revue des Études Latines* 33 (1955), 166–182.

[11] *Digesta* 1.8.9.3: *Proprie dicimus sancta, quae neque sacra neque profana sunt, sed sanctione quadam confirmata: ut leges sanctae sunt, sanctione enim quadam sunt subnixae. Quod enim sanctione quadam subnixum est, id sanctum est, etsi deo non sit consecratum*.

[12] Ulpian continues by noting that *Muros etiam municipales nec reficere licet sine principis vel praesidis auctoritate nec aliquid eis coniungere vel superponere* (*Digesta* 1.8.9.4).

account for it. Consequently, they largely abandoned its use, retaining it only for the fossilized category of walls and gates. Modern scholarship, however, has had greater success in explaining the classification of *res sanctae* as *res divini iuris*. Well over a century ago, Valeton convincingly argued that the adjective *sanctus* was originally a technical term designating a *res* that had been inaugurated, just as the adjective *sacer* was a technical term designating a *res* that had been consecrated. In support, he cited passages from writers of Augustan date that give *sanctus* as a synonym for *augustus*, as well as a reference in Varro to "the writers of glosses" who say that *templa*, in the technical sense of *loca inaugurata*, are *sancta*.[13] Valeton's argument provides the best explanation for the fact that *res sanctae* belonged to the category of *res divini iuris* yet were somehow distinguished from *res sacrae* and *res religiosae*. It also explains why city walls were *res sanctae*: because of their association with the *pomerium* of an *urbs*, which was a *locus inauguratus*.[14] By the late Republic, however, the technical meaning of *sanctus* had been largely forgotten, even by scholars like Varro and Aelius Gallus.[15] The fact that walls were *sancti* was remembered in isolation, and so a new explanation for that fact was devised: walls were protected by sanctions.

In the original technical meaning of the term, then, *res sanctae* constituted a category very similar to that of *res sacrae*, and were subject to much the same rules. That is, they were items whose juridical status had been altered by a formal ceremony conducted by a public official. It was

[13] I.M.J. Valeton, "De templis Romanis," *Mnemosyne* 20 (1892), 338–390, at pp. 338–354. See Paulus, epitome of Festus, *De verborum significatu* 2L.: *Augustus, locus sanctus ab avium gestu, id est, quia ab avibus significatus est, sic dictus*; Ovid, *Fasti* 1.609–610: *Sancta vocant augusta patres, augusta vocantur / templa sacerdotum rite dicata manu*; Varro, *De lingua Latina* 7.10: *Quod addit templa ut sint tesca, aiunt sancta esse qui glossas scripserunt*.

[14] According to Gellius (*Noctes Atticae* 13.14.1), the augurs defined the *pomerium* as *locus intra agrum effatum per totius urbis circuitum pone muros regionibus certeis determinatus, qui facit finem urbani auspicii*. See further Pierangelo Catalano, "Aspetti spaziali del sistema giuridico-religioso romano. Mundus, templum, urbs, ager, Latium, Italia," *Aufstieg und Niedergang der römischen Welt*, 2.16.1 (Berlin-New York, 1978), pp. 440–553, at pp. 479–486.

[15] Although the augural college remained active in the late Republic and augural lore was the subject of several treatises, the quantity of augural material must by that time have been immense, and there does not seem to have been any dictionary of augural terms; see J. Linderski, "The Augural Law," *Aufstieg und Niedergang der römischen Welt*, 2.16.3 (Berlin, 1986), pp. 2146–2312 at p. 2247. Moreover, terms were subject to a gradual redefinition, as the augurs worked to keep their material relevant to changing political and social situations. If *sanctus* were no longer an important augural term, it would not be surprising that antiquarians were unaware of its technical significance.

thus members of the elite, as priests and magistrates, who were directly responsible for the creation of both *res sacrae* and *res sanctae*. But even more important was the control that the elite, in their capacity as religious and legal authorities, exercised over the very terminology used for the sacred.[16] When the pontiffs and augurs defined *res sacrae* and *res sanctae* as things that had undergone formal and precisely defined rituals, they were making an implicit claim that those things alone were "truly" sacred. It was by appropriating the very words *sacer* and *sanctus*, by laying claim to their "true" meaning, that the Roman elite attempted to exert fundamental control over the category of the sacred within their society. Before I pursue this argument further, however, I must consider the third subcategory of the sacred discussed by the jurists, that is, *res religiosae*.

3. Res Religiosae

As far as we can judge from the remains of their writings, the imperial jurists regarded graves as the only type of *res religiosae*. That graves should in some sense be considered sacred is not at all surprising, since many cultures set apart places associated with death and mark them by more or less defined taboos. We should note, however, that the jurists were not dealing with vague scruples attending places associated with death. On the contrary, they defined a number of specific requirements that a grave had to meet in order to qualify as a *res religiosa*. For one thing, the actual presence of a corpse was necessary; Paulus noted that once the remains were moved elsewhere, the place ceased to be *religiosus*.[17] Moreover, although the presence of a corpse was necessary, it was not sufficient. The jurists clearly assume that a *locus religiosus* is a formal

[16] It is important to remember that in the early Republic the procedures of civil law were known only to the pontiffs, who accordingly functioned as both religious and legal experts (if indeed that distinction is a meaningful one in the context of archaic Roman culture); there is good reason to think that the pontiffs' supervision of civil litigation lasted as late as 200 BC: see Olga Tellegen-Couperus, "Pontiff, Praetor, and *Iurisdictio* in the Roman Republic," *Legal History Review* 74 (2006), 31–44, and see further Valgaeren, this volume. The pontiffs, and the augurs as well, of course always belonged to the distinguished strata of Roman society.

[17] Ulpian, *Digesta* 11.7.44 *in fine*: *Cum autem impetratur, ut reliquiae transferantur, desinit locus religiosus esse*. The status of cenotaphs was consequently debated: Marcian, appealing to the authority of Vergil, said that it was better to consider them *loca religiosa* (*Digesta* 1.8.6.5), but he was apparently unaware that Marcus Aurelius and Lucius Verus had ruled in a rescript that they were not (Ulpian, *Digesta* 11.7.6.1).

grave, not simply any place where a corpse happens to be.[18] Nor is it even any grave, but only one made by a person with a legal right to the land on which it is made. The various ramifications of Roman property law could make this requirement quite complex. Ulpian explains that if one person has ownership but another the usufruct, neither can independently make the place *religiosus*; similarly, if there is a servitude on the land no one can make it *religiosus* without the permission of the person who holds the servitude.[19]

It is clear that the main concern of the jurists in their treatment of *res religiosae* was with property rights. Because *res religiosae* were *res divini iuris*, they were not susceptible of human ownership. Accordingly, if their creation were not strictly regulated, they could undermine property rights.[20] The reason why the jurists treated *res religiosae* in such detail was that anyone could make a grave. Only public priests and magistrates could create *res sacrae* and *res sanctae*, but any private citizen could in the right circumstances transform a plot of land into a *locus religiosus*. The elite, then, did not directly control the creation of individual *res religiosae* to the same extent as they did that of individual *res sacrae* and *sanctae*. It was thus important that the jurists define very closely who had the legal authority to make a place *religiosus*, so that even though private individuals could create this type of *res divini iuris*, they could do so only within defined parameters. But if we dig beneath the imperial jurists, down to the scholars of the late Republic, we find that in earlier periods even this element of control was somewhat loose.

Although Aelius Gallus used the grave as an example of a *res religiosa*, he defined the term *religiosus* much more broadly, as "that which it is not permitted for a person to do, so that if he should do it, he seems to

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[18] This condition goes back at least to the late Republic: Cicero notes that *prius quam in os iniecta gleba est, locus ille, ubi crematum est corpus, nihil habet religionis; iniecta gleba tum ille humatus est et sepulcrum vocatur, ac tum denique multa religiosa iura complectitur* (*De legibus* 2.57); see further Georg Wissowa, *Religion und Kultus der Römer*, 2nd ed. (Munich, 1912), p. 478 n. 4.

[19] Ulpian, *Digesta* 11.7.2.7–8; cf. Paulus, *Digesta* 11.7.34 on land held as a conditional legacy and Marcian, *Digesta* 1.8.6.4 on joint ownership, and see in general Fernand de Visscher, *Le droit des tombeaux romains* (Milan, 1963), pp. 52–63.

[20] This strict regulation of burials went back to the praetorian edict, which evidently prevented people from burying their dead on the property of other people; see Ulpian, *Digesta* 11.7.2.2: *Praetor ait 'sive homo mortuus ossave hominis mortui in locum purum alterius aut in id sepulcrum in quo ius non fuerit, illata esse dicentur.' Qui hoc fecit, in factum actione tenetur et poena pecuniaria subicietur*. Cf. Gaius, *Digesta* 11.7.7 and Ulpian, *Digesta* 11.7.8.

act contrary to the will of the gods."[21] Festus, presumably following Verrius Flaccus, defined as *religiosi* those people "who distinguish what is to be done and what is to be avoided" and *dies religiosi* as those "on which it is considered *nefas* to do anything except what is necessary."[22] These definitions all reflect the basic meaning of the word. Broadly speaking, anything characterized by *religio* is *religiosus*, just as anything characterized by *forma* is *formosus*. Although that much is simple enough, attempts at precise definition are complicated by the fact that the exact meaning of *religio* is uncertain.[23] Yet we can at least observe that it almost always had connotations of obligations and prohibitions, of things that should and should not be done.[24] *Res religiosae*, then, were things associated with some sort of religious scruple that required or prohibited particular types of actions. It is worth noting that the kinds of legal remedies that served to protect *res sacrae* and *res sanctae* were not equally available for *res religiosae*; for example, a praetorian interdict prevented the violation of a *locus sacer*, but against the violator of a tomb only an *actio in factum* was available.[25] Aelius Gallus thought that "that which is *sacer* is at the same time *sanctus* by ancestral law or ordinance, so that it cannot be violated without punishment. *Religiosus* is also the same thing, since it is something that is not permitted for a person to do, which if he does,

[21] Festus, *De verborum significatu*, 348L.: *Quod homini ita facere non liceat, ut si id faciat, contra deorum voluntatem videatur facere*.

[22] Festus, ap. Macrobius, *Saturnalia* 3.3.10: *religiosi sunt qui facienda et vitanda discernunt*; *De verborum significatu*, 348L.: *quibus, nisi quod necesse est, nefas habetur facere*.

[23] See, e.g., Maximilian Kobbert, *De verborum 'religio' atque 'religiosus' usu apud Romanos questiones selectae* (Königsberg, 1910); Godo Lieberg, "Considerazioni sull'etimologia e sul significato di religio," *Rivista di filologia e di istruzione classica* 102 (1974), 34–57; Agnes Kirsopp Michels, "The Versatility of *Religio*," in *The Mediterranean World: Papers Presented in Honour of Gilbert Bagnani, April 26, 1975* (Peterborough, ON, 1976), pp. 36–77; Robert Muth, "Vom Wesen römischer *religio*," *Aufstieg und Niedergang der römischen Welt*, 2.16.1 (Berlin-New York, 1978), pp. 290–354; Jörg Rüpke, "*Religio* and *Religiones* in Roman Thinking," *Les Études Classiques* 75 (2007), 67–78.

[24] See, e.g., Kobbert, *De usu*, p. 61: "Intellegitur ergo sub voce *religio* illud *tabu*, quibusdam locis, diebus, actionibus impositum, quo homo ipse religatur atque impeditur;" Kirsopp Michels, "Versatility," pp. 73–74: "There are two elements in its character which are very important and have some relation to each other. First and most obvious is the element of fear, from which result acts of worship in cult, and the prohibition of other acts .... A less obvious but very important element in *religio* is the sense of obligation."

[25] Ulpian, *Digesta* 43.6.1. pr.: *Ait praetor: 'in loco sacro facere inve eum immittere quid veto'*; id., *Digesta* 47.12.3.pr.: *Cuius dolo malo sepulchrum violatum esse dicetur, in eum in factum iudicium dabo*. Cf. Gaius, *Institutiones* 4.159: *Simplicia [prohibitoria interdicta] sunt veluti quibus prohibet praetor in loco sacro aut in flumine publico ripave eius aliquid facere reum*.

he seems to act contrary to the will of the gods."[26] Yet while Gallus evidently regarded these conditions as practically identical, his actual language seems instead to imply a significant distinction: that which is *sacer* is protected by human law, while that which is *religiosus* is protected only by divine law, by the *religio* from which it took its name. When a person violated a *religio*, he might have been acting contrary to the will of a god, but in the absence of a human law, the Romans were often content to let the gods take care of their own affairs.[27]

The question, then, becomes one of the extent to which human authority could control the process whereby a place acquired a *religio*. If, as the imperial jurists apparently thought, graves were the only type of *res religiosae*, it is easy to see that public officials might control the process in some detail.[28] But while late Republican scholars like Aelius Gallus apparently considered the grave as the *res religiosa* par excellence, they were also aware that other places could likewise be *religiosus*. The best attested of these is the *fulguritum*, which Festus defines as "that which has been struck by a lightning bolt; the place was thought immediately to become *religiosus*, because it seemed that a god had dedicated it to himself."[29] This definition reinforces the interpretation of a *locus religiosus* as a place marked by a *religio* of any sort. It also suggests not only that people other than a public official could introduce a *religio*, but that a *religio* might develop for reasons completely outside any human control. Clearly, no mortal was responsible for the creation of *fulgurita*: the *religio* followed automatically from an uncontrollable natural phenomenon. There is thus some evidence that the category of *locus religiosus* was not originally limited to graves, but could include any place with which some *religio* was associated.[30] In other words, *res religiosae* constituted a category of the

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[26] Festus, *De verborum significatu* 350L., quoted below in n. 32.

[27] Valeton, "De templis," pp. 345–349 argues this in detail; see in general John Scheid, "Le délit religieux dans la Rome tardo-républicaine," in *Le délit religieux dans la cité antique. Actes de la table ronde, Rome, 6–7 April 1978* (Rome, 1981), pp. 117–171.

[28] But note, in this connection, the argument of de Visscher, *Droit des tombeaux*, pp. 62–63, that even a grave acquired a *religio* by the very fact of its being a grave, and that the juristic rulings concerning the ownership of the land cited above (nn. 19–20) were merely attempts to accommodate the interests of the living owners: "ce sont les droits des morts sur la terre qu'ils occupent, et non ceux des vivants, qui font de celle-ci une chose religieuse."

[29] Paulus, epitome of Festus, *De verborum significatu* 82L.: *Fulguritum, id quod est fulmine ictum, qui locus statim fieri putabatur religiosus, quod eum deus sibi dicasse videtur*.

[30] See Kobbert, *De usu*, pp. 4–19; Wissowa, *Religion und Kultus*, p. 478; and especially the thorough discussion of Fabrizio Fabbrini, "Dai 'religiosa loca' alle 'res religiosae,'"

sacred that was at best only partly under the control of human authorities, in contrast with the more strictly controlled categories of *res sacrae* and *res sanctae*.[31]

4. *The Limits of Elite Control*

As I have already suggested, the whole tripartite system of *res divini iuris* was probably in large part the work of late Republican scholars, who attempted to interpret, organize, and systematize the mass of traditional material that they had inherited. It would not be surprising if someone like Aelius Gallus, in writing a handbook on legal terminology, attempted to sum up the meaning of the three terms *sacer*, *religiosus*, and *sanctus* by providing an illustrative example for each term. These efforts ultimately resulted in the orderly tripartite category of *res divini iuris* that we find in the writings of the jurists of the imperial age. In the process, however, the scholars of the late Republic obscured some of the distinctive features of the individual subcategories as I have outlined them above; Aelius Gallus, for example, was apparently able to conclude that "the same things can be both *sacra* and *sancta* and *religiosa*."[32] If we keep in mind the original differences between the three terms, however, I think that we can discern underneath the threefold distinction of the late Republic a more basic

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Bullettino dell'Istituto di Diritto Romano 73 (1970), 197–228. Fabbrini makes a distinction between *loca religiosa*, sites associated with ancient and often obscure *religiones*, and *res religiosae*, a juristic category that was from the start limited to graves. But it is not clear to me that the former ever formed a clearly defined category, or that we should see a real distinction between *loca* and *res*; in discussing *res sacrae* and *res sanctae*, the jurists seem to treat the terms *loca* and *res* as effectively interchangeable: see, e.g., Pomponius, *Digesta* 11.7.36 (above, n. 4), Ulpian, *Digesta* 1.8.9.pr. (above, n. 9), Ulpian, *Digesta* 43.6.1.pr. (above, n. 25).

[31] Compare the distinction made by Dario Sabbatucci, "Sacer," *Studi e materiali di storia delle religioni* 23 (1951–1952), 91–101, at pp. 98–99: "resterà sempre una grande differenza tra ciò che va a far parte del divino in seguito a deliberazione umana e quello che è già degli dei indipendentemente dall volontà dell'uomo: nel primo caso si dirà 'sacer' e nel secondo 'religiosus' .... L'attività umana è un presupposto del 'sacrum,' mentre solo 'passività' caratterizza l'ambito del 'religiosum.'"

[32] Festus, *De verborum significatu* 350L. *Siquidem quod sacrum est, idem lege aut instituto maiorum sanctum esse puta[n]t, ⟨ut⟩ violari id sine poena non possit. Idem religiosum quoque esse, quoniam sit aliquid, quod ibi homini facere non liceat; quod si faciat, adversus deorum voluntatem videatur facere. Similiter de muro et sepulcro debere observari, ut eadem et sacra et sancta et religiosa fiant, sed quomodo [quod] supra expositum est, cum de sacro diximus*. I use here the emendation "quoniam", taken from Lindsay's apparatus, in place of the manuscript reading "qui non iam."

twofold division between the sacred as defined and controlled by human authority, a category that comprised both *res sacrae* and *res sanctae*, and the sacred as simply marked off by some religious scruple, *res religiosae*, a category that was less susceptible to elite definition and control.

But why, we might ask, if the Roman elite had such interest in the control of the sacred, did they recognize this less controlled category at all? To a large extent they probably had no choice, since a place might become associated with a *religio*, and so in some sense be regarded as sacred, for reasons that they simply could not control. I would thus suggest that the category of *res religiosae* originated as a way to maintain the restricted meaning of the terms *sacer* and *sanctus*. Although in popular usage these words might be applied to anything considered "sacred" or "holy," it was easy for religious and legal authorities to insist that only things that had been formally consecrated or inaugurated were truly *sacer* or *sanctus*, as long as there was another term that they could apply to everything else. In short, I would suggest that the category of *res religiosae* was a later addition to an original twofold division of the sacred into *res sacrae* and *res sanctae*, devised to enable the elite to maintain their control over the latter. If we dig yet further, however, we can uncover evidence that suggests that their control even of those terms was not original.

The word *sacer* clearly belongs to a very early stratum of the Latin language. In the form *sakros*, it appears on the so-called Lapis Niger cippus, one of the oldest of Latin inscriptions (*Corpus Inscriptionum Latinarum* 1^2.1), and it has close cognates in Oscan and Umbrian. It derives from the root **sak*-, from which, by another route, the word *sanctus* also derives: *sanctus* is the perfect passive participle of the verb *sancio*, which probably had the original sense of 'to make **sak*-.' *Sacer*, then, is that which is characterized by the quality **sak*-, while *sanctus* is that which has been made **sak*-. What precisely that quality was is not very clear, but for the purposes of my argument here, the original sense of the root is not important.[33] What is more important is that a range of evidence suggests that in archaic Rome the word *sacer* (or *sakros*) was applied to anything spontaneously perceived as having some inherent connection with the divine.

[33] Huguette Fugier, in the most detailed study of the problem, attempted to prove that the original sense of the root **sak*- was "exister, être réel:" *Recherches sur l'expression du sacré dans la langue latine* (Paris, 1963), pp. 109–125.

On the one hand, a number of places regularly described as *sacer* had apparently not been officially consecrated by priests or magistrates of the Roman people. There was, for example, the Mons Sacer, a hill outside of Rome associated with the semi-legendary secessions of the plebs in 494 and 449 BC.[34] Although Festus preserves a tradition that the plebs consecrated this hill to Jupiter,[35] it is perhaps more likely that this story was invented after the fact, and that the mountain had always been *sacer*: Jupiter was after all a sky god, and it would not be surprising if a mountain near Rome had been perceived as his domain. Certain groves were similarly considered sacred. We know of many such groves in or near Rome that were associated with very ancient and minor deities, some of whom were no longer understood at all. That such groves could be spontaneously perceived as sacred is indicated by an archaic prayer preserved by the elder Cato: "God or goddess whose sacred grove this is, as it is right to sacrifice an expiatory pig to you for the sake of thinning this sacred grove and for the sake of these things, whether I or one ordered by me do it, may it be rightly done."[36] In this case, the fact that the worshipper did not even know the identity of the deity to whom the grove was sacred clearly indicates that the grove was simply perceived as sacred and had not been formally consecrated to a particular god. Then there was the Sacra Via, the street that ran the length of the Forum, from the Carinae to the Arx. We can in this case be confident that the street had never been formally consecrated, but was simply described as *sacer* because of its proximity to some of the holiest and most ancient sites of Rome.[37]

On the other hand, the word *sacer* also described a particular legal / religious status that in archaic Roman tradition resulted from the commission of certain offenses. For example, Servius cites a law of the Twelve Tables that "if a patron has defrauded a client, let him be *sacer*," and other sources attribute the same penalty to laws of Romulus, Numa, and

[34] Livy, *Ab urbe condita* 2.32; 3.52.

[35] Festus, *De verborum significatu* 422–424L.

[36] Cato, *De agri cultura* 139: *Si deus si dea es, quoium illud sacrum est, uti tibi ius est porco piaculo facere illiusce sacri coercendi ergo harumque rerum ergo, sive ego sive quis iussu meo fecerit, uti id recte factum siet*.

[37] See Festus, *De verborum significatu* 372L. *Sacram viam quidam appellatam esse existimant, quod in ea foedus ictum sit inter Romulum ac Tatium; quidam, quod eo itinere utantur sacerdotes idulium sacrorum conficiendorum causa*. See in general, Filippo Coarelli, *Il Foro Romano, 1: periodo arcaico* (Rome, 1983), pp. 11–118.

Servius Tullius.[38] Some confirmation of the historicity of this penalty can be found in the occurrence of the phrase *sakros esed* in the Lapis Niger inscription, even though the precise context is uncertain.[39] The general understanding of this penalty is that it removed the malefactor from the protection of human society and instead consigned him or her to the gods; as such, the guilty person no longer enjoyed the protections afforded by membership in the community and could for example be killed with impunity. As Kaser has argued, this use of *sacer* suggests that it designated anything marked by the perception of a particular interest on the part of the gods, which mortals had to respect.[40] Although in this case the quality of being *sacer* came about through human actions, these were not ritual actions intended to impart that quality, but rather criminal actions that inadvertently gave rise to it. In this respect, here too we have evidence that the term *sacer* originally denoted the sacred as spontaneously perceived.

In light of this evidence, I would propose the following hypothesis. Whatever the original sense of the root **sak*-, the adjective *sacer* was in the archaic period applied to places or people simply perceived as sacred or associated with a deity. As Rome developed socially and politically, however, this situation became increasingly undesirable to the elite. They came to regard the random apprehension of the sacred as a potentially disruptive factor in Roman society, and to feel that they needed to control it in order to maintain tranquility and order, not to mention their own position of social dominance. It was for this reason that the priests began to appropriate the word *sacer* and its cognate *sanctus*. We must remember

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[38] Servius, *In Vergilii Aeneidem* 6.609. Twelve Tables 8.21 = 8.10 in Michael Crawford, ed., *Roman Statutes* (London, 1996): *patronus si clienti fraudem fecerit, sacer esto*; for a recent discussion of these laws, with full references to the evidence and earlier scholarship, see Claire Lovisi, *Contribution à l'étude de la peine de mort sous la République romaine (509–149 av. J.-C.)* (Paris, 1999), pp. 13–64.

[39] This inscription is generally dated to c. 600 BC. Text in A.E. Gordon, *Illustrated Introduction to Latin Epigraphy* (Berkeley-Los Angeles-London, 1983), no. 4; for the interpretation, see R.E.A. Palmer, *The King and the Comitium: A Study of Rome's Oldest Public Document*, Historia Einzelschriften 11 (Wiesbaden, 1968); Coarelli, *Foro Romano*, pp. 178–188; and the discussion of Leon ter Beek in this volume.

[40] Max Kaser, *Das altrömische Ius. Studien zur Rechtsvorstellung und Rechtsgeschichte der Römer* (Göttingen, 1949), p. 48: "Nach alldem sind sacrae von Haus aus, ohne Rücksicht auf die staatlichen Eigentumsverhältnisse, alle Gegenstände, die wegen des gehobenen Interesses, das die Gottheit an ihnen hat, unter ihrem gesteigerten Schutz stehen, den auch die Menschen zu respektieren haben. Dieses Gottesinteresse kann ein dem Gegenstand günstiges oder ungünstiges sein, je nachdem ob der Gegenstand sacral rein oder unrein."

that down to the year 300 BC the major priesthoods were restricted to patricians, so that for many years the pontiffs and augurs were well placed to promote the interests of the old elite. It is thus not surprising that they restricted the application of these words to places or objects that had undergone specific rituals that they themselves controlled. These redefinitions of the traditional terminology for the sacred were in effect claims that the sacred existed only when the elite said it did.

As I have noted, however, the control of the elite could extend only so far. People continued to perceive certain spaces as sacred for reasons that had nothing to do with pontifical or augural ritual, and to describe them, just as do the non-technical Latin writers whose works are extant, as *sacer* or *sanctus*. It was in response to the continued existence of various types of uncontrolled sacred space that the priests began to employ the term *religiosus*. In doing so they acknowledged the fact that people might experience a place or object as sacred without their authority, but at the same time continued to insist on the technical specificity of the other, older terms. The fact that the elite recognized a category of the sacred that they did not control was thus a concession to popular religiosity as well as way of maintaining their claim over the meaning of the terms *sacer* and *sanctus*. By the late Republic, legal scholars had systematized the three terms into an orderly tripartite category of *res divini iuris*. In this period we can perhaps also observe the same process of appropriation beginning again. *Res religiosae* had in legal and technical discourse become largely restricted to a few specific cases, notably the grave and the *fulguritum*; by the imperial period, they had effectively become restricted to graves alone, which as I noted above were much easier for the elite to regulate.

By that time, however, it had largely ceased to matter. The expansion of Roman rule and the extension of Roman citizenship had brought the entire traditional system of religious control to the point of collapse. The technical meaning of the words *sacer* and *sanctus* and *religiosus* had ceased to be important. Already by the mid-second century AD, Gaius conceded that even though temples and graves in the provinces were not strictly speaking *loca sacra* and *religiosa*, they were for all practical purposes treated as such. During the imperial period, then, the sacred increasingly came to be that which people treated as sacred, and the elite's pretensions to control over its definition became entirely nominal. It was only with the dominance of Christianity that a new elite was able to define and control the sacred in a new and more comprehensive way.

THE IMMORTALITY OF THE SOUL AND ROMAN LAW*

Jan Willem Tellegen

1. *Introduction*

The Romans considered man to be a mortal being, just as we do today.[1] Their long-standing belief was that when someone died the soul left the body.[2] The soul remained on earth. The notion that the soul journeyed to the underworld is of Greek origin.[3]

There is a fundamental difference between the modern and the ancient concept of the immortality of the soul. According to the Romans, after the soul had left the body its immortality depended on the way in which the dead body had been handled. A person could take steps during his lifetime to ensure that his soul would find rest after death. Most of the sources show that, in their will or codicil, people inserted a *fideicommissum* requesting their heirs or legatees to carry out their wishes regarding their funeral.[4]

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* An earlier version of this paper was published in *Studi in onore di Antonino Metro*, 6, ed. Carmela Russo Ruggeri (Milan, 2010), pp. 297–321. All translations are my own unless otherwise indicated.

[1] J.MC. Toynbee, *Death and Burial in the Roman World* (Baltimore and London, 1971), pp. 33–39; Franz Cumont, *Recherches sur le symbolisme funéraire des Romains* (1942; repr. Paris, 1966), p. 35.

[2] On the other hand, followers of philosophical schools such as those of Epicurus and the Stoa believed that upon death the human soul perished. Toynbee, *Death and Burial*, p. 34.

[3] Kurt Latte, *Römische Religionsgeschichte*, 2nd ed. (Munich, 1976), p. 64. There were many other ideas on this subject. I will deal solely with what Latte calls the original "Religion der Bauern", since this interpretation was apparently still relevant in the early Empire.

[4] Edward Champlin, *Final Judgements. Duty and Emotion in Roman Wills 200 BC–AD 250* (Berkeley-Los Angeles-Oxford, 1991), p. 169. Several sources mention that a fine was imposed for not carrying out a testator's wishes; the fine was payable by the heir for the benefit of the local community, cf. *Testamentum civis Romani Gallicae nationis* 2.1–7; in V. Arangio Ruiz (ed.), *Fontes Iuris Romani Antiqui*, 3 Negotia, 2nd ed. (Florence, 1972), pp. 142–146. In the following, this work will be referred to as FIRA. For an archaeological commentary, see J.J. Hatt, *La tombe Gallo-Romaine* (Paris, 1986), p. 66. With regard to fines, see Keith Hopkins, *Death and Renewal* (Cambridge, 1983), p. 251.

The big problem was that a *fideicommissum* could not be enforced because after the testator's death, there was no longer any interested party. A number of funerary inscriptions state that the heirs have fulfilled their obligations.[5] In other cases the costs were so high in relation to the estate that the heirs either ignored the *fideicommissum* or even refused to accept the inheritance.[6] Particularly when there was such a conflict of interests the immortality of the soul became a legal problem.[7] I will begin my paper by examining the importance of and the concern for the immortality of the soul. Then, I will study three cases, in which heirs had been asked to build a monument—one in which the *fideicommissum* was not carried out and two in which it was. Finally, I will discuss three further cases in which the *fideicommissum* to build a monument caused legal problems. As the basis for this paper I will use some literary sources, various inscriptions, and three *responsa* from Justinian's *Digest*.[8] When these sources are compared it becomes easier to put Roman views on the immortality of the soul in their historical context.

2. *The Importance of and Concern for the Immortality of the Soul*

The Romans assumed that the soul was the immaterial part of a person which left the body when that person breathed his last. The soul remained under the ground, generally in the grave. This is why people sometimes built a monument in the form of a small house:

> AEDES AEDIFICAT DIVES, SAPIENS MONUMENTUM
> HOSPITIUM EST ILLUD CORPORIS, HIC DOMUS EST.
> ILLIC PAULISPER REMORAMUS, AD HIC HABITAMUS[9]

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[5] This is represented by the abbreviation "HETFC", which means: "*heres ex testamento faciendum curavit*." In this connection, see René Cagnat, *Cours d'épigraphie latine*, 4th ed., (1914; repr. Paris, 2001), p. 433.

[6] See the detailed clauses in the *Testamentum civis Romani Gallicae nationis* 2.1–19. Such detailed clauses were ridiculed by Petronius, *Satyricon* 15.71. See below for information about the relationship between the costs of the monument and the value of the estate, in connection with Scaevola, *Digesta* 32.42.pr.

[7] See Christoph G. Paulus, *Die Idee der postmortalen Persönlichkeit im römischen Testamentsrecht* (Berlin, 1992), passim.

[8] There are more *responsa* that deal with this problem. Alexander Severus apparently also tried to solve the problem of the non-enforceability of a testator's request by declaring the negligent heir to be *indignus*. According to *Codex* 6.35.5, that attempt also failed and the emperor gave up.

[9] Grave of Turpilia Dionysia and Turpilius Eros in Rome, CIL 6, 2778/B 1488. See for the Simpelveld sarcophagus, Toynbee, *Death and Burial*, p. 281.

> The rich man builds himself a house, the wise man a grave.
> The one provides shelter for the body, the other is a real house.
> There we stay for only a short time, here we live.

Sometimes gardens were even laid out for the deceased.[10] Sometimes a tube was placed in the grave so that the dead person could be supplied with wine etc.[11] It was dark under ground and not very pleasant:

> HIC SITUS FINITA LUCE[12]
>
> When you lie here, the light has gone out.

When someone died the relatives were expected to perform a number of rituals with meticulous care.[13] If they failed to perform the rituals or had not performed them well the soul went to join the *Lemures*. Such souls could not find peace and roamed around at unseasonable hours. If the relatives had performed the rituals well they hoped that the soul would go to join the *Dii Manes*:

> NON DIGNE, FELIX, CITTO CARUISTI, MISELLE:
> VIVERE DEBUERAS ANNIS FERE C(ENTU) LICEBAT
> SI SUNT MANES, SIT TIBI TERRA LEVIS[14]
>
> It is not right, Felix, to leave life so soon. Unfortunate creature
> that you are, you could have lived till you were nearly a hundred years.
> If the *Manes* exist, may this earth be light to you.

The *Dii Manes* formed an undifferentiated mass of souls. A newly arrived soul ran the risk of being swallowed up and losing its identity, as is made clear by Petronius:

> *Eheu nos miseros, quam totus homuncio nil est!*
> *Sic erimus cuncti, postquam nos auferet Orcus.*
> *Ergo vivamus, dum licet esse bene.*[15]

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[10] See the *Testamentum civis Romani Gallicae nationis* 1.11. In his *Satyricon* 15.71, Petronius reported that Trimalchio regarded his grave as a house and wanted a garden to be laid out around it.

[11] Toynbee, *Death and Burial*, p. 32.

[12] This notion stems from an inscription on a grave in Ostia, CIL 14, 1865.

[13] For details, see William Smith, *A Dictionary of Greek and Roman Antiquities* (London, 1875), pp. 558–562; Latte, *Religionsgeschichte*, pp. 98–103. In the *Codicilli filii familias cuiusdam* in FIRA, p. 170, the deceased directs these words to his father. A funeral procession is depicted in Cumont, *Recherches*, p. 239. The burials generally took place on public ground somewhere outside the city.

[14] Grave of C. Iulius Felix who lived to the age of 82 years and 7 months in Amedara, Byzacium (Africa), CIL. *Suppl.* 1195 / B1328. This was not certain!

[15] Petronius, *Satyricon* 34.

> Woe to us, wretched creatures that we are; all mankind is nothing!
> We shall all merge into a mass when we journey to the realm of the dead.
> Enjoy life while you can: your happiness may not last long.

Apparently, the Romans were afraid that the soul might get lost in this mass of souls. The way to avert this possibility was to keep the *memoria*, i.e., the memory, of the deceased alive among his descendants. The idea was that, if someone was still remembered after his death he had not in fact died and could even acquire immortality.

A Roman had to take the right steps in good time if he wanted his memory to be kept alive.[16] He had to make it clear to his relatives that they would have to ensure that he was buried or cremated in an appropriate manner, that a sepulchral monument was erected for him for a fixed sum of money, and that the grave was properly tended. An epitaph was to be inscribed on the monument. Often, the inscription had a heading: DIS MANIBUS or DIS MANIBUS SACRUM, frequently abbreviated to D.M. and D.M.S. respectively. These words or abbreviations were followed by the name of the deceased in the nominative, genitive, or dative case, indicating that the body of the deceased lay below.[17] We know from the sources that the epitaphs were often 'embellished' to give the impression that the reputation of the person commemorated was better than he had actually deserved in real life.[18]

3. *Three* Fideicommissa *in Relation to the Burial and the Grave*

As was mentioned earlier, requests regarding the burial and the grave were expressed in the form of a *fideicommissum* and incorporated in a will or codicil. These clauses can be identified because they contain words like *rogo, volo, iubeo*, or *fideicommitto*.[19] Originally, a *fideicommissum* was only morally binding.

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[16] Famous Romans like Julius Caesar, Emperor Augustus, and also later emperors were immortal because they were declared *divus*. Julius Caesar and the Emperor Augustus were helped by the fact that the months *Quinctilis* and *Sextilis* were named after them. Emperor Nero, who was not declared *divus*, wanted the month *Aprilis* to be named after him.

[17] According to Latte, *Religionsgeschichte*, p. 99, the words "Dis Manibus" in the plural were placed before the name of the individual, which is grammatically incorrect.

[18] See Pliny the Younger, *Epistulae* 6.10 and 9.19 in connection with Verginius Rufus; *Epistulae* 7.29 in connection with Pallas. Petronius *Satyricon* 15.71 ridicules it in the inscription for Trimalchio's grave.

[19] Max Kaser, *Das römische Privatrecht*, 1, 2nd ed. (Munich, 1971), p. 758. Mario Amelotti, *Il testamento romano attraverso la prassi documentale* (Florence, 1966) p. 131.

In modern Romanist literature (i.e., literature on Roman law), it is assumed that, from the time of Augustus onwards, all *fideicommissa* were legally binding, including those relating to burials and tombs. *Fideicommissa* in the latter category, however, were just not enforceable. The *fideicommissum* was only important for the testator. His *memoria* was at stake and he wanted his soul to become immortal. However, he could not ensure that the *fideicommissum* was obeyed because he could not force his heirs by law to carry out the *fideicommissum* relating to the grave. I shall now discuss three sources that deal with this problem. First, a letter by Pliny the Younger in which he wrote about a case in which the *fideicommissum* was not carried out. Then, I shall discuss the inscription on the monument of Popilius Heracla and an inscription in memory of a young man, both showing that, in these cases, the heirs had indeed done what the testator wanted.

3.1. *Pliny the Younger on the Grave of Verginius Rufus*

Pliny the Younger was a splendid politician and orator and above all an outstanding lawyer. He delivered and published numerous oral pleadings, but unfortunately they have not come down to us. Pliny's Letters have, however, been well preserved. Not only are they real letters, they also represent a literary genre which Pliny himself invented.

In his letter 6.10, which dates from the year 107, Pliny writes about Verginius Rufus and his *memoria*:

> *C. PLINIUS ALBINO SUO S.*
>
> *1. Cum uenissem in socrus meae uillam Alsiensem, quae aliquamdiu Rufi Vergini fuit, ipse mihi locus optimi et maximi uiri desiderium non sine dolore renouauit. Hunc enim colore secessum atque etiam senectutis suae nidulum uocare consueuerat. 2. Quocumque me contulissem, illum animus illum oculi requirebant. Libuit etiam monimentum eius uidere, et uidisse paenituit. 3. Est enim adhuc imperfectum, nec difficultas operis in causa, modici ac potius exigui, sed inertia eius cui cura mandata est. Subit indignatio cum miseratione, post decimum mortis annum reliquias neglectumque cinerem sine titulo sine nomine iacere, cuius memoria orbem terrarum gloria peruagetur. 4. At ille mandauerat caueratque, ut diuinum illud et immortale factum uersibus inscriberetur*:
>
> *Hic situs est Rufus, pulso qui Vindice quondam*
> *imperium adseruit non sibi sed patriae.*
>
> *5. Tam rara in amicitiis fides, tam parata obliuio mortuorum, ut ipsi nobis debeamus etiam conditoria extruere omniaque heredum officia praesumere.*

> *6. Nam cui non est uerendum, quod uidemus accidisse Verginio? cuius iniuriam ut indigniorem, sic etiam notiorem ipsius claritas facit. Vale.*[20]
>
> *GAIUS PLINIUS GREETS HIS DEAR ALBINUS.*
>
> 1. When I visited the country estate of my mother-in-law at Alsium, a house which formerly belonged to Verginius Rufus, the place revived in me a feeling of longing mingled with grief for that great and splendid man. For here he was accustomed to live in seclusion and he used to call it his nest for his old age. 2. Wherever I turned, my mind and my eyes searched for him. I also wanted to see his tomb and it grieved me to have seen it. 3. For it is still incomplete, not because of the difficulty of the work, which is modest, even humble, but because of the slackness of the person in charge. I was full of indignation and pity because ten years after his death his remains and his ashes lie neglected without inscription or name, while his glorious memory travels the world. 4. But he left instructions that his divine and immortal deed should be recorded in verse:
>
> Here lies Rufus who once defeated Vindex and who claimed
> imperial power, not for himself but for his country.
>
> 5. Loyalty in friendships is so rare, the dead are forgotten so quickly that we must erect our own memorials and anticipate all the duties of the heirs. For who would not be afraid of what we see happened to Verginius? His renown makes the wrong done to him just as undeserved as it is blatantly obvious. Farewell.

Verginius Rufus was a person of senatorial rank who came from Milan. He had a very successful public career; he was consul three times. When he died he was given a state funeral at which the great Tacitus himself delivered the funeral oration. He was buried on his estate at Alsium. Pliny visited the estate of Verginius ten years later. In the meantime, it had come into the hands of his mother-in-law, Pompeia Celerina, who had bought it from the heirs of Verginius.[21]

Pliny had been very fond of Verginius. He had once been Pliny's guardian and had later supported him in his political career. Pliny was

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[20] *C. Plini Caecili Secundi epistularum libri decem*, ed. R.A.B. Mynors (Oxford, 1963), pp. 169–170. For the commentary, see A.N. Sherwin-White, *The Letters of Pliny* (Oxford, 1968), pp. 365–366.

[21] Pliny was on his way to Centumcellae, which was a two-day journey from Rome. Emperor Trajan was to administer justice at Centumcellae and Pliny had to be present because he was a member of the *consilium principis*. As a man of standing, he did not spend the night in an inn but stayed on the country estate at Alsium, which was a day's journey from Rome.

also very interested in the state of the monument of Verginius. Evidently, he was familiar with Verginius' will and he knew that a particular inscription had to be put on the monument.

The inscription is a distichon, a verse of two lines, a hexameter and a pentameter. It refers to something that happened in the year 68 in the latter part of the reign of the Emperor Nero. Verginius was a legate in *Germania superior* and Vindex held exactly the same position in *Gallia Lugdonensis*. We do not know what actually happened.[22] It seems that Vindex threatened to capture Vesontio, but that his troops were beaten by the soldiers of Verginius. Then they wanted to appoint Verginius as emperor, but Verginius refused the appointment.[23] His courage and patriotism must have represented the peak of Verginius' career; he wanted these qualities to be recorded for posterity in the form of an inscription on his monument, hoping thereby to win immortality. In another letter written later, Pliny stated that Verginius was seeking immortality for his soul by means of the inscription on his monument.[24] As mentioned earlier, Verginius had included in his will a clause instructing his heir to erect a memorial for him, bearing the above inscription. He had possibly formulated a *fideicommissum* on that subject. This can be deduced from letter 6.10.5 where Pliny uses the words "*fides*" and "*heredum*"; tactfully, he does not mention the name of the heir in question.

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[22] Vindex wanted to organise an uprising against Nero. He had put forward Galba, the governor of Spain, as Nero's successor, gathered an army of local troops, and set out to conquer Lugdunum. When he failed, he captured Vesontio. Apparently, Verginius Rufus thought he should intervene and, after hesitating for a considerable time, he set out for Vesontio with a huge army. He negotiated with Vindex and was almost persuaded to join forces with Vindex against Nero and in support of Galba. The troops of Verginius went berserk among the troops of Vindex and routed them.

[23] Later the emperorship was offered again to him, and again he refused to accept.

[24] *Epistulae* 9.19.3. The letter is about the various ways in which a person could ensure that his soul would be immortal. Pliny discusses a comparison which Ruso had drawn between Verginius and Frontinus, another of Pliny's faithful friends. Section 3 shows that Verginius wanted an epigraph to help his soul to attain immortality, whereas Frontinus rejected this idea completely. According to Frontinus, building such a monument was a complete waste of money because a person automatically became immortal if he had deserved immortality through his deeds. Frontinus became immortal partly because of his monograph on Rome's water supply and his monograph on battle strategy. The irony of history is that Pliny contributed to the immortality of both Verginius and Frontinus by writing about them in his letters. According to Champlin, *Final Judgments*, p. 170, Pliny censured Froninus' attitude but praised that of Verginius. In my view, however, Pliny wrote that both pursued the same goal, namely fame among later generations, but that they walked different roads in attaining that goal.

In his letter 6.19, Pliny expresses his indignation at the fact that ten years had elapsed and there was still no inscription. The reasons for this are not clear. In view of the modest nature of the monument, the possible cost of such an inscription was unlikely to have caused the negligence of the heir. It has been suggested that Verginius' heir did not go ahead with the inscription because the information it gave was untrue.[25] I do not think this is a likely explanation. Verginius probably wanted his name to live on and to ensure that future generations would remember him as the hero of Vesontio and the saviour of the fatherland.[26] According to Pliny, there was still no inscription because the heir had been negligent. Apparently Pliny could not do anything about this either, even though he was an excellent lawyer. However, he did do something indirectly in that he quoted the inscription twice in his letters. Even though the *fideicommissum* was never carried out, Verginius is still remembered almost 2000 years later.

3.2. *The Codicil of Popilius Heracla*

The sepulchral monument to Popilius Heracla forms part of the alley of graves below the main altar in St. Peter's in Rome. A marble plaque over the entrance to the grave bears an inscription which is probably still in its original position.

D M

EX CODICILLIS TRIPLICIBVS POPILI
HERACLAE
C POPILIVS HERACLA HEREDIB SALVT
VOS HEREDES MEI ROGO IVBEOQVE
FIDEIQVE VESTRAE COMMITTO VTI
MONVMENTVM MIHI FACIATIS IN VATIC
AD CIRCVM IVXTA MONVMENTVM VLPI
NARCISSI EX HIS VI N IN QVAM REM
NVMERABIT NOVIA TROPHIME HS III N
ET COHERES EIVS III N IBIQUE RELIQVIAS
MEAS ET FADIAE MAXIMAE VXORIS MEAE
SIQUID EI HVMANITUS ACCIDERIT PONI VOLO

[25] On the basis of letter 9.19.5, it has been assumed that inscriptions were a way of writing history, so one had to be honest and objective. Verginius had not defeated Vindex himself; his troops had been responsible.

[26] Was the inscription ever put on the grave of Verginius? Cassius Dio, *Roman History* 68.2.4 suggests that it was, but I doubt it. Possibly, Cassius Dio made this assumption on the basis of Pliny's letters 6.10 and 9.19.

CVIVS MONVMENTI IVS LEGO LIBERTIS LIBERTA
BUSQ MEIS ET QVOS TESTAMENTO MANVMISERO
SIVE QVEM IN STATV LIBERTATIS RELIQUI ET HOC AMPLIUS
NOVIA TROHPIME LIBERTIS LIBERTATISQ EIVS
POSTERISQUE SVPRA SCRIPTORUM ET ITUM ADITUM AM
BITVM SACRIFIQUE FACIENDI CAVSA AD ID MONV
TVM VTI EI LICEAT[27]

To the gods of the underworld.
From the three-page codicil of Popilius Heracla.
Gaius Popilius Heracla greets his heirs.
I ask you, I charge you,
and trust in your common decency that
you will erect a monument for me in the Vatican
at the circus beside the monument to Ulpius
Narcissus for those 6,000 sesterces of which
Novia Trophime will pay 3,000 and
her co-heir 3,000 and I want my remains and those of my wife,
Fadia Maxima, to be placed there if something human should happen to her.
I bequeath the right to this monument to my freedmen and freedwomen
and to those whom I will manumit by my will or to those whom liberty
is granted and further to the freedmen and freedwomen of
Novia Trophime and to the descendants of the above-named persons
so that he or she is permitted to approach, enter and visit this monument in order to bring an offering.

The text is a copy of a codicil. It was not unusual for a copy of the whole or part of a last will and testament to be inscribed on a monument. Sometimes even the complete text of a will was inscribed on someone's monument—this is probably what happened with the will of Dasumius.[28]

The inscription is important for two reasons. First of all, it is important for archaeology because the circus of Nero is mentioned in line 7. Secondly, the content is important for our knowledge of Roman law. The inscription is written in rather crude Latin, which makes translation rather difficult. The text contains three clauses relating to inheritance:

– Lines 4–10 contain a *fideicommissum* concerning the construction of a monument. This is clear from the words "*rogo iubeoque fidei vestrae committo*" in lines 4 and 5.

[27] Edition by Fernand de Visscher, "A propos d'une inscription nouvellement découverte sous la basilique Saint Pierre," *L'Antiquité classique* 15 (1946), 121–122.

[28] *Testamentum P. Dasumii Tusci* in FIRA, pp. 132–142.

- Lines 10–12 contain a request relating to Popilius' own burial and that of his wife Fadia Maxima. The word "*volo*" in line 12 indicates that lines 10–12 also refer to a *fideicommissum*.
- Lines 13–19 contain a request relating to the *ius monumenti*. In my view, the use of the term "*lego*" in line 13 indicates that a legacy is involved, probably a *legatum per vindicationem*.

In Romanist literature, attention has been given mainly to the third clause in connection with the type of grave that was required. Hardly any attention has been given to the other two clauses. I intend to discuss each of the three clauses in the order in which they occur in the codicil.

The *fideicommissum* of Popilius Heracla relating to the construction of the grave was directed to two heirs, Novia Trophime and an anonymous heir. The probable reason why the second heir is not mentioned by name in the inscription is that the inscription reproduces only a section of the original codicil. The name of the second heir would certainly have been mentioned earlier in the codicil or in the will itself.[29] The *fideicommissum* was probably carried out in accordance with the testator's wishes.

The second clause relating to the burial of Popilius Heracla and his wife Fadia Maxima was also a *fideicommissum*. The burial was a way of ensuring that their souls did not go to join the *Lemures*. Popilius Heracla probably hoped that he and his wife would go to join the *Manes*. This *fideicommissum* too was probably carried out in accordance with the wishes of the testator.

The third clause grants the *ius monumenti* to a number of freedmen and freedwomen and their descendants in order to enable them to make specific offerings at the monument. In Romanist literature, the *ius monumenti* is always interpreted as the right to be buried in a particular place; the question was whether it was a family grave where family members were to be buried or whether it was an heirs' grave whereby

[29] As far as I know, the only Romanist who has written about this clause is Philip Meylan in his article "Le codicille de Popilius Heracla. À propos d'une inscription nouvellement découverte dans les Grottes Vaticanes," *Museum Helveticum* 32 (1975), 240–250. In his view, the second heir must have been a *postumus* and the remaining heir must have been under the obligation to the other to carry out the *fideicommissum*, on the basis of imperial law. Both interpretations seem to me to be unjustified because they do not take the nature of the inscription into account.

heirs acquired the right to bury or be buried in the same grave.[30] There seems to be little point in pursuing this discussion in this instance since the first clause states that the monument is only for Popilius Heracla and his wife. Furthermore, the *ius monumenti* is granted to a fairly large group of people who could not possibly all be buried there. The legacy probably relates to the *servitus* of *via*, i.e. the right of passage between the site of the monument and the public road. This legacy was valid because it had already come into force before Popilius Heracla had been buried there and thus before the piece of ground had become a *res religiosa*. Because of this legacy, the freedmen and freedwomen and their descendants were free to come and visit the grave. Of course, it is not certain whether the testator's wish that his manumitted slaves would visit his grave and bring offerings was ever carried out.

From the foregoing it appears that Popilius Heracla had tried to ensure, by means of two *fideicommissa*, that the grave and the inscription would perpetuate the memory of himself and his wife. As far as we can judge, his heirs faithfully carried out the *fideicommissa* and he achieved his aim.

3.3. *Codicil of an Unknown Young Man*

Next is the codicil in which a young man asks his father to erect a monument for him. It forms part of an inscription which was found at the town of Cefalu (Sicily), and inserted in the wall of the local cathedral.

EXEMPLUM CODICILLORUM
HAVE MIHI, DOMINE PATER: UALE MIHI, DOMINE
PATER! CUM AD TE HAEC DICTAREM, INFELICISSIMUM TE
AESTIMAUI, UT ERAS CUM ME HOC MITTERES. PETO UT
MONUMENTUM MIHI FACIAS DIGNUM IUUENTUTI MEAE.
A TE PETO EUTYCHIANUM ALUMNUM MEUM MANUMITTAS
UINDICATQUE LIBERES, ITEM APRILEM SERUUM MEUM,
QUI SOLUS EX MINISTERIO MEO SUPERAUIT.
SCRIPSI XV KAL. APRIL(ES) SIRMI, L. CALPURNIO
PISONE P. SALUIO IULIANO COS.[31]

[30] The discussion (between de Visscher, Amelotti, and Meylan) was about the nature of the grave of Popilius Heracla and the meaning of the words "*ius monumenti*" in line 13. Regarding this discussion, see in particular O.E. Tellegen-Couperus and J.W. Tellegen, "Le caractère hybride du fidéicommis romain," in *Mélanges Fritz Sturm* 1, eds. J.F. Gerkens, Hansjörg Peter, Peter Trenk-Hinterberger, and Roger Vigneron (Liège, 1999), pp. 455–463.

[31] FIRA, p. 170.

Transcript of a codicil
I greet you, master and father: farewell, master and father.
When I dictated these words to you, I considered you to be the most unfortunate person, just as you were, when you sent me here.
I request you to construct for me a monument that reflects the dignity of my youth.
I ask you to manumit my student Eutychianus and free him from his bonds and
also my slave Apriles, who is the only survivor of my band of slaves.
I wrote this at Sirmium on 15th April during the consulship of L. Calpurnius Piso and P. Salvius Iulianus.

From this inscription, it can be deduced that the codicil was drawn up in the year AD 175, and that at that time the young man in question was in Sirmium. Since this town was situated on the North Eastern border of the Roman Empire, by the river Danube, it is possible that the young man served in the army and had been fatally wounded. In this codicil, he asks his father to erect a monument for him, a monument that will reflect the dignity of his youth. The inscription shows that the son understands the grief of his father who lost his son. It is highly likely that this inscription with the copy of the codicil was put on the monument.

The inscription is important for three reasons:

- Evidently the son wanted to be remembered as a worthy young man and he requested a monument that would reflect this factor. This is an example of the notion of *memoria*. Surprisingly, the son's name is not mentioned.
- The son made his request to his father via a *fideicommissum*. This is indicated by the use of the word "*peto*" in line 6 (or 7, in the translation).
- The father granted his son's request. Many inscriptions on gravestones relating to parents and children have come down to us.[32] Some of these gravestones reproduce the words of the parents, in other cases the child addresses his / her parents. The inscription represented above is apparently a variation on the second kind.

[32] See Hieronymus Geist and Gerhard Pfohl, *Römische Grabinschriften* (Munich, 1976), pp. 43–54.

4. *The* Responsa *of Scaevola, Pomponius, and Alfenus*

The above examples show that some heirs did what was required of them and erected a monument, but others ignored the *fideicommissum*. Sometimes, the *fideicommissa* caused legal problems. It is also clear that, in their wills, some testators tried to compel their heirs to carry out the *fideicommissum*. This could cause all kinds of problems which then could be put before a jurist. I shall now discuss three texts of Scaevola, Pomponius, and Alfenus respectively that give us some idea of how the jurists solved such problems.

4.1. *Scaevola,* Digesta *32.42 pr.*

The Scaevola in question is Q. Cervidius Scaevola who lived in the second half of the second century AD. The text runs as follows:

> *Scaevola libro trigesimo tertio digestorum. Titius heredes instituit Seiam uxorem ex parte duodecima, Maeviam ex reliquis partibus et de monumento quod sibi exstrui volebat, ita cavit: "corpus meum uxori meae volo tradi sepeliendum in fundo illo et monumentum exstrui usque ad quadringentos aureos". quaero, cum in duodecima parte non amplius quam centum quinquaginta aurei ex bonis mariti ad uxorem perveniant, an hac scriptura ab ea sola monumentum sibi testator exstrui voluerit. respondi ab utraque herede monumentum pro hereditariis portionibus instruendum.*
>
> Scaevola, *Digest* 33. Titius appointed Seia his wife heiress for a twelfth share and Maevia for the rest. He provided for the monument he wished to be raised to himself as follows: "I wish my body to be handed over to my wife for burial in such an estate, and a monument to be erected for up to four hundred *aurei*." Question: Not more than one hundred and fifty *aurei* having come to the wife as her twelfth share from her husband's property, does this clause show that the testator wished the monument to himself to be erected by her alone? He replied that the monument was to be built by both heiresses in proportion to their shares of the inheritance.[33]

The *responsum* comes from D.32 *De legatis et fidecommissis*. Originally, it formed part of book 33 of the *Digest* of Scaevola which dealt with the *lex Iulia et Papia Poppaea*.[34] In this law, or rather laws since it

[33] Text and translation by Tom Braun in *The Digest of Justinian*, ed. Alan Watson (Philadelphia, 1985), p. 86.

[34] Otto Lenel, *Palingenesia Iuris Civilis*, 2 (1889, repr. Graz, 1960), p. 270.

was a combination of the *lex Iulia de maritandis ordinibus* of 18 BC and the *lex Papia Poppaea* of AD 8, Augustus aimed at encouraging marriage and procreation of Roman citizens, using the law of succession for sanctions.

A testator called Titius instituted his wife Seia as his heir for one-twelfth and Maevia for eleven-twelfths. He enacted a *fideicommissum*—the term "*quaero*" indicates a *fideicommissum*—in which he asks that his body be passed to his wife for burial in a certain piece of ground and that a monument be erected for him for a maximum sum of 400 *aurei*. This gave rise to a question, namely whether Titius wanted Seia to pay all the costs by herself?

The *fideicommissum* concerned a monument that was very expensive compared to the value of the estate. Since Seia's share of one-twelfth amounted to 150 *aurei*, the whole estate must have had a value of 12 × 150 = 1800 *aurei*. What is the reason for the small share awarded to Seia? The answer is to be found in the original context of the *responsum*, the *lex Iulia et Papia*. These laws limited the inheritance rights of married couples without children. Probably, the couple in question had no children. This would mean that Seia could inherit from her husband not more than a one-tenth share, namely 180 *aurei*. Seia's meagre share was only 150 *aurei* and thus well below what she was allowed to receive and far below the 400 *aurei* to be spent on the monument.

In this case, it was not clear whether the testator's request was directed only to his wife Seia or to both heirs. Since Seia's share was far below the costs of the monument, the jurist Scaevola advised that both heiresses would contribute to the building of the monument. Their respective obligations—which the testator did not specify—were fixed by the jurist in proportion to their shares of the inheritance. The costs of the monument as stated by the testator was intended as a maximum. Seia therefore was not required to pay more than one-twelfth of 400 = 33 *aurei*. In this way Scaevola made it possible for the *fideicommissum* to be carried out in a reasonable way.

4.2. *Pomponius,* Digesta *33.1.7pr.*

> *Pomponius libro octavo ad Quintum Mucium. .... In testamentis quaedam scribuntur, quae ad auctoritatem dumtaxat scribentis referuntur nec obligationem pariunt. haec autem talia sunt. si te heredem solum instituam et scribam, uti monumentum mihi certa pecunia facias: nullam enim obligationem ea scriptura recipit, sed ad auctoritatem meam conservandam poteris, si velis, facere. aliter atque si coherede tibi dato idem scripsero:*

> *nam sive te solum damnavero, uti monumentum facias, coheres tuus agere tecum poterit familiae herciscundae, uti facias, quoniam interest illius: quin etiam si utrique iussi estis hoc facere, invicem actionem habebitis.*
>
> Pomponius, *Quintus Mucius*, book 8. … Some things are written in wills which merely refer to the authority of him who wrote it and do not create an obligation. The following are of this kind: if I institute you as my sole heir and I write that you should erect a monument for me for a fixed sum; for that clause involves no obligation, but you can put it into effect, if you wish to uphold my prestige. It will be otherwise if I write the same clause after giving you a co-heir; for if I charge you alone to erect a monument, your co-heir will be able to bring an *actio familiae erciscundae* against you, to make you to do so, since it is in his interest. Moreover, if you are both ordered to do it, you will both be entitled to the action against the other.[35]

The text of Pomponius has come down to us in title D. 33.1 *De annuis legatis et fideicommissis*.[36] It originally came from Book 8 *De legatis* of Pomponius' commentary on the famous work *De iure civili libri XVIII* by Quintus Mucius Scaevola.[37]

Pomponius begins this part of the text by quoting a statement made by Quintus Mucius about testamentary clauses which do not create obligations. In this connection, Pomponius gives the example of a *fideicommissum* concerning the erection of a sepulchral monument. He mentions three possibilities. If only one heir is named as the person required to carry out the *fideicommissum*, then it is not enforceable. If on the other hand two heirs are named and the *fideicommissum* is directed to one of them only, it is enforceable to the extent that the co-heir can bring an *actio familiae erciscundae* against the other heir. According to Pomponius, if the *fideicommissum* is directed to both heirs, each is entitled to bring that action against the other.

The first case is self-explanatory. My interpretation of the second case is as follows. The *actio familiae erciscundae (afe)* was an action directed at the dividing up of an estate. If one of the two heirs failed to carry out the *fideicommissum* that had been entrusted to him the other heir could ask for partitioning of the estate by means of the *afe*. Although the words *ex fide bona* had not been added to the formula for this action, the judge had a great deal of freedom with regard to the dividing of the estate between

[35] Text and translation by Robin Seager, in *The Digest of Justinian*, p. 103.

[36] All the fifty books of Justinian's *Digest*, except 30–32, are subdivided into chapters. These chapters have titles and are therefore commonly called "title".

[37] Lenel, *Palingenesia*, 2, p. 67.

the two heirs. For instance, he could reduce the share of the defaulting heir by the sum required to erect the whole monument or part of it. In the third case, this could happen mutually. As a result, the *fideicommissum* became enforceable to the extent that one heir could compel the other to carry out the *fideicommissum*. However, the question is whether the testator could compel an heir or exert force on the other heir. The next text, a *responsum* by Alfenus Varus, is about this question.

4.3. *Alfenus,* Digesta *28.5.45*

> *Alfenus libro quinto digestorum. Pater familias testamento duos heredes instituerat: eos monumentum facere iusserat in diebus certis: deinde ita scripserat: "qui eorum non ita fecerit, omnes exheredes sunto": alter heres hereditatem praetermiserat, reliquus heres consulebat, cum ipse monumentum exstruxisset, numquid minus heres esset ob eam rem, quod coheres eius hereditatem non adisset. respondit neminem ex alterius facto hereditati neque alligari neque exheredari posse, sed uti quisque condicionem implesset, quamvis nemo adisset praeterea, tamen eum heredem esse.*
>
> Alfenus, *Digest*, 5. A *pater familias* had instituted two heirs by will and ordered them to build a monument within a certain time; then he wrote: "Whichever of them has not done so, let all be disinherited". One heir had disregarded the inheritance, the other heir, when he himself had built the monument, sought an opinion as to whether he might not be heir, in view of the fact, that the co-heir had not accepted the inheritance. He replied that no one can be bound to an inheritance or disinherited by the act of another person, and that, when one of them had fulfilled the condition, he was nevertheless heir although no one else had accepted the inheritance.[38]

The text is included in *Digest* title 28.5 *De heredibus instituendis*, on the institution of heirs. It originally came from the fifth book of Alfenus' *Digesta*, about wills.[39]

A testator had named two heirs in his will and had instructed them to erect a monument for him within a specific time. To this instruction, he had added the following clause: if one of the heirs failed to carry out the task, all heirs would be disinherited. One of the heirs chose not to accept the inheritance. The other heir, who had accepted the inheritance and had built the monument, wanted to know if he had been disinherited. According to Alfenus, this was not the case because, in his view, no one entitled to an inheritance could be bound to the inheritance or be disinherited as a result of someone else's actions.

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[38] Text and translation by W.M. Gordon in *The Digest of Justinian*, p. 845.

[39] Lenel, *Palingenesia*, 1, p. 42.

This fragment has led to a detailed and lengthy discussion in the Romanist literature. First of all, there is the interpretation produced by Pernice in the late 19th century and recently defended by Roth.[40] According to Pernice, the text is incomprehensible because Alfenus' reply is not about the erection of a monument, it is about disinheritance; moreover it goes completely against the wishes of the testator.

Accordig to Pernice, the problem put to Alfenus must originally have been about the *cretio* which must have been removed from the text by the Justinian compilers. The institution of the heirs must have been worded as follows:

> *Titius et Maevius heredes sunto cerniteque in diebus cc proximis, in quibus monumentum a vobis fieri iubeo; (si) qui vestrum non ita creverit, omnes exheredes estote.*
>
> Titius and Maevius must be heirs and you must accept within the next 200 days, during which I order that a monument is made by you. If one of you will not in this way have accepted, all must be disinherited.

So in his view, two conditions had been attached to the institution of the heirs: the heirs had to accept the inheritance by *cretio* within a certain time, and within this time they had to erect a monument.

Pernice assumes that Alfenus must have replied in the following terms: the receipt and the loss of an inheritance which has already been accepted cannot be made to depend on the action of a third person, namely on a *cretio*: a suspensive condition as well as a resolutive condition would have been null and void. For Pernice, the fact that, in lines 5–6, Alfenus links the word "*hereditati*" not only to "*allegari*" but also to its opposite "*exheredari*" is an indication that a *cretio* is involved here. Pernice comes to the surprising conclusion that, in this case, the task of building a monument was irrelevant.

It is also surprising that, even in our time, Roth following Pernice presumes the text to have been interpolated when he does not understand it. It seems that the remark made by Wolff in a review of Cosentini's book on the *condicio impossibilis* is still pertinent. In connection with another fragment, Cosentini had suspected some words to have been interpolated. Wolff stated that the reconstruction proposed by Cosentini was in itself logical and correct but not convincing. He wrote:

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[40] Alfred Pernice, *Marcus Antistius Labeo: das römische Privatrecht im ersten Jahrhundert der Kaiserzeit*, 3 (Halle, 1892), p. 43 and passim. Hans-Jörg Roth, *Alfeni Digesta: eine spätrepublikanische Juristenschrift* (Berlin, 1999), p. 149 with literature. Pernice assumes that Alfenus does not express his own opinion but that of his teacher Servius. In my view, this is not necessarily so, and therefore I will refer to Alfenus only.

> Gegen die Logik dieser Deduktion ist nichts einzuwenden. Trotzdem erscheint sie mir als überscharf. Sie geht an der Tatsache vorbei, dass die römische Juristen, und zumal die älteren, ihre Entscheidungen aus der unmittelbaren Anschauung der Lebensverhältnisse gewannen und sich auf eine die letzten logischen Konsequenzen aufsuchende Analyse der Tatbestände nur dan einliessen, wenn ohne sie eine befriedigende Entscheidung nicht zu finden war.[41]

Wolff's consideration applies equally well to the *responsum* of Alfenus. The jurist examines the actual case and formulates an adequate solution. There is no reason whatsoever to assume that the text must have been interpolated. On the contrary! It would be very strange if the text were about a *cretio*, which is not mentioned, and not about the task of building a monument, which is mentioned. Why then would such an irrelevant phrase have been left in the text?

Secondly, there is Watson's interpretation which was defended recently by Paulus.[42] Watson et al. do not believe that D. 28.5.45 was interpolated; they assume that the text really is about the building of a monument. Nevertheless, Watson finds the jurist's reply unexpected and even inexact. It is unexpected because Alfenus goes directly against the wishes of the testator in a way for which no parallel in other texts can be found. It is inexact because Alfenus' main argument, that no one can be disinherited by another's behaviour, is expressed as a very general proposition of law, whereas in fact there never has been such a rule. Watson writes: 'Alfenus or Servius is caught giving a decision which is contrary to legal principle and which cannot be defended, juridically, as an exception to the rule.'[43]

I agree with Watson that the interpretation suggested by Pernice really is far-fetched; still, the interpretation produced by Watson does not seem to be correct either. First, his qualification of the *responsum* as 'unexpected' is gratuitous because only a small part of all *responsa* ever given have come down to us.

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[41] Hans Julius Wolff, review of C. Cosentini, *Condicio impossibilis*, *IURA* 4 (1953), 401: 'No objection can be raised concerning the logic of this deduction. Nevertheless, it seems to me to be too sharp. It ignores the fact that the Roman jurists, particularly the older ones, made their decisions on the basis of the direct perception of relationships in life and only became involved in the factual analysis of the last logical consequences if a satisfactory solution could not be found otherwise' (my translation).

[42] Alan Watson, "D.28.5.45 (44): an Unprincipled Decision on a Will," *The Irish Jurist* 3 New Series (1968), 377–391; Paulus, *Die postmortalen Persönlichkeit*, p. 183.

[43] Watson, "D.28.5.45 (44)," p. 382.

Moreover, I do not think that part of Alfenus' answer can be qualified as a general rule and, as such, inexact. There is no reason to single out the words that "no one can be disinherited by the act of another person" as the main part of the decision. This phrase should be read together with the words that "no one can be bound to an inheritance by the act of another person". In this case, Alfenus deals with a particular problem for which he does not formulate a decision or a rule but just gives his opinion. The fact that he worded it in fairly general terms does not mean that it represents a legal ruling. What we have here is normal persuasive spoken language.

Finally, Watson concludes that Alfenus decided contrary to legal principle. It seems that, in this connection, he refers to the *voluntas testatoris*. However, this concept was not used as a legal principle but as a means to interpret unclear wills.[44] If it had been a legal principle, the intention of the testator would have bound the heir to accept the inheritance. In fact, it was impossible for a testator to bind an heir to accept the inheritance or to reject it. An heir was free to decide whether to accept an inheritance or not, and that freedom was more important than the intention of the testator.[45] This is exactly the point made by Alfenus.

It seems that Watson failed to grasp the essence of the text because he ignored the background problem of the *memoria*. Not only did the testator want a monument to be built for him, he also wanted to force the heirs to perform the task together. He probably also wanted this cooperation to be mentioned in the inscription on the monument, for that would bestow even more honour and glory on himself.[46] Watson did not realize that the testator, wanting to secure his *memoria*, exceeded his legitimate competence by introducing this disinheritance clause. In stead, Watson isolated Alfenus' words that no one can be disinherited by the act of the other person, qualified the phrase as a general rule, and concluded that the *responsum* was not in accordance with Roman law. Therefore, Watson mystified rather than clarified Alfenus' words.

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[44] According to Hans Josef Wieling, *Die Testamentsauslegung im römischen Recht* (Munich, 1972), p. 56, the interpretation according to *verba-voluntas* was not the decisive criterion to settle the matter, as has long been presumed by Romanists. Many other criteria were applied as well. In our text, Alfenus decided as well against the words as against the intention. It is not clear whether Scaevola in his *responsum* of *Digesta* 32.42pr. mentioned above, followed the *verba* and / or the *voluntas testatoris*.

[45] An exception to this rule was the slave who was manumitted in the will and instituted as heir: he was *heres necessarius*.

[46] CIL IX 5228; CIL XII 1012. Geist-Pfohl, *Römische Grabinschrifte*, pp. 43–53 for inscriptions concerning parents and children.

In my view, the *responsum* should be explained as follows. A testator had instituted two persons as his heirs; it is not clear whether they were *sui* or *extranei heredes*.[47] He instructed them via a *fideicommissum* to erect a monument for him when he died and to do this within a certain time, cooperating with each other. This request for cooperation between the heirs was apparent from the additional clause that if one of the two heirs did not cooperate in the set task they would both be disinherited. This disinheritance clause was formulated as a resolutive condition to the *fideicommissum*.[48] The first heir was unwilling to cooperate and did forego the inheritance. The second heir accepted the inheritance and had the monument built at his own expense. For some reason or other, he then turned to Alfenus and asked whether he was disinherited now that the first heir had not accepted the inheritance and he, the second heir, built the monument alone, without any help from the other heir.

The *responsum* of Alfenus is worded in fairly specific terms. There are no particular problems about the grammar. Alfenus does not link the two terms *exheredari* and *hereditati*. He prefers to use the latter term because only one inheritance is involved. The *responsum* of Alfenus is an appropriate answer to the question posed. He deals with the position of both heirs because in the will two heirs were instituted and there was a danger that they would be played off against each other. Alfenus makes it clear that the first heir does not have to accept the inheritance simply because the second heir has accepted it, neither can the second heir lose his right as heir because the first heir has chosen to forego the inheritance. Because the second heir had fulfilled the condition and had built the monument, he was and remained heir, and there was no reason to believe that he would lose that position.

The text shows that there was no possible legal construction by which the testator could force the heirs to carry out his bidding; he was dependent on the willingness of the heirs. The fact that the testator got his monument was due not to the legal construction of the *fideicommissum* but to the dutifulness of one of the two heirs he had instituted.

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[47] Watson, "D.28.5.45 (44)," p. 377 assumes they were *extranei*. According to H. Heumann and E. Seckel, *Handlexikon der Quellen des römischen Rechts*, 9th ed. (1907, repr Graz, 1958) p. 14, *adire hereditatem* refers to *heredes voluntarii*, i.e., *heredes sui* as well as *heredes extranei*.

[48] Roth, *Alfeni Digesta*, p. 150 and Paulus, *Die postmortalen Persönlichkeit*, p. 184 both assume that the clause was attached to the institution of the heir, but according to Roth it was a resolutive condition whereas Paulus qualifies it as a suspensive one. Neither of these interpretations is in accordance with the text.

The problem we are dealing with here concerns the relation between religion and law. In religion, when somebody dies his soul continues to exist. His problem is how to make his soul immortal, when he dies and the heir does not obey the *fideicommissum* to build a monument for him. In law, when somebody dies his soul cannot sue anybody in a trial. So he cannot force the heir to obey the *fideicommissum*.

A slave cannot sue anybody either, because he has no *status libertatis*. When a slave is freed by *manumissio testamento directa* he is free when the heir accepts the inheritance. When a slave is freed by *fideicommissum* the heir can be forced to obey the *fideicommissum* on the basis of a number of *Senatus consulta*.[49] According to Roman law, a slave and a soul both lack a *caput*, i.e., personality. The difference between a soul and a slave is that a slave is a human being after all. A soul, although he does exist, is legally a non-entity. The Roman Senate could nor would help him, because that could threaten the integrity of the family capital.[50] And that would create chaos in Roman Society.

5. *Conclusion*

In the foregoing, I have attempted to show how important the immortality of the soul was for the Romans. They tried to keep the *memoria* of themselves and / or others alive among future generations by having a monument built. It was customary to incorporate in a will a *fideicommissum* requesting heirs or legatees to carry out the testator's final wishes on such a matter. Often the heirs did what they had been requested to do, but not always. Attempts on the part of testators to make such *fideicommissa* enforceable were supported by Roman jurists to a certain extent. The jurists did not go so far as to curtail the freedom of heirs to accept or forego an inheritance.

In order to investigate the question of the immortality of the soul and Roman law, one has to use a combination of sources of various kinds. The starting-point must be to trust that the Roman texts are authentic. The next step is to compare the legal sources with literary texts and inscriptions. Only then is it possible to understand the paradoxical nature and the importance of the legal problems involved. This approach will

[49] Kaser, *Privatrecht* 1, p. 295.

[50] In Roman law, several measures protected the heir. The SC. Pegasianum, for instance, guaranteed the heir a fourth part of the estate. Kaser, *Privatrecht* 1, p. 760.

make it possible to put Roman views on the immortality of the soul in their historical context and to understand the common sense of the *responsa prudentium*.

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