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Motivation in Ancient Accounts of the Early History of the Quaestorship and its Consequences for Modern Historiography*

It may be felt that there is no need for another essay on the origins of the quaestorship. As long ago as 1936 LATTE provided a plausible account of their original function[1] and more recently SANTALUCIA has put forward an elegant explanation of the relationship between the earliest quaestors and the mysterious *duumviri perduellionis*.[2] This paper is concerned with something different; its purpose is to suggest that the accounts of the origin and early history of the quaestorship

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[1] K. LATTE, The Origin of the Roman Quaestorship, TAPhA 67, 1936, 24–33 (= Kleine Schriften, 1968, 359–366).

[2] B. SANTALUCIA, Diritto e processo penale nell'antica Roma[2] (hereinafter Diritto), 1998, 51, 21–22, the first edition (1989) being translated into German by E. HÖBENREICH under the title: Verbrechen und ihre Verfolgung im antiken Rom (hereinafter Verbrechen), 1995, 9–10. ‹La tradizione parla, a questo proposito, di *quaestores par(r)icidii* e di *duumviri perduellionis*: compito dei primi sembra essere stato quello di accertare se l'omicidio fosse o meno avenuto con dolo e di sovraintendere all'esercizio della vendetta dinanzi al popolo *in contione*; i secondi invece costituivano, come tutto fa credere, un tribunale straordinario a cui era affidato l'incarico di proclamare la responsabilità e di procedere all'immediata esecuzione capitale del reo di perduellione colto in flagranza.› (‹Tradition speaks in this connection [that of assistants to the king in the prosecution of crimes] of *quaestores par(r)icidii* and of *duumviri perduellionis*; the function of the first seems to have been that of verifying whether a homicide had or had not occurred with malice and of supervising the operation of the vendetta in the presence of the people *in contione*; the second on the contrary, as everything leads us to believe, constituted an extraordinary tribunal to which was entrusted the task of proclaiming the responsibility and of proceeding to the immediate capital execution of someone charged with *perduellio* and caught in the act›). – To the ample bibliography therein on the early quaestorship I would only add A. GIOVANNINI, Les origines des magistratures romaines, MH 41, 1984, 15–30, esp. 21–26; L. GAROFALO, La competenza giudiziaria dei *quaestores* e Pomp. D.1.2.2.16 e 23, SDHI 51, 1985, 409–423; M. D'ORTA, Trebazio Testa e la questura, SDHI 59, 1993, 279–297; R. STEWART, Public Office in Early Rome, 1998, 29–30, 69–70; A. LINTOTT, The Constitution of the Roman Republic, 1999, 133–137.

given in our sources are dependent upon each author's view of the development of institutions in the regal and early republican period. There is nothing surprising about this but the implications are more disturbing than most historians of ancient Rome would be prepared to recognise. For if we accept that the pattern of development of the quaestorship as set out in an ancient source is contingent upon that source's explicit or implicit view of the development of early Roman institutions, then it becomes evident that we ought to be very reluctant to pick and mix elements from sources with different agendas. It is not difficult to show that there is no common tradition about the foundation, date and original function(s) of the quaestorship; indeed, some ‹traditional› elements, such as quaestors acting as prosecutors before the assembly of persons charged with any serious offence, may well be relatively late inventions. Any value that our sources possess, with the exception of the material to be found in the antiquarian writers, lies in the credibility of the account each of them presents of the evolution of Rome's magistracies. We should make allowances for mistakes, misunderstandings and anachronisms, but the underlying structure has to be at the very least plausible. Such an enquiry is to some extent independent of the disputes between those who accept the fundamental historicity of Livy's and Dionysius' account of early Rome and those whose approach to the ancient sources for history before the fourth century BC is more critical or even hypercritical, though admittedly our method sits more comfortably with the critical approach. Nevertheless, if the procedure proposed in this paper is thought to be reasonable, it would be legitimate to argue, for example, that Livy and Dionysius offer a much more contextually probable account of the invention and development of the quaestorship than Ulpian or Tacitus and that therefore we should accept at least in outline the narratives of the Augustan historians. On the other hand, the partisans of the ‹hypercritical› approach are required to accept only one historical fact: that an event, known subsequently as the expulsion of the kings, occurred in the late fifth or early fourth centuries and that the government of the infant state, previously in the hands of a single ruler, was now more widely diffused.[3]

[3] At the same time, it is only fair to the reader that I should state my own position. I believe that a solid but small core of fact underlies the narrative of Roman history, at least from the sixth century onwards, a core which continues to grow for the fifth and fourth centuries, but it is no more than a core. Anyone who denies the almost limitless capacity of chroniclers before the early modern period to invent on the grand scale to meet the requirements of contemporary society or political power-struggles needs only to reflect upon the monstrous burgeoning of the tale of King Arthur during the early middle ages. We cannot exclude the possibility that the later Roman annalists used the meagre materials at their disposal in exactly the same way that Geoffrey of Monmouth in the Historia Regum Britannie used the materials which he inherited from Gildas and Nennius, namely by padding them out with invented detail and bogus dates, in Geoffrey's case cross-dating to events in Roman and Biblical history where he can, just as Dionysius cross-dated episodes in his work to Olympiads and Athenian archonships. Indeed, in the case of the Arthurian

Let us begin by examining sources which place the institution of the quaestorship during the regal period. The Digest, rather surprisingly,[4] preserves an extract on the origin of the quaestorship from Ulpian's single book on the office of quaestor (Dig. 1.13). Ulpian states that, according to Iunius Gracchanus, Romulus and Numa had two quaestors apiece elected by the people, but that, whether or not this is true, ‹it is a fact (*certum est*) that they existed in the time of Tullus Hostilius and the majority of the ancients ascribed their introduction to Tullus.›[5] Unfortunately, any further details of the quaestorship between Numa and 138/137 BC that Ulpian may have recorded have been omitted by Tribonian's compilers.[6] Nor does Ulpian tell us whether the *veteres* corrected Gracchanus merely

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‹legend› there may be no factual core at all; see N. J. HIGHAM, The English Conquest, 1994, 211: ‹Not only did Arthur himself not exist but the age which led to his invention was no less fictional› and King Arthur: Mythmaking and History, 2002, passim, but particularly 38–97 & 222–226.

[4] A possible explanation is that Tribonian himself at the time when he was supervising the Digest's compilation was *quaestor sacri palatii* to Justinian. Lydus admired him and seems to have regarded his quaestorship as one of his chief claims to fame (de mag. 3.20). Ulpian's statement that it was possibly the oldest of all the magistracies was perhaps thus in Tribonian's eyes worth preserving for posterity.

[5] *Origo quaestoribus creandis antiquissima est et paene ante omnes magistratus. Gracchanus denique Iunius libro septimo de potestatibus etiam ipsum Romulum et Numam Pompilium binos quaestores habuisse, quos ipsi non sua voce sed populi suffragio crearent, refert. sed sicuti dubium est an Romulo et Numa regnantibus quaestor fuerit, ita Tullo Hostilio rege quaestores fuisse certum est, et certe crebrior apud veteres opinio est Tullum Hostilium primum in rem publicam induxisse quaestores.* (1) *et a genere quaerendi quaestores initio dictos et Iunius et Trebatius et Fenestella scribunt* (dig. 1.13 pr. & 1). On this excerpt see D'ORTA (n. 2) passim.

[6] There probably were more. Lydus' account of the quaestorship begins (1.24) and ends (1.28) with material derived from Ulpian's book or more probably the tranche from which the compilers of the Digest drew their excerpts (see J. CAIMI, Burocrazia e diritto nel De Magistratibus di Giovanni Lido, 1984, 193–199). There is another possible indicator that Ulpian is Lydus' source. Ulpian tells us that some quaestors were allotted provinces *ex senatus consulto quod factum est Decimo Druso et Porcina consulibus* (dig. 1.13.1.2). *Porcina* must be M. Aemilius Lepidus Porcina, the consul of 137 BC – *Porcina* by itself (e.g. Ad Her. 4.7; Chronographus 55) refers only to him; perhaps the agnomen is unique. However, there is something wrong with *Decimo Druso*: during the Republic only the *gens Livia* takes the cognomen Drusus and its members use only Gaius and Marcus as *praenomina*. So either *Decimo* or *Druso* is corrupt. MOMMSEN, having noted that D. Iunius Brutus was consul in the previous year, plausibly emended *Druso* to *Bruto*. He was surprised by the chronological error, but it is confirmed by a similar error in Lydus; Lydus (de mag. 1.27) dates the institution of the *quaestores classici* in the aftermath of the Pyrrhic War to the consulships of Regulus and Iunius; M. Atilius Regulus was consul in 267 and D. Iunius Pera in 266. It is unlikely that Lydus and Ulpian independently used a source making exactly the same type of chronographical error and more probable that Lydus found the mistake in a longer extract from Ulpian whose source systematically made this type of inaccuracy. There is thus no need to emend the text of Lydus. (The use of Varro-derived dating in this paper does not imply that the dates are correct but is for convenience only).

on the dating of quaestors back to Romulus and Numa or rejected as well his theory of popular election for quaestors in the regal period. Lydus in his mangled version of Ulpian (which he attributes to Gracchanus) thought popular election produced Tullus' quaestors and this may well be the implication of the passage.[7] Gracchanus' motivation is clear: he is intent on associating popular involvement in the selection of quaestors with the very foundation of Rome.[8] For Ulpian too a regal origin for the quaestorship would be attractive: the emperor is the successor of the kings: both owe their absolute power to the people.[9] It is therefore not incompatible with his case that the king should early have had assistants who may have owed their position to the people. On the other hand, it is less clear why a majority of the *veteres* were anxious to father their introduction on Tullus Hostilius, when most of our sources make the quaestorship a republican institution. Perhaps the answer lies in the role of quaestors as assistants to the consuls engaged in military campaigns: Tullus as the most warlike of the kings would have had most need of such assistants. If these quaestors were also elected by the people, then Tullus as the first king to have granted the people capital jurisdiction[10] is an obvious choice as the institutor of the election of magistrates. To sum up, then, for Ulpian and his sources the quaestorship goes back to the regal period and the earliest quaestors served as assistants to the kings. Their institution is dated to early in the regal period;

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[7] Προεχωρήσαντο τῆι ψήφωι τοῦ δήμου. Τοῦλλος δὲ ὁ ῥὴξ μετὰ τούτους (sc. Romulus and Numa, though L. has not mentioned them) ἀναγκαίαν εἶναι τὴν τῶν κυαιστώρων ἀρχὴν ἔκρινεν (de mag. 1.24) L. claims to be citing *verbatim* (αὐτοῖς ῥήμασι) Γραχχιανός (sic but his mistakes over Roman names may be the fault of the copyist).

[8] M. Iunius was so great an admirer of C. Gracchus that he was given the name/cognomen Gracchanus, *Gracchanus appellatus est*, according to Pliny (NH 33.36), hence the ‹popularist› bias.

[9] Cf. dig. 1.4.1. pr., from Ulpian's first book of Institutes: *quod principi placuit, legis habet vigorem: utpote cum lege regia quae de imperio eius lata est populus ei et in eum omne suum imperium et potestatem conferat.* The passage, though probably made more absolutist by Justinian's compilers, is in substance Ulpianic, and the substance has one interesting point of contact with the Tacitean excursus below.

[10] Though there are different versions of the trial of M. Horatius, the hero of the Alban war, for killing his sister, all conclude with Horatius being tried by the people sitting as a court. Except on the one occasion (dig. 23.1.2) when he uses the expression in the sense of ‹our ancestors›, *veteres* for Ulpian means lawyers writing not merely in or before the Augustan period (dig. 7.8.10.3–4; 13.6.11–12), but even apparently jurists as late as Sabinus and C. Cassius Longinus working under Claudius and Nero (dig. 17.2.52.18). During the early empire the first six kings become more popular figures, more like idealized prototypes of the emperor, and thus more suitable sponsors for legal and political institutions. As we shall see, Dionysius, Livy and Plutarch all make the quaestorship a republican institution and, with the just possible exception of Dionysius, show no knowledge of the tradition attested by Ulpian and Tacitus. This would suggest that it was of little importance until Trebatius and Fenestella (and perhaps the emperor Claudius) gave it publicity, utilising Gracchanus' ideologically motivated invention.

Gracchanus certainly and Ulpian's other sources possibly supposed that they were elected by the people.

Tacitus' celebrated excursus on the history of the quaestorship (ann. 11.22.2–6) demonstrates similarities with Ulpian's account but exhibits one important difference; the quaestorship goes back to the kings, ‹as the *lex curiata* reintroduced by L. Brutus shows›.[11] On the other hand, pace Gracchanus and possibly Ulpian's other sources, the kings appointed their quaestors as indeed did the consuls for 63 years after the expulsion of the Tarquins (until 447 BC). The office of urban quaestor came later when required by the increasing financial responsibilities of the state. In other words, the quaestorship is of regal origin, quaestors as assistants to kings and consuls antedate quaestors as supervisors of the treasury and they were originally appointed by the kings and by the consuls, not elected. But the reference to L. Brutus' *lex curiata* ‹showing› that the quaestorship was of regal origin reveals that Tacitus' polemic was not only, or even primarily, directed against Gracchanus and possibly also others who claimed that quaestors were elected, not appointed, during the regal and early republican period, but had in its sights a quite different tradition.

This tradition, represented for us by Livy, Dionysius and Plutarch,[12] presents us with quaestors instituted in the early Republic, and, what is more, with treas-

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[11] *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. creatique Valerius Potitus et Aemilius Mamercus sexagesimo tertio anno post Tarquinios exactos, ut rem militarem comitarentur. dein gliscentibus negotiis duo additi qui Romae curarent.* Tacitus is not wholly clear here. Probably the second sentence means that Valerius and Aemilius were the first quaestors to the consuls to be elected, not selected by their superiors, *ut rem militarem comitarentur* being a case of *variatio* with *qui Romae curarent* at the end of the next sentence, exhibiting Tacitus' customary disdain for the appropriate technical expression. However, the passage might mean that only from 447 BC onwards did the quaestors acquire financial responsibilities in the field. This would explain why they were henceforth elected by the people, not chosen by their respective consuls.

[12] Tacitus' excursus fits rather uneasily into its context, P. Cornelius Dolabella's proposal in the senate that henceforth quaestors should provide annual gladiatorial shows at their own expense. The quaestorship had had a respectable history *donec sententia Dolabellae velut venundaretur* (11.22.6). In other words, the fact that the quaestorship was now to be virtually up for sale is characteristic of the decline from republican standards under the impact of the Julio-Claudian autocracy. The point is underlined by the personality of the proposer of the *senatus consultum*, Dolabella, characterised as the sort of gross flatterer who flourishes under a tyranny, cp. 3.47.3 *Dolabella Cornelius ... absurdam in adulationem progressus*, similarly 3.69.1 (see also 4.66.2), except when he can be represented as a victim of Tiberius, 4.26.1. Yet the excursus itself seeks to show that the ‹democratic› origin of the quaestorship is a myth; quaestors were creatures of kings and consuls until 447 BC. Perhaps the historian was utilising a source, possibly a speech of Claudius, that had a different agenda altogether. For discussions of this excursus see R. Syme, Tacitus, 1958, I.433.7; E. Koestermann, Tacitus: Annalen, 1967, III. 71–73; H. Y. McCulloch Jr., Narrative cause in the Annals of Tacitus, 1984, 99 & 99.2; E. Aubron, Rhétorique et histoire

ury quaestors instituted earlier than quaestors as assistants to the consuls. However, a republican origin for the treasury quaestorship is the only common feature between the three sources; on inspection, ‹tradition› breaks down into different forms, some of which are probably not genuine traditions at all, but, like Gracchanus' ascription of popular election of quaestors to the age of Romulus, a product of late republican ideological conflicts. Moreover, Livy and possibly others introduce a new function for the quaestor(s), namely that of state prosecutor; when they simply appear in the narrative with no other apparent role they will be designated ‹floating› quaestors.

The material to be found in this group of sources differs in two ways from what we have found in Ulpian and Tacitus. Firstly, with the exception of Plutarch[13] who dates the creation of the treasury quaestorship to the first year of the Republic, no source offers an explicit account of the origin of the quaestorship. This has to be inferred from the narrative. Secondly, Livy and Dionysius offer us examples of quaestors in action which seem on the face of it to have at best only a loose connection with their general views on the function(s) of the quaestorship. In Livy's constitutional scenario quaestors who supervised the treasury are the only types of quaestor operating before 421. He does not tell us when they were instituted but in a speech dated to 445 (4.4.3) Canuleius is made to place the institution of the quaestorship between that of the dictatorship (501) and the decemvirate (451). In 421 there were added to the two urban quaestors two more quaestors as assistants to the consuls engaged in military operations (4.43.4). Dionysius does not mention the second type, probably because our full text of the Roman Antiquities ends in 443/441, but the treasury quaestors turn up without explanation or past at the very beginning of the Republic, for at Roman Antiquities 5.34.4 Lars Porsena makes a series of presents to the infant Republic ‹of no small value, as appeared from the sale made by the ταμίαι after the king's departure›. They turn up again in the Roman Antiquities

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chez Tacite, 1985, 114; M. M. Sage, Tacitus' historical work, ANRW II.33.2, 1990, 988 & 988.695; O. Devillers, L'art de la persuasion dans les *Annales* de Tacite, 1994, 291–292.

[13] Ἐπηινέθη δὲ καὶ διὰ τὸν ταμιευτικὸν νόμον, ἐπεὶ γὰρ ἔδει χρήματα πρὸς τὸν πόλεμον εἰσενεγκεῖν ἀπὸ τῶν οὐσιῶν τοὺς πολίτας, οὔτ' αὐτὸς ἅψασθαι τῆς οἰκονομίας οὔτε τοὺς φίλους ἐᾶσαι βουλόμενος οὔθ' ὅλως εἰς οἶκον ἰδιώτου παρελθεῖν δημόσια χρήματα, ταμιεῖον ἀπέδειξε τὸν τοῦ Κρόνου ναόν, ὃι μέχρι νῦν χρώμενοι διατελοῦσι, ταμίας δὲ τῶι δήμωι δύο τῶν νέων ἔδωκεν ἀποδεῖξαι· καὶ ἀπεδείχθησαν οἱ πρῶτοι Πούπλιος Οὐετούριος καὶ Μινούκιος Μᾶρκος ... (Plut. Publicola 12.2) [(Publicola) was also praised for his treasury law. For when it was necessary for the citizens to contribute money for the war out of their possessions, he was unwilling to engage in the administration of it himself or to allow his friends to do so or indeed for the public funds to pass into the house of a private citizen. So he assigned the temple of Saturn for use as a treasury, a function which it has served up to the present day, and he granted the people the right to appoint two young men as treasurers. And the first to be appointed were P. Veturius and M. Minucius ...] Τῶι δήμωι ... ἔδωκεν ἀποδεῖξαι – ‹granted the people the right to appoint› – indicates the motivation behind this account.

at 6.96.3 & 4.[14] Perhaps he was following the same source as Plutarch who, as we have seen, dated the establishment of the treasury quaestors to the first year of the Republic.

When we examine the two or possibly three episodes where the quaestors are shown in action, we find them in a new role, as public prosecutors. The most widely attested case is the trial of Sp. Cassius for *perduellio*, alleged to have taken place in 485. Involvement by quaestors is attested both by Livy (2.41.10–11) and by Dionysius (8.77–9);[15] both record an alternative version – that the father of Cassius was responsible for his death – though the account takes somewhat different forms in each. In Livy the father exercises *patria potestas* and ‹tries› him

[14] Also 8.77.1, 8.78.5, 8.82.4, 9.51.2, 10.21.6, 10.23.4, 10.24.3, 10.25.1, 10.56.2, 11.46.4 & – from the excerpted text – 13.9.2. One passage – a verbal attack by a tribune, M. Decius, on Coriolanus (7.63.2–3) – stands apart from all the other references in Dionysius. Decius is complaining that Coriolanus neither handed over the Volscian booty to *the* quaestor (τῶι ταμίαι) for him to sell nor sold it himself, in either case for the benefit of the treasury. The former practice has never been violated since the foundation of the city nor even criticized: καὶ τοῦτον τὸν νόμον ἐξ οὗ τήνδε οἰκοῦμεν τὴν πόλιν οὐχ ὅπως κατέλυσέ τις οὐδ' ἠτιάσατο. There is only one quaestor and the practice goes back to Romulus. Very probably Dionysius is putting into the mouth of Decius either a statement which the historian believes to be false – as Decius is portrayed as a disreputable character, this is likely enough – or at any rate a rhetorical exaggeration of the ‹fact› that even the kings used booty for the public good. However, we do have to reckon with the faint possibility that Dionysius or his source was aware of Gracchanus' claim that quaestors as assistants to kings and consuls go back to Romulus. This is only a possibility; the fact that Decius mentions only one quaestor and Dionysius does not mention the quaestorship in his extensive account of allegedly Romulean ordinances (2.9–25) makes it more likely that the historian is thinking – anachronistically in his terms – of the quaestor with financial responsibilities who accompanied a general on campaign at a later date. If Dionysius, like Livy, thought that these assistants to the consuls were instituted in 420 or thereabouts, then the notice would have appeared in the mostly lost Book XII.

[15] The only surprising addition to Livy's account that we find in Dionysius is an emphasis on the good social connections, wealth and political skills of these quaestors: ἄνδρες ἐκ τῶν πατρικίων νέοι μὲν ἔτι τὴν ἡλικίαν, ἐπιφανέστατοι δὲ τῶν ἄλλων κατά γ' (τ' MSS) ἀξιώσεις προγόνων καὶ διὰ τὰς ἑταιρίας τε καὶ πλούτους μέγα δυνάμενοι, καὶ ὡς νέοι τὰ πολιτικὰ πράττειν οὐδενὸς τῶν ἐν ἀκμῆι χείρους, Καίσων Φάβιος, ἀδελφὸς τοῦ τότε ὑπατεύοντος, καὶ Λεύκιος Οὐαλέριος Ποπλικόλας, ἀδελφὸς (?ἀδελφιδοῦς, ἀδελφόπαις) τοῦ καταλύσαντος τοὺς βασιλεῖς ... (8.77.1). However, Livy does make the same sort of point in his reference to the quaestors who eventually convict Q. Volscius Fictor, the subject of the next alleged quaestorian prosecution (3.25.1–2): *in novis quaestoribus maior vis, maior auctoritas erat. cum M. Valerio Mani filio Volesi nepote quaestor erat T. Quinctius Capitolinus qui ter consul fuerat.* In each case one of the quaestors is a Valerius and it is tempting to see the embroidering hand of Valerius Antias here. Sulla had upgraded the quaestorship in 81 BC (see D'Orta [n. 2]) making the holding of that office an automatic qualification for membership of the senate. Furthermore, thereafter we find *quaestores pro praetore* and even *quaestores pro consule*, an added enhancement of the dignity of the office. A post-Sullan annalist who approved of Sulla's work seems indicated and Valerius Antias fits the description. For a recent bibliography on Cassius and Fictor, see Santalucia, Diritto, 41.39.

at home – *cognita domi causa* – sentencing him to death *more maiorum*, whereas Dionysius represents him denouncing his son to the senate which pronounces him guilty, leaving the father to inflict the death penalty. Both historians prefer the quaestorian version. Cicero (rep. 2.60) also knows the quaestorian prosecution story, though in his case only one quaestor is involved.[16] The involvement of prosecuting quaestors is puzzling: of the nineteen assembly prosecutions recorded in Livy between 491 (Coriolanus, 2.35.3) and 391 (Camillus, 5.32.8) fourteen are ascribed to tribunes. In another (that of Q. Pomponius and A. Verginius in 393, 5.29.6–7) Livy does not state who initiated the prosecution. There are a solitary aedilician prosecution[17] and three quaestorian prosecutions.[18] Livy therefore regards tribunician prosecutions as the norm in the early Republic. It is not helpful to suggest, as some do,[19] that in the case of Cassius we have the exposure of a very early stratum of Roman constitutional history, when quaestors were the magistrates who regularly mounted criminal prosecutions before the *comitia centuriata*. The unhelpfulness is not due to the fact which caused MOMMSEN to reject the story as annalistic fiction, namely that the story fails to conform to his model for the prosecution of crimes in archaic Rome;[20] according to this model the quaestors as deputies of the consuls prosecute in the centuriate assembly all capital offences except *perduellio* which is the province of the *duumviri perduellionis*:[21] since quaestors are shown prosecuting Cassius for *perduellio* the annalistic narrative cannot be authentic. This difficulty can be overcome by the more sophisticated approach of SANTALUCIA: MOMMSEN and his disciples were wrong in supposing that the *duumviri perduellionis* and the early quaestors are analogous magistrates. In SANTALUCIA's reconstruction of procedure in criminal trials in the early Republic (see n. 2) the quaestors handle

[16] *Sp. Cassium de occupando regno molientem, summa apud populum gratia florentem, quaestor accusavit eumque, ut audistis, cum pater in ea culpa esse comperisse se dixisset, cedente populo morte mactavit.* This is an intriguing statement; we have a non-Livian reference to a floating quaestor or is it perhaps to Cassius' own quaestor, though in the other accounts, the prosecution took place *after* his consulship, when he would no longer have had a quaestor? And if the quaestor prosecuted Cassius in the assembly-court, what does *cedente populo* mean? Not simply ‹with the approval to the people› (Loeb) but ‹with the people giving way›, i.e. foregoing *provocatio*, thus correctly K. ZIEGLER, Cicero: Staatstheoretische Schriften, 1974, 121 and K. BUCHNER, Kommentar (on the de republica), 1984, 240.

[17] Of C. Veturius in 454, 3.31.5.

[18] As we shall see, there were two attempts by quaestors to prosecute M. Volscius Fictor whose case we shall discuss next, but as they were part of the same campaign against Fictor they can be regarded as part of the same episode.

[19] Notably R. M. OGILVIE, A Commentary on Livy Books 1–5, 1965/1967, 323–326, and, by implication, SANTALUCIA, Diritto 48–49 (= Verbrechen 27–28).

[20] TH. MOMMSEN, Römisches Strafrecht, 1899, 155.3.

[21] TH. MOMMSEN, Römisches Staatsrecht[3], 1887, II.1 537–542; MOMMSEN (n. 20) 155–156.

all crime including *perduellio* (activity hostile to the state) except where the accused party's treasonable activities are so blatant that extraordinary magistrates can be appointed to deal summarily and capitally with the miscreant. And, if the *duumviri* really are an archaic institution,[22] then SANTALUCIA's approach has much greater plausibility than MOMMSEN's; for if the only mainstream annalistic story which supports quaestorian prosecutions in early Rome is totally irreconcilable with MOMMSEN's theory of the *duumviri* as regular prosecutors in cases of *perduellio*, then, in all probability, MOMMSEN is simply wrong. No, the real reason for the unhelpfulness of the geological analogy is that we can rightly ask to have it explained why in this case alone the quaestorian stratum remained exposed when in all others it was covered by a layer of fictitious tribunician prosecutions. Certainly, this event is given an early date (485 BC), but this early dating did not stop annalists from inventing an even earlier tribunician prosecution.[23] It would be better to look at an alternative hypothesis, KUNKEL's: the fact that there are, at the most, only three recorded instances of quaestorian prosecutions is due to the fact that, with the possible exception of the treasury-related trial of Camillus, there were none in the earliest record.[24] It is equally possible that the exact contrary of MOMMSEN's and OGILVIE's view is correct[25] and that the intrusion of quaestors into the annalistic record is later, not earlier, than accounts of tribunician prosecutions. However, the involvement of quaestors in the prosecution of Cassius is more widely attested than in the case of Fictor to be discussed next and this may point to the quaestorian version of Cassius' trial being not so late an invention as the quaestorian prosecution of Fictor. There is indeed a motive for giving the quaestors the function of prosecutors in Cassius'

[22] The *duumviri perduellionis* have a rather dubious pedigree. They are first mentioned in Livy 1.26 as having been instituted by Tullus Hostilius to deal with M. Horatius' sororicide and are only mentioned once again, in connection with the trial of M. Manlius Capitolinus in 384, until the trial of C. Rabirius Postumus in 63. Full discussion will be left for a subsequent paper, but there are two different questions to be addressed. Firstly, is the involvement of *duumviri* in the trials of Horatius and Capitolinus historical and secondly are the *duumviri perduellionis* a genuinely archaic institution? The answer to the first question is, as was argued in: Livy's source for the trial of Horatius, LCM 2, 1977, 205–213, that the intrusion of *duumviri* into the stories of Horatius and Capitolinus is not merely unhistorical but of late republican origin. The *duumviri* themselves may possibly be of ancient origin and, if so, SANTALUCIA's account of their function (n. 2) is the best so far offered, but the eccentricities of the document which instituted them and is recorded in Livy 1.26, make it more likely that it and they are an invention, adapted or invented to serve Caesar's purposes in 63 when he used the alarming ritual contained in it for the prosecution of C. Rabirius.

[23] Livy 2.35.2 (the prosecution of Coriolanus in 491).

[24] W. KUNKEL, Untersuchungen zur Entwicklung des römischen Kriminalverfahrens in vorsullanischer Zeit, 1962, 34–36; Staatsordnung und Staatspraxis der römischen Republik vol. 2, completed and edited after his death by R. WITTMANN, 1995, 523 & n. 48.

[25] MOMMSEN (n. 20) 155–156, esp. 155.3; OGILVIE (n. 19) 324–326.

trial; in Livy they simply appear as prosecutors, but the connection with the treasury quaestors is transparent in Dionysius' version. The state confiscates Cassius' property;[26] in a capital prosecution of which, for the first (?) time, part of the penalty is *publicatio bonorum*,[27] there is a role in the story for the quaestors, one that would push back into the heroic age of the early Republic both their right to prosecute on a capital charge and their function as administrators of the treasury.[28]

The other Livian example of an alleged quaestorian prosecution in early Rome is the trial of M. Volscius Fictor for false witness during the preliminary proceedings of a capital case; A. Verginius, a tribune, proposed to initiate a prosecution of Caeso Quinctius on Fictor's evidence for having brought about the death of Fictor's brother. Caeso jumps bail but when Fictor's story is found to be false two of Livy's floating quaestors, Cornelius and Servilius, attempt to prosecute Fictor in 459 but are foiled by the tribunes. Different quaestors were finally successful in 458 when Cincinnatus, Caeso's father, was dictator and the tribunes were too nervous of the latter to intervene; Fictor was convicted and went into exile.

Now, whereas the exile of Caeso Quinctius is attested not only by Livy (3.11–14) and Dionysius (10.5–8) but also by Cicero (dom. 86),[29] the trial of

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[26] Τὰ χρήματα αὐτοῦ (sc. Κασσίου) τὸ κοινὸν ἀνέλαβεν· ἐξ ὧν ἀπαρχὰς ἐν ἄλλοις τε ἱεροῖς ἀνέθηκε καὶ δὴ καὶ τῇι Δήμητρι τοὺς χαλκέους ἀνδριάντας ἐπιγραφαῖς δηλοῦντας ἀφ' ὧν εἰσι χρημάτων ἀπαρχαί (79.3).

[27] For the early development of this penalty see F. SALERNO, Dalla ‹consecratio› alla ‹publicatio bonorum›, 1990, esp. 80–84.

[28] Τὴν ταμιευτικὴν ἔχοντες ἐξουσίαν ... καὶ διὰ τοῦτο ἐκκλησίαν συνάγειν ὄντες κύριοι (77.1) could imply that in Dionysius' view it was in virtue of their treasury magistracy that they could convene the assembly. – It is hypercritical to deny the probability that the execution of Sp. Cassius is historical and that he was aiming at making himself sole ruler (*affectatio regni*), as suggested by the sources. The tradition was widespread (Cic. rep. 2.49 & 60; Phil. 2.87 & 114; Lael. 36 [implicitly 28]; dom. 101; Dion. 8.79.1; Val. Max. 6.3.1; Pliny NH 34.30) and it is the sort of event that both popular tradition and the *annales maximi* would have preserved. If Cassius' death is a fiction, then we would need to write off virtually everything in the record between the expulsion of the kings and the decemvirate. The contradictory detail on the other hand is surely annalistic invention; the version involving the exercise of *patria potestas* does at least have plausibility on its side. E. GABBA has noted signs of post-Sullan political discussion in Dionysius' account; see: Dionigi d'Alicarnasso sul processo di Spurio Cassio. La Storia del diritto nel quadro delle scienze storiche, Atti del primo congresso internazionale della società italiana di storia del diritto, 1966, 143–153.

[29] The attempted trial of Caeso Quinctius is itself doubtful history; see OGILVIE (n. 19) 416–418; as KUNKEL 1962 (n. 24) 35.113 points out, the name of the star witness, Volscius Fictor, is itself highly suspicious, given that he is committing perjury and Livy's Volscians are by nature unreliable (see P. G. WALSH, Livy[2], 1989, 109, who compares Livy 2.22.3: ‹Volscis ... *suum* rediit *ingenium* [‹their native duplicity›, Loeb tr.]: rursus *occultum* parant bellum.›). For what it is worth, Zonaras' (Dio's) description of Cincinnatus as a poor man who had devoted his life to farming›: πένητα ... ἄνδρα καὶ γεωργίαι συνεζηκότα (Zon. 7.17), implies a different tradition in which Cincinnatus had always been poor, not reduced to

M. Volscius Fictor is not known to Dionysius[30] or mentioned by any source except Livy (3.24.3–7; 25.1–3; 29.6). This in itself would imply a late origin for the story, but the lateness of its date is confirmed by one item in the record: Volscius is condemned and goes into exile at Lanuvium.[31] Exile is anachronistic as a form of the death penalty;[32] in archaic Rome a convicted Fictor would probably have been flung off the Tarpeian Rock.[33] But Livy's source seems to have forgotten that before the institution of *quaestiones perpetuae* a defendant tried by the *comitia centuriata* had to go into exile *before* the end of the trial proceedings, if only just before, in order to escape the death penalty.[34] But Volscius goes into exile *after* sentence, as did defendants found guilty before a *quaestio*. It is therefore probable that the story of Fictor's trial was invented after *falsum testimonium* was included in *quaestio* legislation, probably after 81.[35] It cannot therefore be part of any early tradition about the quaestorship.[36]

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poverty by paying up the bail money for his absconding son. In Cicero too there is no jumping bail; Caeso is classed with Camillus and others among those who were unjustly condemned by the *comitia centuriata* and returned from exile without a stain on their characters. But if the trial of Caeso is merely improbable, the trial of Fictor for the reasons stated in the text is almost certainly an invention of the first century BC.

[30] D. vaguely assumes that the truth about Volscius' perjury emerged ‹in the course of time› (10.8.4): Οὐολσκίου ψευδῆ μαρτυρήσαντος, ὡς ἐγένετο φανερὸν σὺν χρόνωι . . .

[31] *Volscius damnatus Lanuvium in exsilium abiit* (2.29.6).

[32] See U. Vincenti, «Falsum testimonium dicere» e il processo di Marco Volscio Fittore, in: Idee vecchie e nuove sul diritto criminale romano ed. A. Burdese, 1988, 22–43, a painstaking analysis of Livy's tale which demolishes any claim it may have to historicity in its Livian form.

[33] At all events, the penalty for false witness under the Twelve Tables was precipitation from the Tarpeian Rock (Roman Statutes, ed. M. H. Crawford, 1996, Tab. VIII.12 = Gell. 20.1.53). It is hazardous of M. P. Piazza, La disciplina del falso nel diritto romano, 1998, 29–50, to reject Gellius' explicit testimony on this point.

[34] Polybius 6.14.7; the defendant had to be on his way before the declaration of the votes was completed.

[35] The anachronism was duly noted by both Vincenti (n. 32) 38 and Piazza (n. 33) 45–46. Both scholars attribute the story of Fictor's exile to Livy himself, but it could have been invented at any point after giving false testimony to convict an innocent person on a capital charge became part of *quaestio* legislation. It certainly looks as if the *Lex Cornelia de sicariis* of 81 BC was aimed at senators and magistrates who gave or knowingly permitted such false testimony, see Crawford (n. 33) II.749–753, but Livy or his source may have thought that Fictor, as a *tr. plebis* or former tribune, depending on the version followed (see next footnote), was a plebeian senator. The clause in the *l. Cornelia* was taken over from a *l. Sempronia* of C. Gracchus which gives us 123 as a theoretical terminus post quem. However, since there is no reason to think that the *l. Sempronia* established a *quaestio* and that therefore those convicted under it were permitted to go into exile after conviction, 81 offers a more plausible terminus post quem.

[36] The motive behind this intrusion of quaestors into the story can only be guessed at. In the annalistic record a tribune or tribunes normally prosecute on capital charges, but tribunes are needed to obstruct the prosecution of Fictor, who is an anti-patrician ex-tri-

Lastly, accounts of the history of Roman Criminal Law regularly refer to the trial of Camillus in 391 BC as the latest of three early prosecutions brought by quaestors; as it is an episode from the fourth century, it is prima facie the most likely to be historical.[37] However, if one actually looks at the text of Pliny the Elder, our only source for the story, there is no explicit mention of a quaestorian prosecution at all; all that Pliny says is that a/the/his quaestor Sp. Carvilius levelled against Camillus amongst (other) charges that he had bronze doors in his town house.[38] It is scarcely surprising that the editors of a recent edition of the relevant book, 34, of the Natural History, suggest that Carvilius was a prosecution witness in the trial of Camillus mentioned in Livy 5.32.8–9 ‹propter praedam Veientanam› where the prosecutor is a tribune, L. Apuleius.[39] Whether or not tribunician prosecutions at this date are historical, this particular example is highly suspicious. In De viris illustribus 23 the tribune is given a cognomen – Saturninus – and the retrojection becomes even more obvious, as well as the political malice; L. Apuleius Saturninus, tribune in 103 and 100 and persecutor of the optimate general Q. Metellus Numidicus, has been provided with an ancestor, equally adept at driving aristocratic military heroes into exile. Camillus' exile is solidly embedded in annalistic traditions[40] and could even be true, but it is also very convenient: to explain the defeat of the Romans at the river Allia and the subsequent sack of Rome, Camillus, the heroic conqueror of Veii has first to be removed from the scene. However, the veracity of details of the prosecution which led to his exile is a very different matter. If Pliny is referring to a quaestorian prosecution and, as we have seen, this is by no means a necessary implication of his brief reference, then his source was probably inventing too: a tribune Sp. Carvilius in 212 successfully prosecutes a *publicanus*, M. Postumius Pyrgensis, who, like Camillus, was accused of defrauding the treasury (Livy 25.3.8–4.9). The source, aware perhaps of a document which shows quaestors how to prosecute on a capital charge,[41] and realising that this was a case of peculation & thus

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bune himself or, in Dionysius (10.7.1) a fellow-tribune of Verginius when he produces his false evidence. Quaestors could within the historical period bring capital prosecutions (cf. the document cited in n. 41) and with tribunes ruled out there was no obvious alternative.

[37] Nevertheless, scholars doubt its historicity: so KUNKEL 1962 (n. 24), 35, likewise T. J. CORNELL, CAH VII.2[2], 1989, 306–307 and The Beginnings of Rome, 1995, 316–317. SANTALUCIA, Diritto 51.17, 77 (= Verbrechen 29) is ambivalent.

[38] *Camillo inter crimina obiecit Sp. Carvilius quaestor ostia quod aerata in domo haberet* (NH 34.13).

[39] R. KÖNIG – K. BAYER, 1989, esp. 131.

[40] Dionysius 13.5.1–3; Val. Max. 5.3.29; Plutarch Cam. 11–13 & de fort. Rom. 12; Appian It. 8; Cass. Dio 6.24.6 & 52.13.3.

[41] The Commentarium vetus anquisitionis cited by Varro (de lingua latina 6.90–92). Close scrutiny of the document does provide some slight support for KUNKEL's view, 1962 (n. 24), 35–36 & 1995 (n. 24), 523–524.51, that only the treasury/urban quaestors had the right to bring a capital prosecution before the assembly and then only in cases involving

appropriate for the intervention of a treasury quaestor, improved upon his historical model by introducing a quaestor as principal instead of a tribune. OGILVIE offers a different palingenesia for the process.[42] Camillus' exile marks the earliest stage of the story,[43] and the imaginations of the annalists supplied the rest. And, as KUNKEL and DRUMMOND[44] remind us, even if the usual interpretation of Pliny is correct and reflects a historical fact, then the passage still provides no evidence for the MOMMSEN-derived belief that quaestors, as assistants to the consuls, could prosecute in the *comitia centuriata* on any capital charge except *perduellio*.

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the *aerarium*. The words *collegam roges ut comitia edicas* indicate that the quaestor prosecuting T. Quinctius Trogus is an urban/treasury quaestor. The singular *collegam* implies that he is one of a pair and this fits the urban/treasury quaestors; the assistants to the consuls, the only other obvious pair, could not be counted on to be in Rome on a specific date, as they would be likely to be accompanying their superior in his *provincia*. Dionysius cited in n. 28 shows that the urban quaestors had the right to convene an assembly. It is also interesting that Trogus is characterized as *scelerosus* in the indictment, a very strong word, coupled with *impius* in Terence Eun. 643; its use suggests the possibility that Trogus may have been accused of *sacrilegium*, perhaps stealing money from the treasury in the temple of Saturn. Varro's introductory words seem to exclude the possibility that quaestors had a general role as prosecutors in criminal cases. The text is very corrupt, but the general sense is clear; I give the vulgate: *Circum muros mitti solitum quo modo inliceret populum in eum ⟨locum⟩ unde vocare posset ad contionem non solum ad consules et censores sed etiam quaestores commentarium indicat vetus anquisitionis* . . . – ‹That someone was regularly sent round to entice the people to that place from which he might call them to the gathering not only before the consuls and the censors but also/even before the quaestors is shown by an old commentary on the indictment . . .› (the Loeb translation). The words imply surprise that quaestors ever did initiate capital prosecutions, possibly even imply that this prosecution was a one-off event, since the handbook was designed to show a specific quaestor, M'. Sergius, how to prosecute a specific individual.

[42] OGILVIE (n. 19) 698–699 proposes the following stages: 1. a possibly authentic tradition of a successful quaestorian prosecution of Camillus for peculation followed by exile; 2. attribution to the quaestor of the name Sp. Carvilius; 3. the replacement of this story with a tribunician prosecution modelled on the attack made by Saturninus on Metellus.

[43] Unless Diodorus' narrative (14.117.6) which mentions a fine but no exile marks an even earlier stage. Cicero (dom. 86) refers vaguely to *annales populi romani* and *monumenta vetustatis* in support of his contention that Camillus, like other antique heroes, returned to Rome without a stain on his character after being unjustly convicted by the *comitia centuriata*. As in rep. 1.6, Cicero in dom. 82 and 86–87 associates Camillus' and Numidicus' unjust exiles with one another in paradigmatic fashion. The reference to annals and monuments implies that the story of the exile belongs to an early stratum of the annalistic record, or that Cicero wanted his audience to think so. On the other hand, the invention of the tribune's name must be the work of a first-century annalist; for it is too much of a coincidence that two unjustly exiled aristocratic generals, regularly linked together by Cicero as victims of unscrupulous assembly prosecutions, should both have been attacked by a tribune called L. Apuleius. The name was therefore added to the story after the historical L. Apuleius Saturninus' death in 100 by someone who disliked what he stood for.

[44] KUNKEL 1962 (n. 24), 35–36, 1995 (n. 24), 523.49; DRUMMOND, CAH VII.2[2] 195.

By now a common feature of most of these accounts has become apparent: they are closed systems, coherent in themselves, but not with one another. This is clearest in Livy and Tacitus and probable for Dionysius. For Livy the quaestorship is essentially a product of republican constitutionalism. A king may do what he likes with his income and the spoils of war but under a constitutional republic a treasury needs to be independent of the supreme magistrate. This development is plotted by Livy and the quaestors as assistants to the consuls are created mainly to handle the consular finances on a campaign. Dionysius' account is similar – except for one aberrant exception recorded in n. 14 – but his Roman Antiquities has dissolved into Byzantine excerpts before he reaches Livy's second stage; he stresses the treasury quaestors' constitutional role. Typically the good general hands over the booty from a successful battle to them. They simply *appear* at the beginning of the Republic. Tacitus' account is almost an inversion of Livy's: quaestors as assistants to kings and consuls come first and serve in a sense as model for the treasury quaestors – the former accompany abroad the *res militaris* which I take to refer primarily to the campaigning consul's treasure chest and the latter eventually become controllers of finance within Rome. A subordinate theme is the development of popular control. Dionysius and Tacitus associate the treasury quaestorship with financial controls independent of the higher magistrates; in Tacitus such controls do not exist until the quaestorship has become an office filled by election, while for Dionysius the treasury quaestorship is a symbol of the republican constitution. The point is made expressly in the passage cited in n. 13 from Plutarch's Life of Publicola. Plutarch's Publicola needs to raise funds from the citizens for the war against the Etruscans but to achieve their support he must do two things: elected officials must take charge of the money raised and the money must be kept in a public place, not a private house. So he invents the treasury quaestors who are elected and use the temple of Saturn as a treasury. Lastly, the evidence is very thin indeed for quaestors having the right to prosecute in the assembly on capital charges outside their treasury sphere.[45]

[45] A quaestorian prosecution c. 104 BC surfaces from time to time in the literature (e.g. in SANTALUCIA, Diritto, 77 & n. 29 = Verbrechen 45.5) but is almost certainly a phantom. Orosius in his narrative of unpleasant events at the end of the second century BC reports the murder of his son by Q. Fabius Maximus (Eburnus) and his successful prosecution by a Cn. Pompeius. One would have expected this to be an early example of a successful prosecution in the *quaestio de sicariis*, but for Orosius' use of the phrase *die dicta* which is the technical term appropriate to a comitial trial. Therefore, the argument runs, Eburnus must have been prosecuted in the (centuriate) assembly. Now at about the same time a Cn. Pompeius was not permitted to prosecute T. Albucius, the governor of Sardinia, whose quaestor Pompeius had been (Cic. div. in Caec. 63). Therefore it was this Cn. Pompeius (probably, Strabo, father of Pompeius Magnus) who brought a quaestorian prosecution in the assembly. Even stated in this form the argument is not very convincing, but since Orosius uses *die dicta* of any kind of criminal prosecution, e.g. of a notorious *quaestio* trial, that of P. Rutilius Rufus in 92 *de repetundis* (*die ... ab accusatoribus dicta*, 5.17.12),

One further type of quaestor occurs in the ancient record – the parricide quaestors (*parricidii quaestores*). It should be emphasized that there is absolutely nothing in the annalistic record to link the prosecuting quaestors whom we have encountered in connection with Cassius, Fictor and Camillus with parricide quaestors. The prosecuting quaestors are never termed parricide quaestors; this is hardly surprising since they initiate assembly prosecutions for *perduellio*, false witness and, in the case of Camillus, possibly *peculatus*, but never homicide, let alone parricide. Nor do the quaestors provide a formal framework in the presence of the people *in contione* for the conduct of vendettas, as SANTALUCIA supposes the parricide quaestors to have done (n. 2). Where the sources do state the mode of trial it appears to be the sort of quaestorian prosecution mentioned in the *commentarium vetus anquisitionis M'. Sergii ... quaestoris* discussed in n. 41. Moreover, the annalists *do* have a clear idea of how murderers were prosecuted; Livy attests prosecutions before an assembly, when specified, the centuriate assembly, the prosecution being conducted, when specified, by a tribune, as well as before a special *quaestio*.[46] It has to be said that these prosecutions all seem to have political overtones but Livy perhaps and Dionysius quite definitely know of another method of dealing with murder – the private criminal prosecution.[47]

The *quaestores parricidii* belong to a different and more significant stream, that of Roman antiquarian research, and this can sometimes provide precious ore.[48]

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the prosecution of Eburnus could have been, and probably was, *inter sicarios*. Even allowing that any quaestor and not solely the *quaestores aerarii* could bring assembly prosecutions (itself a very dubious assumption), it is indeed most unlikely that Albucius would have allowed his quaestor to spend weeks in Rome preparing and mounting an assembly prosecution, as well as one against Albucius himself, as is assumed. In fact, the prosecution that Cn. Pompeius was not permitted to bring was not prosecution before the assembly, but in the *quaestio de repetundis*. Cicero is discussing precedents for not allowing Q. Caecilius to prosecute Verres whose quaestor he had been. Pompeius *had* been (*fuerat*) the quaestor of Albucius and thus as an ex-quaestor was in no constitutional position to launch a quaestorian prosecution of his superior; furthermore, Cicero uses the phrase *nominis deferendi* of the intended prosecution and *nomen deferre* is normally used in Cicero as the term for initiating a *quaestio* prosecution. However, in the much less likely event that Eburnus was prosecuted in the assembly, then BADIAN's suggestion (Three non-trials in Cicero, Klio 66, 1984, 306–309) that he was prosecuted by Pompeius Strabo during his tribunate is far more plausible than a prosecution during his quaestorship.

[46] The prosecution of A. Servilius Ahala (4.21.4) and the projected trial of Caeso Quinctius, since the main charge against him was that he had beaten up one of his victims so ferociously that he had died of his injuries. For a (bogus) senatorial special *quaestio* investigating murder see Livy 8.18 (331 BC).

[47] Dionysius 10.7.5–6; Livy 23.14.3. In Livy 3.33.9–10 and Cicero (rep. 2.61) a decemvir prosecutes in a case of murder, but who else could have been represented as having done so in 451 when all the regular magistracies had been abrogated?

[48] See CORNELL 1995 (n. 37), 18–26; one should distinguish sharply between the phrases, documents and rituals which the antiquarians preserve for us from early Rome and their explanations which may be no more than intelligent guesswork.

Only two or three sources use the phrase ‹parricide quaestors›, Festus, Pomponius and possibly Gaius;[49] these were near contemporaries, all working in the heyday of the second-century AD archaizing movement. Festus and Gaius are respectable sources for early Rome;[50] Pomponius, or the one-book Enchiridion under his name excerpted for the first book of the Digest,[51] is not, but in this instance the relevant passage is backed up by Festus as well as echoing the extract attributed by Lydus to Gaius; even if Lydus is guilty of misattribution here, Pomponius probably used Gaius' Commentary on the Twelve Tables as a source for his Enchiridion.[52] An odd feature about these quaestors stands out; although they

[49] As can be seen from n. 52, Lydus' Greek translation of Gaius is very close to being a Greek translation of the Pomponius passage. Since Lydus is a rather careless scholar and since the excerpt in the Digest which precedes the excerpt from Pomponius and opens the Title is indeed from Gaius' Commentary on the XII Tables, there must always be a strong possibility that Lydus' attribution of this text to Gaius is a mistake. (I have argued for this position in: A pattern of error in Ioannes Lydus: the parricide quaestors, Mélanges à la mémoire de André Magdelain, edd. M. HUMBERT – Y. THOMAS, 1998, 91–108. C. VENTURINI, Pomponio, Cicerone e la *provocatio*, in: Nozione formazione e interpretazione – ricerche dedicate al professore Filippo Gallo, 1997, 527–566, esp. 533, accounts for the similarities between these texts by positing a common Gaian archetype for both and he may be right.) However, a similar error occurs at De Mag. 1.24 where Lydus, failing to note where Ulpian's quotation from Iunius Gracchanus stops, attributes to the latter a reference to Fenestella who lived over a century after Gracchanus' death! Such an error demonstrates that Lydus had a remarkable capacity for carelessness.

[50] The case for Gaius hardly needs making. We would know nothing of the words used in the *legis actio* procedure but for Inst. 4.16. As for Festus, see my comments in Athenaeum 65, 1987, 415–416 on elements in a probably third-century BC *lex de ponderibus* cited by Festus (288L) that are confirmed by our epigraphic sources.

[51] For the whole question of the authenticity of the one volume Enchiridion and its relationship to the longer version cited in Dig. 26.1.13, 38.10.8 & 46.3.107, see GAROFALO (n. 2); D. NÖRR, Pomponius oder «Zum Geschichtsverständnis der römischen Juristen», ANRW II.15, 1976, 498–604, esp. 512–539; B. ALBANESE, D.1.2.12 ed il problema della sua attribuzione, Studi in onore di S. Pugliatti, 1978, 5–27, esp. 25–27 (= Scritti giuridici, 1991, 2.1457–1479, esp. 1477–1479); M. CAMPOLUNGHI, Potere imperiale e giurisprudenza, 1983, 23–24, 120.82. Scholars incline to the view that the one-book Enchiridion is the work of a student of Pomponius.

[52] Gaius (in Lydus, de magistratibus 1.26, our source, who claims to be providing a verbatim translation – αὐτοῖς ῥήμασι – ascribed specifically to the commentary on the XII Tables): Ὡς δὲ τὸ γαζοφυλάκιον τοῦ δήμου εἰς ἐπίδοσιν ἦλθεν, προεχειρίσθησαν κυαίστωρες ὑπὲρ τῆς αὐτοῦ φροντίδος ἀπὸ τῆς περιποιήσεως καὶ φυλακῆς τῶν χρημάτων οὕτως ὀνομασθέντες. ἐπειδὴ δὲ περὶ κεφαλικῆς τιμωρίας οὐκ ἐξῆν τοῖς ἄρχουσι κατὰ Ῥωμαίου πολίτου ψηφίσασθαι, προεβλήθησαν κυαίστωρες παρρικιδίου, ὡς ἂν εἰ κριταὶ καὶ δικασταὶ τῶν πολίτας ἀνελόντων. Cp. Pomponius in Dig. 1.2.2.22–23: *deinde cum aerarium populi auctius esse coepisset, ut essent qui illi praeessent, constituti sunt quaestores, qui pecuniae praeessent. dicti ab eo quod inquirendae et conservandae pecuniae causa creati erant.* (23) *et quia ut diximus de capite civis Romani iniussu populi non erat lege permissum consulibus ius dicere, propterea quaestores constituebantur a populo, qui capitalibus rebus praeessent: hi appellabantur quaestores parricidii, quorum etiam meminit lex XII tabularum.*

are called parricide quaestors, their field is not parricide but murder (Festus, Gaius) or more vaguely capital crimes (Festus, Pomponius), an explanation which no doubt accounts for their assimilation to the annalistic prosecuting quaestors in modern historians. Yet, as THOMAS has rightly stressed, apart from these passages and a puzzling observation by Plutarch,[53] there is nothing in the linguistic record to suggest that in early Latin *parricidium* ever meant anything but ‹parricide›, ‹father-murder› or perhaps ‹parent-murder›. In Gaius and Pomponius these quaestors are quite distinct from the treasury quaestors, but in Dio (Zonaras)[54]

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[53] Y. THOMAS, Parricidium, MEFRA 93, 1981, 643–715, esp. 659–679. Plutarch Rom. 22.4: Ἴδιον δὲ τὸ μηδεμίαν δίκην κατὰ πατροκτόνων ὁρίσαντα πᾶσαν ἀνδροφονίαν πατροκτονίαν προσειπεῖν, ὡς τούτου μὲν ἐναγοῦς ὄντος, ἐκείνου δὲ ἀδυνάτου. Presumably, Plutarch's source ascribed to Romulus the use of the word *parricidium* and its cognates for ‹murder(er)› as well as for ‹parricide› and possibly also stated that no-one was punished for parricide until after the end of the Second Punic War; in the next sentence Plutarch has ascertained (ἱστορεῖται) that the first case of parricide at Rome occurred at that time. Recently C. LOVISI, Contribution à l'étude de la peine de mort sous la république romaine, 1999, 83–89, 131–137, building on A. MAGDELAIN, Paricidas, in: Jus, Imperium, Auctoritas, 1990, 519–538, has suggested a different evolution for *par(r)icidas/parricida*: 1. (in XII Tables) ‹counter-murderer›; 2. (between XII Tables & second half of the second century, the period during which she supposes the ‹law of Numa›, cited in n. 60, to have been composed) ‹meutrier violent›; the law assimilates killing by guile, e.g. poisoning, to violent murder; 3. (from Plautus onwards) ‹parricide›. Plutarch and Festus (n. 60) were misled by glosses on Numa's law. Her ingenious scheme certainly solves some problems, but creates new ones. Firstly, if the *par(i)* element in *paricidas* is derived from the root *par* = ‹equal› and is a formation like *hosticapas*, then just as *hosticapas* = ‹hostium captor›, then *paricidas* should mean ‹killer of an equal›, not ‹equal killer› and M. VOIGT, Die XII Tafeln, 1883, 795.5, would be right to argue that the law brought the killing of clients by their patrons within the scope of murder. Secondly, if poisoning was already assimilated to murder *cum telo* by the middle of the second century, it is difficult to explain why the *quaestio de sicariis* and the *quaestio de veneficis* were only united by Sulla in 81 and even after that the two courts remained de facto distinct even in 66 (cp. Cic. Cluent. 1 & 147). Lastly, LOVISI's palingenesia for *parricida* raises in a particularly acute form the problem caused by the fact that no meaning for the word other than ‹murderer of a parent → murderer of a close relative› is ever found in the abundant literature. Thus her choices for parallel development, *damnum* and *fraus*, are not wholly parallel, since in their case the different senses exist side by side in both the secular and the legal literature, whereas for *parricida* they do not.

[54] Zonaras 7.13.3: Καὶ τὴν χρημάτων διοίκησιν ἄλλοις ἀπένειμεν (sc. Publicola), ἵνα μὴ τούτου ἐγκρατεῖς ὄντες οἱ ὑπατεύοντες μέγα δύνωνται. ὅτε πρῶτον οἱ ταμίαι γίνεσθαι ἤρξαντο· κοιαίστωρας δ' ἐκάλουν αὐτούς. οἱ πρῶτον μὲν τὰς θανασίμους δίκας ἐδίκαζον, ὅθεν καὶ τὴν προσηγορίαν ταύτην διὰ τὰς ἀνακρίσεις ἐσχήκασι καὶ διὰ τὴν τῆς ἀληθείας τὴν ἐκ τῶν ἀνακρίσεων ζήτησιν· ὕστερον δὲ καὶ τὴν τῶν κοινῶν χρημάτων διοίκησιν ἔλαχον καὶ ταμίαι προσωνομάσθησαν. μετὰ ταῦτα δ' ἑτέροις μὲν ἐπετράπη τὰ δικαστήρια, ἐκεῖνοι δὲ τῶν χρημάτων ἦσαν διοικηταί. Note the sequence in Dio/Zonaras: as in Plutarch, Publicola in 509 gives the quaestors control over the Treasury. They were already (imperfect tense ἐδίκαζον) judging capital cases (or does θανασίμους mean ‹involving death›?), hence their name (*quaestores*, ought to mean ‹investigators›). Subsequently the courts were entrusted to others and the quaestors retained only their financial role.

and Varro[55] who speak of quaestors, not parricide quaestors, there is an attempt to marry one of the annalistic and the antiquarian traditions by representing them as in some sense the same institution. How these quaestors were thought to have operated is not very clear. Gaius (or as likely Ioannes Lydus glossing his text) refers to them as κριταὶ καὶ δικασταί which would in more classical Greek mean ‹judges and jurymen› but in Lydus' Greek pleonastically need mean no more than ‹(presiding) judges›.[56] In that case he would be concurring with Pomponius; the latter uses the verb *praeesse* which ought to mean that they presided over some court. Varro regards *his* quaestors in their capacity as suppressors of crime as having the same function as the *tresviri capitales* of his own day; if he meant that they also operated in the same way, then they had coercive powers over slaves & criminals caught in the act and investigatory powers over citizens accused of crime.[57]

How much of all this has any basis in historical fact? It has to be admitted that for the sceptic there is a plausible explanation. The etymology of the word *quaestor* clearly interested the antiquarians – in Varro, Dio, Lydus and (by implication)[58] Pomponius the passages suggestive of a capital jurisdiction are

[55] *Quaestores a qu⟨a⟩erendo, qui conquirerent publicas pecunias et maleficia quae nunc triumviri capitales conquirunt; ab his postea qui quaestionum iudicia exercent quaes⟨i* MOMMSEN*⟩tores dicti* – ‹The quaestors acquired their name from *quaerere* (= seek): they were to seek out/manage the state finances and seek out/investigate the misdeeds that the *tresviri capitales* now seek out/investigate. From these subsequently those who preside over the *quaestio* courts were called *quaesitores*› (de lingua latina 5.81). This would appear to be the sole surviving case of an antiquary attempting to reconcile the antiquarian and the annalistic traditions, ‹appear› because it is not absolutely clear whether the quaestors *qui conquirerent ... maleficia* are parricide quaestors or Livy's ‹floating› quaestors. Varro is probably thinking of the parricide quaestors because on any view of the competence of the *tresviri capitales* it was of a minor order compared with that of the prosecuting quaestors in Livy. Only if this interpretation of Varro is correct, can one use this passage as plausible evidence for the replacement of the parricide quaestors by the *tresviri*; the latter were instituted in the early 280s if Livy Per. XI follows the chronology of the lost Livy original.

[56] See CLOUD (n. 49) 94.

[57] It is the jurisdiction of the *tresviri* that is problematic here; there is ample evidence from Plautus that they had coercive powers against slaves; they could certainly deal with the preliminary investigations into prima facie cases of murder as the case of Avillius in Cic. Cluent. 18–19 shows; they could perhaps deal summarily with the lowest type of citizen, cf. Σ div. Caec. 50. C. CASCIONE, Tresviri Capitales, 1999, 85–117, 143–157 (with copious references to the earlier literature as far back as the Renaissance) convincingly rebuts KUNKEL's attribution of jurisdiction to them, 1962 (n. 24), 71–79, 1995 (n. 24), 533–536. Their limited powers of *coercitio* are not in doubt but CASCIONE is less convincing in attributing to them a form of independent *imperium*. See also W. NIPPEL, Aufruhr und «Polizei» in der römischen Republik, 1988, 33–34 and Public Order in Ancient Rome, 1995, 22–26.

[58] Lydus de mag. 1.25 which includes disquisitions on *quaestor*, *quaesitor*, *quaestio*, *quaero* and *queror*; for other passages see notes 55, 54 & 52. One should probably add Festus 310.25–27L but the text is extremely lacunose. Interest in the etymology of *quaestor* and *quaesitor* was general – see Isid. etymol. 9.4 & 16, 18.15.2 and CGL (6.167) s.v. *quaestor*.

themselves connected to etymological explanations. Quite correctly, they linked *quaestor* with the verb *quaero* which with its cognates, *quaestio*, *quaesitor*, at least as far back as the second century possessed associations with the repression of crime. In short, ‹quaestor› ought to have meant ‹investigator (in a criminal context)›, but the contemporary quaestors known to the antiquarians were very little involved in the detection or prosecution of crime. Apart from the so-called *quaestores classici* their role was either that of assistants with an emphasis on financial responsibilities to the consuls in the field and, by extension, to other holders of *imperium* with defined *provinciae*, or that of day-to-day managers of the *aerarium*. Given the associations in the late Republic of *quaestio* and *quaesitor* (in the sense of ‹president of a court›), it would have been natural for antiquarians to hypothesize a period when quaestors had been in charge of courts dealing with capital offences; our suspicions only deepen when we observe that this is precisely what Pomponius, Festus, Varro and Lydus have done. The very words they use are drawn from the language used of the presiding magistrate.[59] It can therefore scarcely be denied that what our sources say about the way the parricide quaestors worked has little or no independent value. However, total scepticism about the parricide quaestors is misplaced; though the antiquarian accounts of their function are probably the product of intelligent guesswork, the name is so odd that it is hard to see why it was invented; why *quaestores parricidii*? In order to fit the explanation to the title, a two-stage assumption has to be made: (1) *parricidium* has to mean not the murder of a parent or possibly close kinsman but the murder of any citizen; (2) *parricidium*, having now acquired the meaning ‹murder of a citizen›, acquires yet another meaning, ‹capital offence›. To establish (1) someone has to forge a sacral ordinance, the famous *lex Numae*;[60] (2) is merely asserted, per-

[59] Pomponius' use of the phrase *capitalibus rebus praeesse* of the parricide quaestors (dig. 1.2.2.23) evokes *iure dicundo praeesse* in legal inscriptions from the Este frg., CRAWFORD (n. 33) 16.12, onwards and cp. Cic. Rosc. Am. 11 for *quaestioni praeesse*; for the use of *quaero* in the antiquarians cp. the instruction to the praetor or *quaestio* president *(iudex quaestionis) de eius capite quaerito* in chapters 1, 5 and 6 of the *lex Cornelia de sicariis*, CRAWFORD (n. 33) 50 = II.752.

[60] Festus/Paulus (247.19–24L): *Parrici⟨dii⟩ quaestores appellabantur, qui solebant creari causa rerum capitalium quaerendarum. nam paricida non utique is qui parentem occidisset, dicebatur, sed qualemcumque hominem indemnatum. ita fuisse indicat lex Numae Pompili his composita verbis: si qui hominem liberum dolo sciens morti duit, paricidas esto. (Parrici⟨dii⟩ quaestores* used to be created to investigate capital offences. For not necessarily was [only] the man who had killed a parent termed a parricide but [also one who had killed] any unsentenced man whatsoever. This is indicated by the law of king Numa Pompilius, composed in the following words: «if anyone does to death a free man, let him be *paricidas*.») LOVISI's attempt (cf. n. 53) to deny that the *lex Numae* in Festus/Paulus is genuinely early (even though in a modernised and not necessarily regal text) rests basically on a *petitio principii*.

haps because murder is regarded as the paradigm case for a capital offence. If the term *parricidii quaestores* was invented by some antiquarian to give the quaestors a primal function as investigators into capital offences, then the employment of the word *parricidii* is baffling; it would have been much simpler and more plausible to term them *quaestores capitales* or something similar since Varro seems to suggest that they were replaced by the *tresviri capitales*. It is therefore easier to suppose that the term *quaestores parricidii* is genuinely antique, but, in accepting that, we are not thereby necessarily committed to accepting the whole antiquarian package of assumptions about their field and mode of operation.

However, certain options are more likely than others. Apart from a mysterious reference to a *comitiatus maximus* which Cicero may be wrong in identifying with the *comitia centuriata*,[61] the Twelve Tables show no awareness of the subsequent distinction between a crime and a civil offence. Moreover, a well-attested antiquarian text ascribed to the Twelve Tables but given a regal pedigree in some of our sources tells us that in cases of accidental killing the perpetrator is to hand over a ram to the closest blood-relatives of the deceased to be sacrificed as a substitute for the perpetrator.[62] It is a natural inference from this that a man who kills intentionally is handed over to the nearest blood-relative to be killed; it is not surprising that scholars with strongly opposed views on early Roman law agree on this.[63] Furthermore, though we need to exercise great caution in the

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[61] Cicero leg. 3.11 & 44 are the only places where the phrase *comitiatus maximus* occurs. See CRAWFORD (n. 33) II.696–700 for discussion of the problems raised by Tab. IX.1–2 and a bibliography of recent literature.

[62] The most informative texts are Servius Auctus on Virg. ecl. 4.43: *In Numae legibus cautum est ut si quis imprudens occidisset hominem, pro capite occisi agnatis* (mss. *ac natis*) *eius in contione* (mss. *in cautione*) *offerret arietem* (less helpful Servius on georg. 3.387: *aries ... antea pro domino capital dari consueverat: nam apud maiores homicidii poenam noxius arietis damno luebat*) and (for the suggestion that the ram is sacrificed in place of the accidental killer) Festus 476.18–20L, quoting Antistius: *subigere arietem in eodem libro Antistius esse ait dare arietem qui pro se agatur caedatur.* For the attribution to the XII Tables cf. Cic. Tull. 51 (cp. top. 64, de or. 3.158). The ram is slaughtered and is therefore not a form of financial compensation; in the view of Antistius it is a surrogate for the perpetrator; a fragment of Festus (470.19–23L), under the rubric *subici ar[ies - - - - - - -] quod fit, ut ait Cincius [? in libro de officio iuris]consulti, exemplo at[- - - - - - - - - -] expiandi gratia aries m[- - -* - clearly referring to Tab. VIII 13 (24), underlines the ritual character of the act. (Since the word *contione* in Servius Auctus on Virg. ecl. 4.43 plays an important role in attempts to reconstruct the handling of murder in archaic Rome, one needs to remember that it is an emendation and another emendation, *cautione*, still has its supporters. See J. ERMANN, Strafprozess: öffentliches Interesse u. private Strafverfolgung. Untersuchungen zum Strafrecht der römischen Republik, 2000, 25.60, who supports *contione*, but regards *cautione* as possible).

[63] KUNKEL 1962 (n. 24), 37–45; A. H. M. JONES, The Criminal Courts of the Roman Republic, 1972, 38–39; SANTALUCIA, Diritto 15–16 (= Verbrechen 6–8).

use of Athenian parallels,[64] the significance of the, probably essential, role of the agnates in the δίκη φόνου[65] supports their appearance in archaic Roman proceedings against murderers and also supports the view that they brought the prosecution against the alleged murderer. It is also plausible to argue on Kunkelian lines[66] that this institution developed in parallel with the ‹addicting› of a persistent debtor to his creditor; just as the creditor found that it was more profitable to use the bondsman as virtual slave labour than to put him to death, so agnates found the murderer's unpaid labour more valuable than his death. This development was certainly complete by 216 and doubtless much earlier.[67] Such private criminal prosecutions would solve the otherwise insoluble problem: before the

[64] Above all, because there is virtually no evidence of the Athenians privileging parricide as against other forms of murder. There *is* evidence of the horror aroused by murder within the family, if Plato Laws 9. 872D–873B reflects contemporary Athenian feeling on the matter, but in this context the killing of a father is not regarded as any worse than the killing of a child or a brother. Pollux, the late second century AD grammarian from Naukratis, offers the only evidence ever cited for Attic law being particularly severe on those who are accused of killing their parents since they alone are said to be denied the option of going into exile in the middle of the trial (onomasticon 8.117), for, pace R. GARNER, Law and Society in Classical Athens, 1987, 103–104, the final scene of Sophocles' Oedipus Tyrannus offers no support for the thesis – Oedipus *has* killed his father and *does* go into exile. But even Pollux provides no very strong support: all the manuscripts except A have μετὰ δὲ τὸν πρότερον λόγον ἐξῆν (sc. for the man accused of murder) φυγεῖν, εἴ τις γονέας εἴη ἀπεκτονώς. The fact that *we* find it hard to believe that Dracon and the Athenians would have allowed (? only) those accused of killing parents to go into exile before the end of court proceedings does not entail that Pollux found it hard to believe; he could have supposed, for example, that it would have encouraged the accused to take their pollution out of Attica. Certainly the scribe of A who inserted οὐδὲ between λόγον and ἐξῆν thought that killers of parents were more likely than other types of murderer to be allowed to go into exile. Consequently, we cannot be certain that the view that a πλήν or something like it has dropped out before the εἴ is necessarily correct.

[65] See now A. TURIN, Dike Phonou, 1996, who vigorously reasserts the traditional view that only the agnate relations of the deceased (or his master in the case of a slave) had the right of prosecution in the case of murder and provides a vast bibliography. But even those who argue that others could prosecute would hardly deny that agnatic prosecutions provided the norm.

[66] KUNKEL, 1962 (n. 24), 103–105.

[67] Livy 23.14.2–3 & Val. Max. 7.6.1 inform us that after the battle of Cannae the dictator M. Iunius Pera declared that he would order *noxa pecuniaque ... exsolvi* (Livy) those *qui capitalem fraudem ausi quique pecuniae iudicati in vinculis essent* (Livy) – for *capitalem fraudem ausi* Valerius has *capitali crimine damnati* – if they would serve in the army, and there were 6000 volunteers. It is difficult to think of any category of convicted criminal who could be in parallel with *addicti* and in chains apart from the murderer handed over to his victim's agnates. MOMMSEN (n. 20) 328.3, thought that Livy was referring to persons in prison awaiting trial or execution, but this is highly unlikely; Valerius Maximus explicitly and Livy implicitly exclude those awaiting trial. The recent tendency to suggest that imprisonment was used as a punishment (so now CASCIONE [n. 57] 121–142 & n. 228) or that large numbers of people were in public prisons awaiting trial (so J.-U. KRAUSE,

institution of permanent courts concerned with poisoning and with murder *cum telo* in the second half of the second century BC, what happened to murderers whose crimes extended beyond the family and the ‹jurisdiction› of the *paterfamilias*[68] and were not so notorious as to attract the attentions of the centuriate assembly or to merit the setting up of a special commission?

Thus it seems plausible, on the basis of the scanty evidence available to us, that, except where there was a political dimension to the death(s),[69] prosecutions for murder were normally carried out by the agnates of the deceased by means of a private criminal action; in the event of a conviction, in the earliest times the defendant was put to death but subsequently became their bondsman, analogously to an ‹addicted› debtor. The real problem, however, is marrying the two bits of information about the pursuit of murderers that do appear to go back to at least the early Republic, namely the existence of parricide quaestors and the texts cited in n. 62 which tell us that, under the law of the Twelve Tables, in the case of unintentional killing, a ram and, by implication, in the case of murder the

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Gefängnisse im Römischen Reich, 1996, for the Republic 19–23), thus yielding a considerable number of recruits for the dictator must be mistaken because of the relatively small prison area available in Rome to accommodate them, even if it was more extensive than used to be believed, CASCIONE (n. 57) 161–162 & n. 312. Moreover, there must always have been slaves who, having been caught roaming the streets after dark, were locked up in prison for the rest of the night to be flogged the next morning and sent home, as the slave Sosia in Plautus' Amphitruo (153–161) feared would happen to him. Thus prison space available for free men would be further restricted.

[68] The *paterfamilias* did not preside over a court. See now C. FAYER, La familia romana parte prima, 1994, 130–135. The way in the Augustan period in which L. Tarius Rufus dealt with his son charged with the attempted killing of his father, namely himself, is well attested (Sen. clem. 1.15[13], 3–7).

[69] SANTALUCIA, Studi di diritto romano, 1994, 112.24 and Diritto, 52.18, argues rather strangely that three passages in Plautus prove that the competence of the *comitia* was not limited to political crimes. In two of them (aul. 700 and truc. 818–820) a young man is in a panic because a family council is deciding what action to take concerning his rape of a free young girl. In the first he says: *Ibo intro ubi de capite meo sunt comitia*, in the second ‹I have turned to stone (*lapideus sum*); I dare not move; everything has come into the open. *Meo sunt illic* (in the house of the girl's father) *capiti comitia.*› Scholars normally take these references to comitial trials as metaphors, as they do to the third (pseud. 1231–1233) where a brothel keeper complains that a clever slave, Pseudolus, *mihi habuit centuriata habuit capitis comitia*, in defrauding him over the sale of one of his girls. Thus translators use expressions like ‹my head's on the line› or ‹I've been overdrawn and quartered› (TATUM & BEACHAM for the Pseudolus passage). Since trials before the *comitia centuriata* did not take place in private houses, nor did slaves bring prosecutions before it, these references to capital trials can only be ‹in imagine› (TLL III.1808.41–43) like *lapideus sum*. The notion that the *com. cent.* ever dealt with disputes between slaves and brothel keepers is particularly bizarre. Nor should we assume that the background of these cases is ultimately Roman; see A. C. SCAFURO, The Forensic Stage, 1997, 245–246 & 265–272, for an interesting discussion of the first two passages.

killer himself, is offered to the deceased's agnates. Is there any connection at all between the parricide quaestors and the Twelve Tables procedure? And supposing that we postulate such a link, there is a further question imbedded in the contexts in which the references to parricide quaestors occur, namely who were the objects of their legal or para-legal activity. Parricides? Murderers? Anyone who had committed an offence punishable with death? Now it is generally assumed that the parricide quaestors, if they were not MOMMSEN's quaestors prosecuting in the assembly all crimes except *perduellio* as assistants to the consuls, were in some way involved in the Twelve Tables procedure. But the only reason for this assumption is a combination of Pomponius' statement that the parricide quaestors are mentioned in the Twelve Tables (cf. text cited in n. 52) and Occam's Law – parricide quaestors and the procedure involving the agnates are both concerned with unlawful killing and are both mentioned in the Twelve Tables, therefore we should not multiply entities beyond necessity; instead we should conclude that both are part of the same process.

But such a conclusion is not necessarily legitimate. In the first place, it is by no means certain that the parricide quaestors *were* mentioned in the Twelve Tables. There are no other references to magistrates or quasi-magistrates in the extant remains of the law and it is easy to explain the mistake, if mistake it is.[70] Secondly, there is a prima facie contradiction between the two pieces of evidence. As THOMAS maintains, 1981 (n. 53), 659–679, outside the passage in Plutarch mentioned in n. 53 and the so-called *lex Numae* (Festus [Paulus] 247.19–24L), cited in n. 60, there is nothing to suggest that *parricidium* meant anything but ‹murder of a father/*possibly* parent› until, doubtless under the influence of the law, it was gradually extended to cover the murder of any close blood-relation. Even if THOMAS is wrong in supposing that the protasis of the *lex Numae* is a forgery, it remains true that *parricidi quaestores* must have paradigmatically meant ‹pursuers of parricide› and their function, as the Numa law suggests, was only subsequently extended to include murder beyond the family. On the other hand, the Twelve Tables procedure has always been taken to refer to the murder of someone outside the family and to the regulation in some fashion of vendettas between families. One obvious reason for thinking that the parricide quaestors were originally concerned with the murder of a father by a son is that in such a

[70] CRAWFORD (n. 33) II.702–703, suggests that Pomponius derived his material from Gaius' Commentary on the Twelve Tables. We know from Dig. 1.2.1 that Gaius' Commentary included an account of law from the regal period to the Twelve Tables and Pomponius could have erroneously inferred that because Gaius mentioned the parricide quaestors in his Commentary (perhaps in connection with Numa's law), then the parricide quaestors must have been mentioned in the Twelve Tables. Alternatively, if the single volume Enchiridion is based on the lecture notes of one of Pomponius' students (cf. HONORÉ, OCD[3] 1218, also references in n. 51 of this article), then the student himself could have made the mistake.

situation the son could well be the nearest agnate and he would hardly be likely to prosecute himself! Moreover, if he were to be convicted, then handing a ram, and a fortiori his own person, over to himself would be a ludicrous and indeed a meaningless consequence! This fact points to a hole in archaic Roman justice that the parricide quaestors may have been created to plug. The Twelve Tables procedure may have, and was certainly thought to have, existed before that law dealt with the killing of someone outside the family; the *pater familias* concerned himself with all crimes committed within the *familia* including the killing of fellow members and the attempted killing of himself by one or more of them. The one offence within the family that he cannot by definition handle and that no member of his family is likely to handle is the successful murder of himself by a son who on his death becomes a *pater familias*. Yet in all societies patricide occurs and at Rome, given the absolute powers of the father, it was a tempting option for the desperate son.[71] Moreover, even if one thinks that the *culleus* penalty was not primitive but a product of the hysteria engendered by the second Punic War that also led to the drowning of hermaphrodite babies and human sacrifice,[72] nevertheless patricide must always have been regarded as one of the gravest of crimes and one generating pollution, given the pivotal role of the father in Roman society. There can be no cause for surprise if at some primitive stage a very small number of men were given the task (by the king? by the *pontifex maximus*?) of identifying and punishing patricides. (Or perhaps these parricide quaestors were self-selected, like modern vigilante groups, and were simply accepted by the community.) To be sure, such suggestions are speculative, but at least they have the merit of explaining the name *parricide* quaestors.

Two questions remain, both of them in the last resort unanswerable with any certainty. Did the parricide quaestors have any function with regard to forms of killing other than parricide? Secondly, did they have any function with regard to

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[71] As D. DAUBE pointed out long ago: Roman Law: Linguistic, Social and Philosophical Aspects, 1969, 87–91. However, from the later Republic onwards emancipation and indeed adoption will have removed some potentially parricidal sons from their natural family.

[72] This is the view of myself, Parricidium, SZ 88, 1971, 26–34, E. NARDI, L'otre dei parricidi e bestie incluse, 1980, 65–68, apparently that of E. CANTARELLA, I supplizi capitali in Grecia e a Roma^2, 1991, 266 & n. 22, and LOVISI (n. 53) 128–129.483, with ample references. The drowning ritual was first applied to hermaphrodite babies in 207 on the advice of haruspices as a drastic form of pollution-removal (Livy 27.37.5–6) and then applied to the equally dangerous pollution incurred by parricide. For the adoption by the Romans of inhuman practices at this period compare the burying alive of foreigners, first instanced in 228. (See A. M. ECKSTEIN, Human Sacrifice and Fear of Military Disaster in Republican Rome, AJAH 7, 1982, 69–95.) The killing of parents must have been regarded as peculiarly abhorrent in archaic times, since even the beating of a parent by a child or daughter-in-law in certain circumstances justified consecrating them to the gods of parents, according to a plausibly ancient sacral norm (Fontes Iuris Romani Anteiustiniani^2, ed. RICCOBONO, Leges Regiae I.11 & VI.6).

offences other than killing? All one can say in answer to the second question is that Varro, Festus (Paulus) and Pomponius all thought so. Festus (Paulus) and Pomponius, by writing of their having some sort of jurisdiction over *res capitales*, imply that they dealt with all offences that either in archaic Rome or in their own day were capital. The antiquarians may have had some evidence for this view – Varro and Festus were respectable scholars – but the *lex Numae* cited by Paulus does not support it, as, whatever its precise meaning, it is concerned solely with murderers, not with perpetrators of other/all capital crimes. The question is thus unanswerable.

On the first question we can be a little more positive. If Numa's law cited in note 60 is genuine and if *paricidas* is the archaic form of *parricida*, then the parricide quaestors did handle all cases involving the unlawful killing of a Roman citizen. SANTALUCIA, like a few before him, thinks that such a primitive and important law must have had a sanction and consequently ‹paricidas esto› must conceal such a sanction and have nothing to do with ‹parricida›, as the ancients and most moderns have thought that it did.[73] THOMAS is convincing on the fundamental linguistic fact; *parricidium* and *parricida* never meant anything other than ‹parricide› in Latin and Festus is wrong. However, this does not entail, as THOMAS argues, that the protasis of Numa's Law is a forgery; all that the law need be saying is that henceforth anyone who kills with malice aforethought a free man will be treated as a parricide. If Festus is right in connecting the *lex* with the parricide quaestors, then the law involves an extension of the role of parricide quaestors and that is why Festus (Paulus) quotes it under that lemma.[74] It does not imply a change in the meaning of the word, any more than the use of ‹he› for ‹he or she› in pre-feminist English formal documents, when duly signalled at the beginning, implied that ‹he› had thereby lost its associations with the male gender.[75]

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[73] Diritto 16–19 (= Verbrechen 7–8) & Studi di diritto penale romano, 1994, 107–109 n. 1. The *lex tribunicia prima* (Festus 424.10–12L) tells somewhat against both SANTALUCIA & THOMAS. Its wording, *si quis eum qui eo plebei scito sacer sit occiderit, parricida ne sit*, implies that *paricidas* (= *parricida*) *esto* is a perfectly respectable apodosis for an archaic law in the sense of ‹let him be (treated as a) parricide›. It also presupposes the existence of Numa's Law and the authenticity of the protasis since it implies that the killing of anyone other than a *homo sacer* would be treated as parricide.

[74] *Parrici* is simply a mistake for *parricidi[?i]*. Paulus' [Festus'] gloss is totally incomprehensible without the lemma *parrici⟨di⟩ quaestores*. Moreover, the evidence of Lydus and Pomponius supports the supplement. But, since the *lex Numae* does not support Paulus' extension of *parricida* from parent-killer to the killer of any unsentenced man, it is always possible that some or all of the explanatory material is the work of Paulus Diaconus himself and not that of Festus or his predecessor, Verrius Flaccus.

[75] Of course, this analysis of the *lex Numae*, while not incompatible with the view that the drowning of convicted parricides in a leather bag (*culleus*) existed in archaic times, makes better sense if the then penalty for all types of murder was the same, namely the

As to how these parricide quaestors might have been involved in the ‹trial› of murderous delinquents, if indeed they were, we can only guess: SANTALUCIA's suggestion cited in n. 2 is persuasive – they were there to regulate the vendetta between the two families involved. If the ‹in contione› of Servius on Virg. ecl. 4.43 is a correct emendation and if the ancient scholar was not merely indulging in conjecture, then something took place at an informal public meeting. The trial of the delinquent? The announcement of the innocence or guilt of the suspect, and in the latter case, the handing over of the guilty party to the agnates? The announcement of a prima facie case against the suspect, prior to an action against him before a judge or judges? The second alternative is perhaps the most plausible.[76]

This examination of the early history of the quaestorship has identified three different traditions about its origin. In the first, represented by Ulpian and Tacitus, the quaestorship goes back to the regal period; the earliest quaestors were assistants to the kings. The urban or treasury quaestorship is a later, early republican, development. The second tradition, the main annalistic tradition, represented by Livy, Dionysius and Plutarch, places the origin of the quaestorship in the aftermath of the expulsion of the kings and regards the treasury quaestorship as primary and the quaestors as assistants to the consuls as a later development. There supervenes on this tradition a tenuous and late tradition of quaestors prosecuting in capital trials which reflects the fact that treasury quaestors occasionally introduced capital prosecutions in connections with their treasury functions. A third tradition, the antiquarian tradition, represented by Festus, Pomponius and possibly Gaius, introduces the parricide quaestors, who belong to the regal

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handing over of the murderer of the agnates of the deceased to be sacrificed. See n. 72 and bibliography. Furthermore, a relatively late dating for the *culleus* penalty might help to explain why in Plautus and later writers *parricidium* no longer included the murder of non-family members: the penalties had diverged, exile or *addictio* for the latter, drowning by *culleus* for patricide. It is perhaps significant that the Romans do not seem to have coined *homicida/homicidium* before the late Republic (*homicida* first in Cic. Phil. 2.30; *homicidium* first in the elder Seneca contr. 1.2.17) and that in the *lex Cornelia de sicariis et veneficis* (81 BC) the legislator resorts to periphrasis *qui . . . hominem .. ⟨occidit⟩ occiderint* or prepositional phrases involving *sicarius*.

[76] The procedure outlined in Cicero dom. 45 is puzzling with its reference to three accusations (at *contiones*, cf. Livy 26.2.7 & 3.7, the trial of Cn. Fulvius) before the magistrate, on the day after the last of which he must either impose a fine or sentence, and only *then* follows the real trial before the assembly. Perhaps the procedure implies a period when assembly trials did not yet exist: the *contio* provided a public forum at which a magistrate pronounced sentence on his own account or gave civic force to the decision of a private tribunal. However, the completely different function of the analogous proclamation in the agora in Athenian law relating to the δίκη φόνου (IGI^3 1981 I.1.104.20–21 = approx. [Demosthenes] 46.67 with Antiphon 6.35–36 and see D. MACDOWELL, Athenian Homicide Law, 1966, 23–29) ordering the alleged killer to keep away from the legal things (εἴργεσθαι τῶν νομίμων) ought to remind us that we are here dealing in conjecture.

period according to Festus or Paul the Deacon, or the early Republic, according to the antiquarian jurists. They are distinct from the treasury quaestors. Varro contaminates the first and third tradition, Dio/Zonaras the second and third. If this analysis is correct, it leads to a number of conclusions.

Firstly, parricide quaestors are very probably a genuine feature of archaic Rome and, since no ancient source identifies them with the quaestors who assist kings or consuls, we should not do so either.[77] This conclusion is not new – LATTE advanced it in 1936 (cf. n. 1) – but it is reinforced by our analysis of the sources. More importantly, on our analysis SANTALUCIA's and LOVISI's assumption that the parricide quaestors developed into the quaestors who could prosecute all capital offences in the assembly is unjustified, particularly as it is doubtful whether quaestors of the second type ever existed.[78] Occam's law ought not to apply in this field; after all, there are three totally different groups of person called tribune in the late Republic – military tribunes, *tribuni plebis* and *tribuni aerarii*.

Secondly, since the antiquarian tradition has nothing to say about the origins of the other two types of quaestor, we are at liberty to look at the other traditions for them. Unfortunately, there was no one overriding tradition about the origins of the other two types and it is impossible to judge definitively between the two approaches, that of Livy and Plutarch (and probably Dionysius), which affirms a republican origin and the priority of treasury quaestors, and that of Tacitus and probably Ulpian, which affirms a regal origin and the priority of quaestors as assistants to kings and consuls.

Two approaches are of little or no help. If it were true that Rome had no treasury before it had a coinage, then the Ulpian-Tacitus scenario has plausibility; even if the dates are wrong, the treasury quaestors will be the last in the sequence. However, since the Romans used one pound lumps of bronze in lieu of currency, probably from the sixth century onwards,[79] the existence of some form of treasury can be assumed quite reasonably for the fifth or fourth centuries. Thus the Livian sequence is not excluded. A second approach is etymological. It is easy to see why the parricide quaestors were termed ‹quaestors›, since, however they functioned, they were certainly involved in the investigation of crime. It is however difficult to see why the quaestors who ran the treasury and the quaestors who assisted the consuls were called quaestors, since their primary

[77] As the article in OCD[3] s.v. *quaestor* appears to do. It also identifies the parricide quaestors with the quaestors who prosecute capital cases in the assembly.

[78] SANTALUCIA, Diritto 48–49 = Verbrechen 27–29; LOVISI (n. 53) 88. Even the contaminating sources, Varro and Dio/Zonaras (notes 58 & 54), that appear to identify the parricide quaestors with other officials, identify them with treasury quaestors, not with Livy's ‹floating› quaestors. In the one quaestorian capital prosecution in Dionysius, that of Cassius, the historian, as we have seen, thinks of the prosecutors as treasury quaestors.

[79] See M. H. CRAWFORD, Coinage and Money under the Roman Republic, 1985, 20–21.

functions were not investigatory at all. The problem is clear enough from the Varro extract cited in n. 55 where the polymath tries rather desperately to establish an etymological connection between (probably) the parricide quaestors, the treasury quaestors and the *quaesitores* who presided over the *quaestiones perpetuae*. It could be of some slight significance that Varro does not even mention in this context the quaestors who assisted the consuls and that it is easier to ascribe an investigatory function to the *quaestores aerarii* who were concerned with matters like tribute and the use of public funds for the building of temples than it is to the assistants of consuls, now that their prosecutorial functions have been exploded. So it may be that the Livian sequence is a little more plausible, but only a little; one cannot exclude the Ulpian-Tacitus sequence. However, we ought not to privilege Tacitus' account, simply because he is a better historian than Livy, as well as a far finer artist. Whether his excursuses into early Roman history, derived though they may be from speeches of Claudius to the senate, deserve any special reverence is open to doubt.[80]

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[80] Tacitus' argument from the *lex curiata* only functions by begging the question, even if one accepts his premisses. If the *lex curiata* installing the first consuls was identical with that installing the kings, then it would only follow that the kings had quaestorian assistants, if the consuls had them, and that protasis assumes Tacitus' answer to the question at issue. As for the Ulpianic tradition, as we have seen (n. 10), it seems to have developed in the early imperial period out of an invention by Gracchanus and is thus per se no more reliable than the annalistic tradition utilised by Dionysius, Livy and Plutarch.