

NULLUS VIDETUR DOLO FACERE:
THE ROMAN SEIZURE OF SARDINIA IN 237 B.C.

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POLYBIUS WROTE his history of Rome's rise to world power at a time when propaganda still dominated the story of Roman-Carthaginian relations. The first Roman historian, Fabius Pictor, writing in Greek primarily for a Greek audience, had taken special care to justify the two wars that Rome up to his time had fought against Carthage.¹ The *Origines* of Cato, champion of Carthage's destruction in the years before the outbreak of the Third Punic War, was noted for its catalogue of Punic treaty violations.² The pro-Carthaginian side of the story is almost entirely lost. If Carthage produced any historians, we hear nothing of them. Philinus of Agrigentum wrote a work on the First Punic War, something of which can be gleaned from the later tradition; other historians sympathetic to Carthage are now hardly more than names.³

Polybius himself attempted an evenhanded approach and proclaimed early in his work the historian's duty to set aside partisanship, to relate the facts truthfully, and to censure bad faith or dishonorable conduct wherever it might be found.⁴ A famous example is his condemnation of Rome's seizure of Sardinia in 237, an event he declared to be without justification and a violation of good faith and treaty obligations.⁵ Modern scholars have accepted his view, portraying the Sardinian affair as a clear instance of bad faith on the part of the Romans, who took advantage of Carthage's preoccupation with the Mercenary War to breach the recent Treaty of Lutetia and seize Sardinia without provocation or justification.⁶

1. Polyb. 1.14.3 and 3.8.1–9.5. On the propaganda still current in Polybius' time, see Polyb. 1.65.9.

2. Gellius 10.1.10: *Carthaginienses sextum de foedere decessere*. See B. D. Hoyos, "Cato's Punic Perfidies," *AHB* 1.5 (1987): 112–21 and idem, "Cato's 'Duovicesimo Anno' and Punic Treaty-Breaches in the 230s B.C.," *AHB* 4.2 (1990): 31–36.

3. Cf. Polyb. 1.14 and Diod. 23.1.4 for traces of the pro-Carthaginian tradition. On Philinus, see F. W. Walbank, "Polybius, Philinus, and the First Punic War," *CQ* 39 (1945): 1–18. For attempts to reconstruct the anti-Roman Greek historiography of the third and second centuries B.C., see E. Gabba, "Storiografia greca e imperialismo romano (III–I sec. a.C.)," *RSI* 86 (1974): 625–42; cf. L. Castiglioni, "Motivi antiromani nella tradizione storica antica," *RIL* 61 (1928): 625–39.

4. Polyb. 1.14.4–8. For this moralizing aspect of Polybius, see now A. M. Eckstein, *Moral Vision in "The Histories" of Polybius* (Berkeley, 1995), 84–117.

5. Polyb. 3.10.4, 28.1–2, and 30.3–4. The noun employed denotes a "theft" (ἀφαίρεσις).

6. The acceptance of Polybius' judgment is virtually universal: T. Mommsen, *Römische Geschichte*⁹, vol. 1 (Berlin, 1902), 543: "unverhüllte Schamlosigkeit"; W. Otto, "Eine antike Kriegsschuldfrage: die Vorgeschichte des 2. punischen Krieges," *HZ* 145 (1932): 492–93: "brutaler Rechtsbruch"; R. M. Errington, *The Dawn of Empire* (Ithaca, 1972), 32: "a clear case of unprovoked aggression . . . which did not

Although Polybius' judgment has been widely followed, scholars have often expressed surprise at the apparent ruthlessness of the Roman action, dismissing it as an aberration in Roman policy. And with good reason: the senators who directed the affairs of state were also the priests and jurists of Rome, and the Romans in general regarded themselves as the most pious of nations, scrupulous in their attention to religious and legal obligations.⁷ In the third century in particular the Roman nobility had endeavored to publicize their commitment to *fides* in foreign affairs, erecting a temple to Fides on the Capitol—*vicina Iovis optimi maximi* as Cato later observed—and proclaiming to the Greeks of Magna Graecia Rome's devotion to "good faith."⁸ But these same men debated and decided upon the Sardinian expedition, in clear violation, it is said, of sworn treaty obligations. The contradiction invites inquiry.

Polybius' judgment is informed by the morality of a Greek aristocrat of the second century B.C., which was not necessarily the same morality applied by the Romans of 237. His censure of Roman behavior in the Sardinian affair is consonant with modern notions of statecraft, and flatters our own conceptions of morality, but it is worth our effort to uncover, if we can, the original "morality" of the Romans in 237. That morality was peculiarly Roman, foreign both to Polybius and to ourselves. Its exposition will shed light not only on the cultural gulf separating Polybius from his Roman contemporaries but also on some of the peculiar attitudes that informed Roman "imperialism."

I

Polybius appended Rome's seizure of Sardinia to his narrative of the Mercenary War at the conclusion of Book 1 and revisited the subject briefly in Book 3 when discussing the historical causation and preliminaries of the

hesitate to break a treaty to gain its ends"; P. Meloni, *La Sardegna romana* (Sassari, 1975), 37: "un atto di forza . . . malamente mascherato da contenuti giuridici"; H. Bengtson, *Grundriss der römischen Geschichte*³ (Munich, 1982), 90: "nackter römischer Imperialismus"; H. H. Scullard, *CAH*² 7.2 (1989): 569: "unprovoked aggression and treaty-breaking by Rome."

7. Cic. *De Or.* 3.133–35 and *Off.* 2.65. See A. Watson, *International Law in Archaic Rome* (Baltimore, 1993), 62–71, on the relationship between Roman religiosity and legalism. For the aristocratic nature of early Roman jurisprudence, the combination of politician and jurist, and the unity of sacred and profane law at Rome, see F. Schulz, *History of Roman Legal Science* (Oxford, 1946), 6–23; M. Kaser, *Das altrömische ius* (Göttingen, 1949), 345–59; W. Kunkel, *Herkunft und soziale Stellung der römischen Juristen* (Graz, 1967), 41–49. Most pious of nations (Cic. *Nat. D.* 2.8): "Et si conferre volumus nostra cum externis, ceteris rebus aut pares aut etiam inferiores reperiemur, religione id est cultu deorum multo superiores."

8. The Temple of Fides on the Capitol was dedicated by A. Atilius Caiatinus, consul in 258 and 254; Cic. *Nat. D.* 2.61. The cult itself was more ancient, attributed to Numa Pompilius; Livy 1.21.4; Dion. Hal. 2.75.3; Plut. *Num.* 16.1. Cato's speech: Cic. *Off.* 3.104. Cf. Ennius frag. 389 = Cic. *Off.* 3.104: "O Fides alma apta pinnis et ius iurandum Iovis." Rome's emphasis on good faith is reflected in the coins struck by Locri ca. 274 that depict ROMA seated and crowned by ΠΙΣΤΙΣ (Fides); J. Heurgon, "La Guerre aux 4^e–3^e siècles et la fides romana," in *Problèmes de la guerre à Rome*, ed. J.-P. Brissson (Paris, 1969), 28. Appius Claudius relied on the obligations of *fides* to justify his aid to Messina in 264; Diod. 23.1.4. For *fides* as a moral theme of the Roman aristocracy, see now K.-J. Hölkeskamp, *Die Entstehung der Nobilität* (Stuttgart, 1987), 213–16 (with citations of the older literature).

Hannibalic War.⁹ Both accounts lack clear chronological references; and the account in Book 3 provides crucial details omitted in Book 1. But Polybius provides sufficient information to establish a basic chronological framework.

The First Punic War had ended in the late spring or early summer of 241 with the Treaty of Lutatius, by which Carthage ceded Sicily to Rome and agreed to pay a war-indemnity of 3200 talents. Carthage's troubles with her mercenaries began soon after, when an attempt to delay demobilization and payment of the troops led to open warfare, which by the late summer or early fall of 241 had developed into a full-scale rebellion of Carthage's African dependencies and allies.¹⁰ Sometime in 240 the mercenaries in Sardinia joined the revolt, besieging and killing their commander and his officers.¹¹ Carthage immediately sent an expedition to Sardinia under Hanno, but these troops—also mercenaries—mutinied, crucified their commander, and joined the rebels. The mercenaries then seized possession of the towns and sought out and murdered all Carthaginians left on the island.¹²

With most of the cities in North Africa lost, the grain supply from Sardinia interrupted, and large armies of mercenaries in the field against her, Carthage appealed for assistance to those states in alliance with her. The Romans, Polybius tells us, "observed loyally the engagements the treaty imposed on them" (1.83.5). A dispute over some Italian merchants imprisoned by Carthage for trafficking with the rebels was resolved to the satisfaction of both sides: Rome undertook to forbid such trade and Carthage freed the captured merchants (1.83.6–10). Gratified by Carthage's action, the Romans then released without ransom the remaining Carthaginian prisoners of war and "henceforth gave prompt and friendly attention to all [Carthaginian] requests" (1.83.8).¹³ At about the same time Rome

9. Polyb. 1.88.8–12, 3.10.1–4, 3.27.7–8, 3.28.1–4, and 3.30.4. Additional detail, often unreliable, is given by App. *Pun.* 5 and 85, *Iber.* 4, *Sic.* 2.3; and Dio Cass. frag. 46/Zonar. 8.17 and 18. The annalistic version is found in Livy *Per.* 20, Eutrop. 3.2.2, and Oros. 4.11.2 and 12.2–3.

10. The final Carthaginian defeat at the Aegates Islands had occurred on March 10, 241 (Eutrop. 2.27), and C. Lutatius Catulus sought an early peace, since his term of office was about to expire and he wished to garner the glory of finishing the war for himself: Zonar. 8.17; cf. Polyb. 1.62.7. The removal of Carthaginian mercenaries from Sicily presumably began soon after the conclusion of the preliminary treaty, probably in the spring but certainly no later than the summer of 241. It will have taken a few more months for the initial negotiations with the mercenaries to break down and open hostilities to commence.

11. The Sardinian mercenaries rebelled about the time (κατὰ δὲ τοὺς αὐτοὺς καιροὺς) of Hamilcar's second victory over Spendius, the mercenary leader in Africa: Polyb. 1.77.1–79.1. Because this victory occurred before the African mercenaries' execution of their Carthaginian prisoners (1.80.11–13) and before the defection of Hippacritae and Utica to the rebels (1.82.8), we are plainly in the campaigning season of 240.

12. Polyb. 1.79.1–5. Polybius employs a vague connective (αὐτοῖς) when dating Hanno's expedition (1.79.3), but he places it immediately after the execution of Bostar, the Carthaginian commander in Sardinia (1.79.1–2), and immediately before the massacre of all Carthaginians on the island and the rebels' seizure of the Sardinian towns (1.79.4–7). Polybius' sequence makes it likely that the expedition was sent soon after word of Bostar's death reached Carthage, thus also in 240.

13. The prisoners were later said to number 2,743, a sizeable fighting force: Val. Max. 5.1.1. Rome's friendly attitude at this time also is reflected in the annalistic tradition (Nepos, *Ham.* 2.3): "Quibus malis adeo sunt Poeni perterriti, ut etiam auxilia ab Romanis petierint, eaque impetrarint"; (Livy 21.41.12): "pacem cum victis fecimus, tutelae deinde nostrae duximus, cum Africo bello urgerentur."

refused an appeal from the Sardinian mercenaries to occupy the island and rejected an offer of surrender from Utica, one of Carthage's most important dependencies in Africa (1.83.11).¹⁴

After more than three years of war, Carthage succeeded by late 238 or early 237 in subduing the revolt in Africa.¹⁵ Meanwhile, the rebellious mercenaries on Sardinia had been driven from the island by the natives and taken refuge in Italy, where they again appealed to Rome. In a remarkable volte-face, the senate accepted their request and sent an expedition to occupy Sardinia in the spring of 237.¹⁶ The Carthaginians protested against Roman intervention and made their own preparations to recover the island. But when the Romans claimed that these preparations were not against Sardinia but against themselves and unexpectedly declared war, Carthage was forced to yield, agreeing to relinquish any claim to Sardinia and pay an additional indemnity of 1200 talents (1.88.9–12).

Polybius returns to the Sardinian affair in Book 3 when he describes the causes of the Hannibalic War. Here he provides a detail from the diplomatic history of the Sardinian crisis omitted in Book 1: When the Romans had announced their intention to make war on Carthage, the Carthaginians at first were ready "to negotiate on all points," thinking that their position was just; but when the Romans refused to negotiate, Carthage had no

14. The appeal from the Sardinian mercenaries and Utica cannot be dated precisely, but would seem to fall in late 240 or early 239. Carthage's interception of Italian merchants (1.83.6) will have occurred early in the war (ἐν ἀρχαῖς), followed quickly by Rome's protest and resolution of the dispute. The mercenaries' request that Rome occupy Sardinia and Utica's offer of *editio* came "shortly afterwards" (μετὰ δὲ ταῦτα, 1.83.11). Polybius' phrases are imprecise, but Rome's rejection of these appeals is evidently connected to her friendly attitude following Carthage's request for aid and thus should be placed early in the war, when the defection of Carthage's allies and the successes of the African mercenaries had imperiled Carthage's very existence.

15. Polybius 1.88.7 gives the duration of the war as three years and four months. Livy's five years (21.2.1) is an obvious approximation. Diodorus's four years and four months (25.6) is best explained as a copyist's error, as he was likely following Polybius in this portion of his history: B. Niese, *Grundriss der römische Geschichte*⁵ (Munich, 1923), p. 108, n. 1. If the war began in the late summer or early fall of 241 (see n. 10 above), the final campaign would then have occurred in late 238 or early 237. Cf. G. de Sanctis, *Storia dei Romani*², vol. 3 (Florence, [1916] 1967), 1. 385, n. 30. E. Meyer, *Kleine Schriften*, vol. 2 (Halle, 1924), p. 382, n. 2, dates the war from the beginning of 240 to the summer of 237, which seems to allow too much time in 241 for the outbreak of hostilities.

16. Since Polybius explicitly says that the Sardinian affair occurred after the conclusion of the Mercenary War (3.10.1; cf. 1.88.8–12), the Roman expedition to Sardinia (1.88.8) must be dated to the beginning of the campaigning season of 237 (see previous note). The Livian tradition evidently placed it then: Eutrop. 3.2; but cf. Oros. 4.11–12. The only reason to doubt this date is the statement of Sinius Capito (Festus 430L s.v. *Sardi venales*) that Ti. Sempronius Gracchus, consul in 238, subdued the Sardinians. De Sanctis, *Storia dei Romani*², 3.1.273, and Meyer, *Kleine Schriften*, 2.385–86, n. 3, who also place the Sardinian affair in 237, thought Sinius had confused Gracchus with his more famous grandson, the consul of 177, who finally subdued the Sardinian tribes. But Sinius dated the affair by both consuls, Gracchus and Valerius Falto ("Sinius Capito ait Ti. Gracchum consulem collegam P. Valeri Faltonis Sardiniam Corsicamque subegisse"), and there is no need to postulate confusion to retain the proper chronology. Gracchus, who had been campaigning along the Ligurian coast in 238 (Zonar. 8.18; cf. Livy, *Per.* 20), would have had sufficient time in the spring of 237 to occupy Sardinia while returning to Rome at the end of his consular year. An expedition to Sardinia would have seemed a natural extension of his Ligurian campaign, particularly if the Sardinians had reverted to their earlier piracy after the expulsion of the Carthaginian mercenaries. Indeed, a prorogation of Gracchus' term of office to allow an immediate response to the mercenaries' appeal is not impossible, since prorogation before the Hannibalic War, although unusual other than for the celebration of a triumph, was not unknown. See W. F. Jashemski, *The Origins and History of the Proconsular and Proprætorian Imperium to 27 B.C.* (Chicago, 1950), 9–11 and 100; cf. R. Develin, "Prorogation of *imperium* before the Hannibalic War," *Latomus* 34 (1975): 716–20.

choice but to submit and evacuate Sardinia (3.10.1–3).¹⁷ Polybius could find no reasonable pretext for Rome's behavior, since the charge brought against Carthage by Rome in justification for the seizure of Sardinia—the wrongs inflicted upon Roman merchants during the Mercenary War—had been resolved by negotiation some time before (3.28.1–3; cf. 1.83.5–11).

II

Such is the outline of events as related by Polybius. Later writers add little and are contaminated by obvious pro-Roman falsifications.¹⁸ But even the story in Polybius is not without difficulties. First, there is the difficulty of explaining why Rome's attitude toward Carthage changed dramatically within a short period of time from friendly cooperation in the Mercenary War to a peremptory declaration of war in 237. More puzzling still is the timing of Rome's action: the appeal from the mercenaries in Sardinia had been rejected in 240/39, when Carthage was deeply embroiled in the Mercenary War, yet granted, even to the point of war with Carthage, in 237, when Carthage had emerged victorious.

Scholars have offered several explanations to account for this shift in policy. Täubler, followed later by Errington, believed that the Romans had acquired a new awareness of the geopolitical value of Sardinia between 241 and 237 and took the first opportunity after the Treaty of Lutatius to seize what they had neglected to obtain earlier by negotiation.¹⁹ But it is difficult to accept that the Romans were unaware of the military value of Sardinia in 241. While one might rightly doubt the ability of Roman senators to conceive in “geopolitical” terms, they were by and large military men who could hardly have failed to grasp early in the

17. The translation of the phrase in quotations is disputed—and crucial to our understanding of events. See discussion below, pp. 216–21.

18. The Livian tradition made Sardinia a part of the Treaty of Lutatius and the affair in 237 an attempt by Carthage to stir up a rebellion of natives against Rome: Livy 21.40.5 and 41.14; 22.54.11; Ampel. 46.3; Eutrop. 3.2.2; *de vir. illus.* 41 (conflating the treaty of Lutatius, the Sardinian codicil, and the Ebro treaty); Oros. 4.11.2; cf. Florus 1.18.15–16. The garbled account in Dio Cass. frag. 31.5 & 46/Zonar. 8.18, which relates a series of disputes and embassies between Rome and Carthage in the 230s concerning Sardinia, seems to reflect the same tradition. See Hoyos, “Cato's ‘Duovicesimo Anno,’” 31–36; J. W. Rich, *Declaring War in the Roman Republic in the Period of Transmarine Expansion* (Brussels, 1976), 70–71. Livy was aware, however, of the pro-Carthaginian version since he put in the mouth of Hamilcar the claim that the Romans had wrongfully appropriated Sardinia and imposed an indemnity on the Carthaginians in the midst of their African troubles (21.1.5): “nam et Siciliam nimis celeri desperatione rerum concessam et Sardiniam inter motum Africae fraude Romanorum stipendio etiam insuper imposito interceptam.” Appian recognized that the Sardinian affair was separate from the Treaty of Lutatius, but advanced the same justification refuted by Polybius that the Carthaginians were forced to surrender Sardinia as compensation for injuries inflicted on Roman merchants during the Mercenary War: *Iber.* 4 and *Pun.* 5 and 86; cf. Zonar. 8.18.

19. E. Täubler, *Vorgeschichte des zweiten punischen Kriegs* (Berlin, 1921), 16; Errington, *Dawn of Empire*, 32 (see n. 6 above). Cf. W. Dahlheim, *Gewalt und Herrschaft* (Berlin, 1977), 47, who believes that Rome, having overlooked the strategic position of Sardinia in the “Euphorie des Sieges” of 241, was brought back to her senses by the “gesteigerte Aktivität Karthagos nach seinem Sieg im Söldnerkrieg.” This, however, does violence to the chronology in Polybius (the only one we possess) by placing Rome's decision to intervene in Sardinia after rather than before Carthage's attempt to reoccupy the island in 237. Some combine this theme with a shift in political power at Rome, in which the “anti-Carthaginian” faction gained the upper hand ca. 240–37: O. Meltzer, *Geschichte der Karthager*, vol. 2 (Berlin, 1896), 390; E. Badian, *Foreign Clientelae (264–70 B.C.)* (Oxford, 1968), 43; F. Cassola, *I Gruppi politici romani nel III secolo a.C.* (Rome, 1968), 229. But there is no evidence to support the view that such factional divisions either existed or influenced foreign policy at this period.

war the significance of Sardinia as a Carthaginian base. Polybius affirms that the Romans entertained designs on Sardinia "from the moment they concerned themselves with the sea" (1.24.7). And, in fact, after the construction of her first fleet in 261, Rome sought to wrest Sardinia and Corsica from Carthaginian control in a series of campaigns in 259 and 258 (1.20.9–21.3). Whether this was an attempt to create a "staging area" for an invasion of Africa or simply a move to protect the Italian coast from Carthaginian raids, Rome plainly appreciated the proximity of these islands and the desirability of obtaining them if possible.²⁰ If nothing else, the raids on the Italian coast by Carthaginian fleets stationed in Sardinia (which began early in the First Punic War and continued sporadically throughout) would have made the geography evident to the senators in Rome.²¹ It would not have taken Hanno's expedition to Sardinia in 240 to educate the Roman senate on the dangerous proximity of this Carthaginian possession. But no Roman action was forthcoming at that time. On the contrary, the Sardinian mercenaries' appeal was rejected and assistance was provided to the Carthaginians in their struggle against the mercenaries in Africa. All of this makes a sudden new "geopolitical awareness" in 237 an unlikely explanation for the shift in Roman policy.

Others cite "war weariness" to explain Rome's failure to demand the surrender of Sardinia in 241, followed by brutal *Machtpolitik* in Rome's shift of policy and seizure of the island at the opportune moment in 237.²² Now "war weariness" must surely have been a factor in 241, after twenty-four years of war, and this, combined with Lutatius' eagerness to conclude the war before appointment of a successor, may be part of the explanation for Rome's failure to insist on Sardinia's surrender in 241.²³ But neither of these factors can account for Rome's sudden shift in policy in 237. The difficulty is the timing of the Roman action, for if *Machtpolitik* were the only driving motive after 241, we would expect to see some action on Rome's part in 240/39, when the mercenaries had first appealed for aid. A suitable pretext was at hand in the dispute over Carthage's seizure of Italian merchants. And Carthage, preoccupied with the revolt in Africa,

20. Regulus evidently had demanded the surrender of Sardinia as part of his terms in 256 (Dio Cass. frag. 43.22–23). Given the recent Sardinian campaigns, Walbank's rejection of Dio's account is probably unjustified: F. W. Walbank, *A Historical Commentary on Polybius*, vol. 1 (Oxford, 1957), 90.

21. The *coloniae maritimae* established along the western coast of Italy between 338 and 241 are rightly viewed as guard posts against raids from the sea: E. T. Salmon, "The Coloniae Maritimae," *Athenaeum* 41 (1963): 3–33; cf. C. G. Mason, "The Agrarian Role of Coloniae Maritimae: 338–241 B.C.," *Historia* 41 (1992): 75–87. Alsium and Freginae were founded on the Etruscan coast in the closing years of the First Punic War, and probably Pyrgi as well. E. T. Salmon, *The Making of Roman Italy* (Ithaca, 1982), p. 193, n. 211, is surely correct in seeing in them an attempt to protect Italy against Carthaginian raids from Sardinia. For the raids of Hamilcar, based on Hercte in Sicily, against southern Italy, see Polyb. 1.56.

22. So Mommsen, *Römische Geschichte*⁹, 1.542–43 (n. 6 above); de Sanctis, *Storia dei Romani*, 3.1.387–88; B. H. Warmington, *Carthage* (New York, 1969), 190–91; W. V. Harris, *War and Imperialism in Republican Rome* (Oxford, 1979), 190–92; Scullard, *CAH*²: 569.

23. War weariness: Polyb. 1.62.7. Note, however, that the preliminary negotiations for peace were rejected by the *populus* as too lenient and additional clauses were added by a Commission of Ten: they required Carthage to surrender the islands between Sicily and Italy (i.e., the Lipara Islands), added 1,000 talents to the war indemnity, and shortened the term for payment (Polyb. 1.63.1–3). No doubt the Lipara Island clause was the origin of the later tradition that Sardinia had been included in the Treaty of Lutatius. See n. 19 above. For Lutatius' eagerness to conclude the war during his term of office, see Zonar. 8.17.

hardly could have resisted. Yet Rome declined the mercenaries' appeal and refrained from any action designed to take advantage of Carthage's embarrassment. Indeed, Rome's attitude at this time is remarkable in light of her later seizure of Sardinia. It is sometimes thought that Roman behavior was guarded, with the senate reluctantly providing assistance to Carthage while secretly pleased to see Carthage weakened by the Mercenary War.²⁴ But the Romans did not simply maintain a correct neutrality in the conflict, as they had every right to do; instead, they responded promptly to Carthaginian requests for aid, which likely included the provision of grain and permission for Carthage once more to recruit mercenaries among Rome's Italian allies.²⁵ This behavior is inexplicable if we believe that Rome was waiting only to recover her strength before seizing the first opportunity after 241 to wrest Sardinia from her former foe.

Finally, some scholars recognize the inadequacy of the above arguments to solve the riddle of Roman motivations and attribute the decision to seize Sardinia to renewed Carthaginian activity in the Western Mediterranean after the conclusion of the Mercenary War.²⁶ By 237 Carthage had suppressed the rebellion so successfully that the extent of the Carthaginian domain in Africa actually appears to have increased.²⁷ The campaigns of Hamilcar in Spain began soon after, no later than the summer of 237.²⁸ The Romans, so the argument goes, could foresee an attempt by Carthage to retake Sardinia in the near future and acted in a timely manner to prevent it. But again, although this may help explain Rome's motivation, it does not explain the timing of Rome's intervention. If Rome were reacting to a perceived threat by Carthage to reoccupy Sardinia (and note that Polybius makes it clear that the Roman expedition to Sardinia in 237 came before any such preparations were underway at Carthage), how can we account for the failure of Rome to react in 240 when Carthage actually sent an army to Sardinia under Hanno and the mercenaries appealed to Rome shortly after for aid? The circumstances at that time—a reasonable pretext in the merchant dispute and Carthage's preoccupation with the Mercenary War—were more favorable for a Roman intervention than in 237, when no pretense was available and Carthage was in fact resurgent. And a further complication existed for Rome in 237: trouble

24. Mommsen, *Römische Geschichte*, 1.542.

25. Polyb. 1.83.8. Polybius mentions Rome's friendly cooperation in passing and without giving details, but it probably included the items reported in the later tradition: shipments of grain, permission for Carthage to recruit mercenaries in Italy, and attempts to mediate the conflict. App. *Sic.* 2.3 and *Pun.* 5; Zonar. 8.17; cf. Nepos, *Ham.* 2.3. The claim that Rome attempted mediation is often doubted, but may contain a kernel of truth. Roman senators were sensitive to their position as patrons and likely made some response to the offer of *deditio* from Utica and the appeal from the Sardinian mercenaries. While this response may not have been an attempt at formal mediation, some overtone that demonstrated Rome's *tutela* with regard to Carthage (Livy 21.41.12) may lie behind the tradition that mediation was offered.

26. N. Vianelli, "Quando e perchè i romani occuparono la Sardegna," *RSA* 8 (1904): 515–17; Meyer, *Kleine Schriften*, 2.386–87.

27. Nepos, *Ham.* 2.5: "etiam fines imperii propagavit, tota Africa tantum otium reddidit, ut nullum in ea bellum videretur multis annis fuisse." Cf. Diod. 25.8 and 10; App. *Iber.* 4.

28. Hamilcar was dispatched to Spain "as soon as [the Carthaginians] had set the affairs of Libya in order": Polyb. 2.1.5. Since he spent nine campaigning seasons in Spain subduing Spanish tribes before dying in battle in 229/8 (Polyb. 2.1.7), his first campaign there must have occurred in 237.

had been brewing on the Gallic frontier, which had erupted into open warfare probably in 238 and occupied Roman attention until 236.²⁹ From the standpoint of *Machtpolitik*, then, the timing of the Sardinian affair appears very strange indeed.

A new "geopolitical awareness" or a simple failure to insist upon the surrender of Sardinia in 241 cannot account for the sudden shift in Roman attitudes in 237. Rome had had an excellent opportunity to take full advantage of Carthage's troubles (especially her troubles in Sardinia) in 240/39, and had refused. The explanation for the new Roman policy must be sought elsewhere; and a simple one is at hand, consistent not only with Rome's delayed response to the Sardinian question but also with her observance of legal formalities: the Roman perception of the legal status of Sardinia in 237.

III

The desirability of obtaining Sardinia had long been apparent to Rome,³⁰ but the senate must have found some justification for its action in 237. A number of possibilities present themselves.

First, Rome could have claimed (as Livy did later) that Sardinia was included in the final terms of the Lutatius treaty, which required the surrender of the islands between Sicily and Italy. But this was plainly a later fabrication of the annalists, improbable even at the time it was made, and nothing suggests that it was a contemporary argument.³¹

Secondly, the Romans could have alleged, as Polybius expressly says they did, that Carthage had previously breached the treaty by her attacks on Roman shipping during the Mercenary War. But Polybius shows that this dispute had been resolved to Rome's satisfaction long before the Sardinian crisis arose.³² Again we are in all probability dealing with a justification *post eventum*, perhaps originating with Fabius Pictor at the end of the century or with Polybius' contemporary Cato, but in any case still current in Polybius' day.³³

Finally, the Romans might have claimed that the Carthaginians had abandoned their possession of Sardinia, rendering it open for occupation

29. Polyb. 2.21.1–6 reports an alarm on the Gallic frontier and a single campaign in 236. The annalistic tradition reports three campaigns from 238–236: Livy *Per.* 20; Flor. 1.19.2; Oros. 4.12.1; Zonar. 8.18. For discussion, see A. M. Eckstein, *Senate and General: Individual Decision Making and Roman Foreign Relations, 264–194 B.C.* (Berkeley, 1987), 7–10.

30. See text at n. 20 above.

31. Treaty terms: Polyb. 3.27. Sardinia included in Lutatius treaty: Livy 21.40.5 & 41.14; 22.54.11; Ampel. 46.3; Eutrop. 3.2.2; *de vir. illus.* 41; Oros. 4.11.2.

32. Polyb. 3.28.2–3. The same tradition is reflected in App. *Iber.* 4, *Pun.* 5 and 86 and Zonar. 8.18. De Sanctis' suggestion (*Storia dei Romani*², 3.1.388–89) that similar disputes must have recurred later in the war lacks support. For a recent variation on this theme, see M. Dubuisson, "Procédés de la diplomatie romaine: l'annexion de la Sardaigne et le sens de ΣΥΓΚΑΤΑΒΑΙΝΕΙΝ (Polybe, III, 10, 1)," *REL* 57 (1979): 121.

33. Walbank is probably correct in suggesting (*Commentary*, 1.356) that Polybius here was combating contemporary polemics preceding the outbreak of the Third Punic War. Note the similar fabrication of a prior Carthaginian breach of treaty to justify the First Punic War: Livy 21.10.5; *Per.* 15; Dio Cass. frag. 43.1.

by the first comer. This argument, found nowhere in the ancient sources, occasionally has been advanced by modern scholars.³⁴ But what has not been appreciated fully is how closely this claim parallels certain doctrines of the *ius civile*. In fact, the Roman perception of Sardinia's legal status in 237 is fundamental for a proper understanding of Roman motives, for it helps explain the most difficult aspect of the problem, the timing of Rome's action.

To begin with, it is important to distinguish clearly between Rome's decision to occupy Sardinia and her later declaration of war on Carthage. This difference must be emphasized, since scholars sometimes state or imply that Rome preemptively seized Sardinia in response to Carthaginian preparations to reoccupy the island upon the pretext that these preparations were aimed at Rome.³⁵ But the sequence in Polybius' account, although compressed, is clear: Rome had accepted the mercenaries' appeal for help and already had sent an expedition to Sardinia when Carthage protested and began her own preparations to recover the island (1.88.8–9). These preparations in turn provoked the Roman declaration of war and the diplomatic activity leading to Carthage's overt surrender of the island by treaty. The Romans evidently took the view that no diplomatic action was necessary at all regarding their original decision to occupy Sardinia. This must have been because Sardinia had ceased, in Roman eyes, to be Carthaginian territory. It was not even being held by the rebellious mercenaries, but instead had reverted to a state of primitive vacancy, occupied by Sardinian natives to whom no rights or obligations were conceded. Once Rome had taken steps to occupy Sardinia, the counter-preparations by Carthage were in fact directed against Rome. This attitude is likely to have rested on the Romans' perception of Carthage's rights, or lack thereof, in Sardinia.

Before the mercenary revolt, the rights of possession concerning Sardinia were hardly in dispute. Carthage had good diplomatic title, having possessed the southwest cities, but certainly not the hinterland, since the sixth century B.C.³⁶ But the Romans might well have viewed the state of affairs differently in 237. Although concepts of the Roman *ius civile* were never simply imported wholesale into Rome's dealings with foreign

34. Most recently by B. Caven, *The Punic Wars* (London, 1980), 71. Cf. O. Meltzer, *De belli Punici secundi primordiis adversariorum capita quattuor*, Programm des Wettiner Gymnasiums zu Dresden (1885), ix: "Romani statim ab initio causam eo detorsisse videntur, ut non tam Poenis provinciam se eripuisse quam terram vacuum occupavisse contenderent"; Täubler, *Vorgeschichte*, 21 (n. 19 above) and 27; T. Frank *CAH* 7 (1928): 804; G. Giannelli, *Roma nell'età delle guerre puniche* (Bologna, 1938), 108; Badian, *Foreign Clientelae*, p. 43, n. 2 (n. 19 above).

35. See, for example, Niese, *Grundriss* 108 (n. 15 above); W. Hoffmann, "Karthagos Kampf um die Vorherrschaft im Mittelmeer," *ANRW* I.1 (1972): 356, and idem, "Roms Aufstieg zur Weltherrschaft," in *Geschichte Roms* (Frankfurt, 1979), 110; Dahlheim, *Gewalt und Herrschaft*, 47; Harris, *War and Imperialism*, 192.

36. Rome had acknowledged Carthage's rights in earlier treaties: Polyb. 3.22.9 and 24.11. In those treaties the Carthaginians had laid "particular stress on Libya and Sardinia, asserting them to be their own private property (ἐξἰδιαιζόμενοι) and closing all landing places to the Romans": 3.24.14; cf. 3.23.5. On Carthage's inability to subdue the Sardinian uplands, see Diod. 5.15.5. For a succinct discussion of the extent of Carthaginian control in Sardinia, see S. L. Dyson, *The Creation of the Roman Frontier* (Princeton, 1985), 241–45.

states, nevertheless the influence of the *ius civile* on public law and foreign relations is clear and has long been recognized.³⁷ It would be unusual, and probably quite impossible, for Roman senators to have viewed Carthage's rights in any legal frame of reference other than their own. In 240/39, when the mercenaries had first appealed to Rome, the rights of Carthage to Sardinia could hardly have been said to have lapsed. But by 237 Carthage had been ousted from the island for more than two and perhaps as many as three years;³⁸ and with a lapse of possession of such duration, two distinct and fundamental concepts of the *ius civile* will naturally have presented themselves to the Roman mind: those of *res derelicta* and *usucapio*.

The Roman concept of *res derelicta* (abandoned property) was premised on the idea that ownership depended closely on possession. The principle has obvious advantages in a preliterate society where modern techniques of title recordation were unknown and possession was favored as a prime *indicium* of ownership.³⁹ It found expression in the broad division in Roman property law between *res Mancipi* and *res nec Mancipi*: things that could be alienated only by formal ceremony (*mancipatio*) and things that could be transferred by mere delivery. Since originally all things were acquired first by acquisition from a state of natural freedom (*naturalis libertas*), it followed logically for the Romans that once "they escape from our custody and return to their natural state of freedom, they cease to be ours and are again open to the first taker."⁴⁰ The doctrine originated in an attempt to regulate the capture and possession of wild animals, and was later extended to possession in general. The rule ultimately codified in the *Digest* held:

If a thing is treated as abandoned, it ceases forthwith to be ours and will at once belong to the first taker because things cease to be ours by the same means by which they are acquired.⁴¹

Intention was an important factor, for possession was distinct from ownership. An owner might retain legal title, even if dispossessed; but if an

37. See J. E. Kuntze, *Der Parallelismus des jus publicum und privatum bei den Römern* (Leipzig, 1889); U. Coli, "Sul parallelismo del diritto pubblico e del diritto privato nel periodo arcaico di Roma," *SDHI* 4 (1938): 81–84; Kaser, *Das altrömische ius*, 20–28, 74–81, 260–63 (n. 7 above); Badian, *Foreign Clientelae*, pp. 1–13; K.-H. Ziegler, "Das Völkerrecht der römischen Republik," *ANRW* I.1 (1972): 71–73; Watson, *International Law* 68–69 (n. 7 above).

38. The mercenaries' revolt and Hanno's expedition to Sardinia had occurred in 240, followed shortly afterward by the mercenaries' first appeal to Rome. See nn. 11, 12, and 14 above. Carthage subdued the mercenary revolt in Africa by late 238 or early 237, by which time the Sardinian mercenaries had been driven from the island by the natives and had appealed again to Rome. Since Polybius explicitly dates the Sardinian affair after the conclusion of the Mercenary War—thus no earlier than early 237—Carthage had lost possession of Sardinia for over two, and perhaps as long as three, years, from 240 to early 237.

39. Note the protection afforded to the *de facto* possessor under the later possessory interdicts: H. F. Jolowicz and B. Nicholas, *Historical Introduction to the Study of Roman Law*³ (Cambridge, 1972), 259–63.

40. *Digest* 41.1.3.2 (Gaius): "cum vero evaserit custodiam nostram et in naturalem libertatem se receperit, nostrum esse desinit et rursus occupantis fit." Cf. Gai. *Inst.* 2.67. All translations of the *Digest* are from *The Digest of Justinian*, 4 vols., ed. T. Mommsen, P. Krueger, and A. Watson (Philadelphia, 1985).

41. *Digest* 41.7.1 (Ulpian): "Si res pro derelicto habita sit, statim nostra esse desinit et occupantis statim fit, quia isdem modis res desinunt esse nostrae, quibus adquiruntur." Cf. Gai. *Inst.* 1.2.1: "Quod enim nullius est, id ratione naturali occupanti conceditur."

owner acquiesced either in the abandonment of his property or in the possession of it by another, an immediate loss of ownership would result:

If we know that the owner regards a thing as abandoned, we can acquire it. Now Proculus says that such a thing does not cease to be the owner's until it is possessed by another; but Julian says that it no longer belongs to the abandoner but will become another's only when taken into possession; and that is correct.⁴²

The importance of intent (*animus*) is shown by the general rule:

Again, for the loss of possession, the possessor's mental attitude must be considered; if you are on a piece of land and lose the will to possess it, you immediately cease to possess it. Hence, possession can be lost, though it cannot be acquired, by will alone.⁴³

This general rule is illustrated by two specific cases—cases that may well be applicable to Roman thinking in 237:

If someone should inform the owner that his house has been occupied by brigands and, in terror, the owner does not return there, he has certainly lost possession of the house.⁴⁴

Suppose a man to go to market without leaving someone in charge and, while he is returning from market, someone seizes possession; Labeo says that this person possesses by stealth, and so the man who went to market remains in possession; but if the trespasser does not admit the owner on his return, he is regarded as possessing by force rather than by stealth. But if the owner declines to return to his land because he fears superior force, he will be deemed to have lost possession.⁴⁵

The attitude reflected in these rules closely fits the situation in 237. The Carthaginians had lost possession of Sardinia in 240 after the mercenaries' revolt. Although they attempted immediately to regain possession, that attempt failed and the long neglect that followed could be interpreted as an intent on their part to relinquish ownership. By 237 Sardinia had become, in Roman eyes, *res nullius*.⁴⁶

In addition, the principle of *usucapio* (adverse possession) could easily have been thought to apply specifically to the mercenaries' occupation of the island. The purpose of the doctrine was to ensure that ownership of things did not remain uncertain for too long a time.⁴⁷ And the periods

42. *Digest* 41.7.2.1 (Paul): "Pro derelicto rem a domino habitam si sciamus, possumus adquirere. Sed Proculus non desinere eam rem domini esse, nisi ab alio possessa fuerit: Iulianus desinere quidem omittentis esse, non fieri autem alterius, nisi possessa fuerit, et recte."

43. *Digest* 41.2.3.6 (Paul): "In amittenda quoque possessione affectio eius qui possidet intuenda est: itaque si in fundo sis et tamen nolis eam possidere, protinus amittes possessionem. Igitur amitti et animo solo potest, quamvis adquiri non potest."

44. *Digest* 41.2.3.8 (Paul): "Si quis nuntiet domum a latronibus occupatam et dominus timore conterritus noluerit accedere, amisisse eum possessionem placet."

45. *Digest* 41.2.6–7 (Ulpian/Paul): "Qui ad nundinas profectus neminem reliquerit et, dum ille a nundinis redit, aliquis occupaverit possessionem, videri eum clam possidere. Labeo scribit: retinet ergo possessionem is, qui ad nundinas abiit: verum si revertentem dominum non admiserit, vi magis intellegi possidere, non clam. Sed et si nolit in fundum reverti, quod vim maiorem vereatur, amisisse possessionem videbitur."

46. The phrase is Giannelli's: *Roma*, 108.

47. *Gai. Inst.* 2.44: "ne rerum dominia diutius in incerto essent." On *usucapio* in general, see A. Watson, *Roman Private Law around 200 B.C.* (Edinburgh, 1971), 62–65; Jolowicz and Nicholas, *Roman Law*³, 151–55.

of time were short: one year for movables and two years for land.⁴⁸ The doctrine was at least as ancient as the Twelve Tables⁴⁹ and long retained a certain primitive harshness, for although in classical law a thief could not usucapt, a distinction was made between an object taken by theft (*res furtiva*) and one taken by force (*vi possessa*): the latter was subject to *usucapio* until the passage of the *lex Iulia* and the *lex Plautia* in the late Republic.⁵⁰ And neither *bona fides* nor *iusta causa* were required for *usucapio* in the third century.⁵¹ From earliest times, then, it was an unquestioned tenet of Roman law that possession of land (even possession by force) ripened into ownership by the passage of a two-year period.

Thus, apart from the question of Carthage's abandonment of Sardinia, an adverse possessor had been in occupation of the island since 240, well past the prescriptive period under the *ius civile*. The rebellious mercenaries had not taken Sardinia by stealth but by open force, and their lack of "good faith" or "just cause" was no bar to an *usucapio*. Under such circumstances, a general attitude may well have prevailed among the legally-inclined Roman senate that Carthage, having been ousted from Sardinia by force and having failed to reassert her possession for more than two years, had relinquished through long acquiescence whatever rights she once may have held.

Thus, when the mercenaries made their second appeal for aid, Rome justifiably could assume that acceptance would not infringe the rights of any third party. In so doing, the senate was not mechanically or even consciously applying doctrines of the *ius civile* to the affairs of state; rather, the senators' perception of the situation—the conceptual framework within which the senate would judge the rights involved—would naturally be colored by the only legal frame of reference they knew, the *ius civile*. And those perceptions perhaps took a harsher form than we find codified in the *Digest*. Although the law of property remained, as it does today, the most conservative element in legal development, slow to adopt changes liable to disturb vested rights, the precedents from the *Digest* noted above had been gradually mitigated by the development of equitable principles. The law understood by Roman senators in 237 will hardly have been more lenient or flexible. But even the less rigorous principles cited from the *Digest* are sufficient to show how the familiar legalistic attitude of the Romans could have provided a convenient justification for Rome to occupy Sardinia, a step they were otherwise motivated to take.

Another aspect of Roman law is crucial in understanding the further development of the crisis. Any occupation of abandoned property transferred the rights therein to the new owner, and any later injury to those rights (e.g., an attempt by the former owner to regain possession) would give rise to a cause of action.⁵² This is precisely the thinking that appears

48. *Caecin.* 54. Cf. *Cic. Top.* 23, where adverse possession of realty is also tied to a *biennium*.

49. *Gai. Inst.* 42.

50. *Gai. Inst.* 45. Cf. *Digest* 41.3.33.2.

51. Watson, *Roman Private Law*, 66; Jolowicz and Nicholas, *Roman Law*, 153.

52. Presumably (in classical law) a *legis actio sacramento in rem* or *legis actio per conditionem* rather than a *vindicatio*, since the ownership of the *res* was not at issue. See *Gai. Inst.* 4.4–5.

in 237. It was not simply a question, as is sometimes assumed, of acceptance of a *deditio*, which would transfer the mercenaries' rights to Rome.⁵³ None of the prerequisites for a proper *deditio* ceremony were in place: properly constituted envoys, an independent *civitas in sua potestate*, and actual possession of property to be transferred.⁵⁴ It was a question, instead, of assuming ownership of vacant land. And once Rome took steps to occupy such land, any subsequent attempt by Carthage to regain her property would be viewed as an injury justifying a *rerum repetitio*—the very attitude Rome appeared to adopt.

We now have a likely answer to the riddle why Rome chose 237 and not 240/39 to accept the Sardinian mercenaries' appeal. Other factors surely were present in the decision to seize the island: Rome's long-standing desire to create "bulwarks" of defense; perhaps a realization that Carthage, now resurgent, was likely to repossess Sardinia in the near future; or perhaps simply the need to suppress renewed piratical activities of the Sardinian natives, now free of Carthaginian control.⁵⁵ But the crucial difference between 240/39 and 237 was not a sudden Roman realization of the desirability of obtaining Sardinia or keeping Carthage from it. That had been apparent since the early days of the First Punic War. What had changed was the Roman perception of Carthage's rights. That perception, as we may expect, was grounded in the experience of the *ius civile* and in specifically Roman concepts of property rights. Legalistic in the extreme, the Romans likely felt justified in their occupation of Sardinia and their subsequent declaration of war against Carthage.⁵⁶ No doubt the sudden and unexpected declaration bewildered and infuriated the Carthaginians; but from a Roman perspective, it was a *iustum bellum* occasioned by Carthaginian aggression against Roman property, despite modern scorn for the "morality" such an attitude implied.⁵⁷

It is important to recognize that we are not dealing here with mere chicanery. The judgment of Polybius and his modern followers is an ethical one, not a legal one. But morality at Rome before the advent of Greek

53. *Deditio* of mercenaries: Täubler, *Vorgeschichte*, p. 20, n. 28; Badian, *Foreign Clientelae*, 43 (n. 19 above); Errington, *Dawn of Empire*, 32 (n. 6 above); K. M. Girardet, "Die Sicherheitsklauseln des Lutatiusvertrages (241 v. Chr.)," in *Zum Umgang mit fremden Sprachen in der griechisch-römischen Antike*, ed. C. W. Müller, K. Sier, and J. Werner (Stuttgart, 1992), p. 104, n. 41. Polybius nowhere states that a *deditio* occurred, and he was familiar with the procedure: 21.9–10 and 36.4.

54. Livy 1.38.1–2 gives the classic terms of *deditio*: "rex interrogavit: 'Estisne vos legati oratoresque missi a populo Collatino ut vos populumque Collatinum dederetis?' —'Sumus.' —'Estne populus Collatinus in sua potestate?' —'Est.' —'Deditisne vos populumque Collatinum, urbem, agros, aquam, terminos, delubra, utensilia, divina humanaque omnia, in meam populi que Romani dicionem?' —'Dedimus.' —'At ego recipio.'" For modern discussion, see most recently D. Nörr, *Aspekte des römischen Völkerrechts* (Munich, 1989), 16–18.

55. Strabo 5.2.7 (225) mentions raids by the Sardinian natives against Pisa, but without specifying the date. Piracy along the Ligurian coast was notorious; and the Sardinian expedition of Gracchus may be connected with his campaign against the Ligures, also recorded in 238. See n. 16 above.

56. For the Romans as *das Rechtsvolk par excellence*, see the comments of Ziegler, "Völkerrecht," 79 (n. 37 above).

57. H. H. Scullard, *A History of the Roman World, 753 to 146 B.C.*⁴ (London, 1980), 185–86, expresses the common view: "It would be idle to suggest that by abandoning Sardinia for a year or more Carthage had forfeited her rights to it." But this is precisely what would have suggested itself to the legally-minded Roman senators. On the juristic—not moral—conception of *bellum iustum*, see the remarks of H. Drexler, "Iustum bellum," *RhM* 102 (1959): 97–140 = *Politische Grundbegriffe der Römer* (Darmstadt, 1988), 188–226.

philosophy was typically legalistic and can be summarized by an ancient maxim of Roman law: *nullus videtur dolo facere, qui suo iure utitur*.⁵⁸ For the Roman aristocrat there could be no fraud in the exercise of one's rights.

This attitude of legal punctiliousness pervaded Roman public and private life. It appears in a striking form in another, more famous, episode of Roman foreign affairs: the behavior of the consul Postumius following the disaster at the Caudine Forks in 321. To save his surrounded army, Postumius concluded an agreement with the Samnites that bound Rome to withdraw from disputed territories. On Postumius' motion, the agreement was repudiated by the senate as *ultra vires* and Postumius, bound and naked, was delivered to the Samnites in expiation. As Postumius was surrendered by the fetial priest, he thrust his knee into the priest's thigh, proclaiming that he was now (by virtue of the surrender) a Samnite citizen and had maltreated an envoy in violation of the *ius gentium*, "whereby the Romans would make war with better right (*eo iustius bellum gesturos*).” The Samnites rejected the proffered surrender and scoffed at "these mockeries of religion fit only for children (*haec ludibria religionum . . . vix pueris dignas*)"; but Livy must have found this story in a Roman annalist, who presumably was transmitting a tradition that assumed the legal—that is, religious—efficacy of this *causa belli* and the resulting *bellum iustum*.⁵⁹

This attitude reveals little that we or Polybius would recognize as "morality." Rather it is the familiar early Roman conviction of the complete efficacy of form and exactitude in religious and legal affairs. In the same way, it must be doubted that the Romans lingered long over the "morality" of occupying Sardinia. "Rights" and "obligations," which in large measure were the content of early Roman morality, were the issues to be considered. And as we have seen, Carthaginian rights in Sardinia had lapsed and a Roman occupation would thus infringe no provision of the Lutatius treaty. From a Roman point of view, there was no legal or religious obligation to refrain from Sardinia in 237.

IV

When the Sardinian affair is viewed in this light, the attempts of some writers to characterize Rome's actions as fraudulent or deceptive are anachronistic. They are based on the moral judgments of Polybius—that is to say, judgments of a Greek aristocrat of the second century B.C. with his own ideas of proper aristocratic behavior that do not necessarily reflect the

58. *Digest* 50.17.55 ("Rules of Early Law"). A similar concept: "No one causes loss except someone who has done something which he has no right to do (*Nemo damnum facit, nisi qui id fecit, quod facere ius non habet*)": *Digest* 50.17.151 ("Rules of Early Law").

59. Livy 9.9–10. See the interesting comments of M. Merten, "Fides Romana bei Livius" (Ph.D. diss., Johann Wolfgang Goethe-Universität, 1965), 68–71, esp. p. 70, n. 1, who argues that the criticism of Rome's behavior implied in the telling of this story, and explicit in the Samnite response, was Livy's own contribution to the annalistic version, which hitherto had accepted without question the juridical and religious propriety of Postumius' action. The relevance, for our purposes, of the Roman attitude does not depend on the historicity of the event.

legalistic “morality” of Roman senators almost a century before. In particular, the attempt of M. Dubuisson to portray Roman behavior in 237 as “une belle *fraus*” merits special attention here, not only because it is the most recent detailed treatment of the crisis, but also because it is the most extreme representative of the view that Roman action in 237 amounted to *dolus malus*.⁶⁰

Dubuisson’s reconstruction of the crisis rests on a single phrase used by Polybius to describe Carthage’s reaction to Rome’s demands for restitution in 237. Polybius writes (3.10.1–3):

When, on the suppression of [the Mercenary War] by the Carthaginians, the Romans announced their intention of making war on them, the latter at first were ready to negotiate on all points (εἰς πᾶν συγκατέβαινον), thinking that justice being on their side they would prevail; . . . but as the Romans refused to negotiate, the Carthaginians had to yield to circumstances and, though deeply aggrieved, they were powerless and evacuated Sardinia.

The translation of the italicized phrase is in dispute. Paton translates it as “to negotiate on all points,” as does Scott-Kilvert.⁶¹ But Schweighäuser has *in omnes conditiones ire*.⁶² He is followed by Dubuisson, who renders it “consentir à tout ce qu’on leur demandera.”⁶³

Polybius’ meaning is crucial for our understanding of the crisis. Was he indicating that the Carthaginians stood ready to negotiate on all points because they (the Carthaginians) had justice on their side? Or was he saying that the Carthaginians were willing to concede all points, realizing that they (the Romans) were justified in their complaints? And if so, which complaints could these be?

Dubuisson opts for the second interpretation and elaborates a sequence of events that implies not merely Roman intransigence but outright duplicity. On his view, when the Romans learned of Carthage’s preparations to reoccupy Sardinia, they secretly voted a conditional declaration of war and sent an embassy to request reparations (*rerum repetitio*). Without disclosing the full scope of their complaints, the Roman envoys demanded submission; and Carthage, believing that only minor disputes were at stake and that Rome was justified in her complaints, conceded all points (εἰς πᾶν συγκατέβαινον) and stood ready to accept Roman demands for compensation. It was then, Dubuisson believes, that “les Romains dévoilent leur jeu” by demanding the surrender of Sardinia. The Carthaginians, by consenting to everything in advance, unwittingly had given the Roman envoys

60. M. Dubuisson, “Procédés.”

61. W. R. Paton, *Polybius*, “*The Histories*”, vol. 2 (London, 1922), 25; I. Scott-Kilvert, *Polybius, the Rise of the Roman Empire* (London, 1979), 187.

62. J. Schweighäuser, *Lexicon Polybianum* (Oxford, 1822), 417. So also Dübner, *Polybii Historiarum reliquiae* (Paris, 1838), 125: “principio quidem lubentes illi in omnes ierant conditiones, sperantes, se causae suae iustitia victuros.”

63. Dubuisson, “Procédés,” 124–25; cf. *Le Latin de Polybe* (Paris, 1985) 202–3 and 251. E. S. Shuckburgh, “*The Histories*” of Polybius (South Bend, 1980), 100, has “to resist at all hazards” and J. Foucault, *Polybe*, “*Histoires*” (Paris, 1971), 3.42: “ils étaient résolus à tout,” which cannot be correct since Carthage was obviously in no position to resist Roman demands. See F. W. Walbank, “Roman Declaration of War in the Third and Second Centuries,” *CP* 44 (1949): p. 16, n. 13.

a blank check and thus “une base juridique” for their demands. Dubuisson sees in this an explicit parallel to the Roman duplicity leading up to Carthage’s *deditio* in 149 and the subsequent demand for the evacuation of the city.⁶⁴

The cornerstone for this interpretation of the Sardinian crisis is Dubuisson’s claim that συγκαταβαίνειν must be translated in 3.10.1 as “to concede all points.” The argument is a linguistic one, based primarily on Polybius’ other uses of the term; but Dubuisson’s assertion that Polybius invariably employs the verb in a diplomatic context to mean “to yield” or “to consent” is not in fact supported by Polybius’ usage.

The concrete meaning of συγκαταβαίνειν is “to go down together”; but in an extended sense it can mean either “to struggle with” or “to yield to,” depending on the context.⁶⁵ Polybius’ use of the word in a military context normally means “to struggle with” or “to engage in combat.”⁶⁶ But in 4.11.9 the opposite meaning appears. There Polybius describes Aratus’ defeat by the Aetolians at the battle of Caphyae in 220 B.C. and notes how the Achaeans had “yielded (συγκατέβησαν) the advantage” to the enemy by failing to attack them on level ground. Thus even while relating military affairs Polybius employs both meanings of the word. The context must decide between “to struggle with” and “to yield to.”

In a diplomatic context, Polybius’ use of the term generally carries the force of “to yield to” or “to consent to,” as Dubuisson has shown.⁶⁷ But, again, the opposite meaning can occur. In 5.67.3 Polybius is describing a course of negotiations between the envoys of Ptolemy IV and Antiochus III following the latter’s seizure of a portion of Coele-Syria. Ptolemy’s prime minister Sosibius has instructed the Egyptian envoys: συγκαταβαίνόντων εἰς τοὺς κατὰ μέρος . . . λόγους. But since these negotiations come to nothing (5.67.11), and eventually war ensues (5.68.1), the context makes it clear, in this instance at least, that Polybius’ use of συγκαταβαίνειν did not mean a surrender at discretion. The meaning must be, as Paton translates, “to consent to discuss in detail.”⁶⁸ We see, then, that the mere appearance of συγκαταβαίνειν in a diplomatic context in 3.10.1 is not sufficient to determine its meaning, since Polybius uses that term in both its meanings in diplomatic contexts as well as military ones.

A necessary corollary to Dubuisson’s argument is his assertion that the pronoun αὐτοὺς in 3.10.1 refers to the Romans, not the Carthaginians. Thus in his translation of 3.10.1 the Carthaginians conceded all points, “thinking that they (the Romans) would prevail, having justice on their

64. Dubuisson, “Procédés,” 124–25.

65. LSJ, 1662. Polybius also uses the word to mean “to condescend, stoop to” (26.1.3) and “to lower the demanded price” (21.26.12).

66. 1.11.13; 1.39.12; 3.89.8; 3.90.5; 3.108.7; 5.66.7. The usage is equivalent to the Latin *descendere in arenam* (LSJ, 1662) or *descendere in certamen* (Dubuisson, “Procédés,” 119; cf. Schweighäuser, *Lexicon*, 417).

67. Dubuisson, “Procédés,” 119–20, citing 4.45.4; 5.67.3; 7.4.3; 21.15.11; 24.15.10; 24.15.11; 28.8.10.

68. Given the inherent ambiguity of the word, even Paton’s translation may not carry the full force of Polybius’ expression, which perhaps could be rendered more precisely as “to resist in negotiation,” or “to contest in negotiation.” This would apply equally to 3.10.1, where νικήσαι τοῖς δικάτοις implies a combative attitude.

side" (ὕπολαμβάνοντες αὐτοὺς νικῆσιν τοῖς δικαίοις).⁶⁹ But Dubuisson's argument concerning αὐτοὺς is not convincing. He claims that the subject accusative in Greek, while not incorrect, would be "inutile" in indirect speech and has been mistakenly emended by the manuscript editors from αὐτοὺς to the reflexive αὐτοῦς under the influence of Latin usage. But the subject accusative in indirect speech is familiar in both Latin and Greek; and although Dubuisson is correct that the pronoun is not required with an infinitive, as it is in Latin, this does not render it "inutile," for it may be used to add emphasis in a contrasting expression.⁷⁰ And emphasis is probably exactly what Polybius intended, not only to make his own meaning clear but to underscore his agreement with the Carthaginian view that Rome's actions were unjust. Thus it was the Carthaginians (αὐτοὺς) who thought, according to Polybius, that they had right on their side.

In sum, Dubuisson's purely linguistic analysis cannot by itself establish the meaning of 3.10.1; only the larger context of the passage can decide the sense of συγκαταβαίνειν, as 4.11.9 and 5.67.3 demonstrate. But when the context of 3.10 is examined, Dubuisson's translation makes nonsense of Polybius' text and runs counter to the very point that Polybius strives to impress upon his readers throughout his discussion of the causality of the Hannibalic War. Dubuisson has the Carthaginians believe that the Romans would prevail in the negotiations because they (the Romans) had right on their side. But it is plain that Polybius' view was precisely that the Romans were not justified in their demands and were acting now contrary to their behavior in the past and in a fashion inconsistent with their obligations under the Treaty of Lutatius. Polybius had pointed out earlier that the Romans had "loyally observed the engagements the treaty imposed on them," specifically by refusing the *deditio* of Utica and the appeal from the Sardinian mercenaries (1.83.5–11). It was their change in behavior that drew Polybius' heavy censure (3.28.1–2):

For the second war, that in which they made the treaty about Sardinia, it is impossible to discover any reasonable pretext or cause. In this case everyone would agree that the Carthaginians, *contrary to all justice* [emphasis added] and merely because the occasion permitted it, were forced to evacuate Sardinia and pay the additional sum I mentioned.

For that reason, Polybius thought it would have been more appropriate for Hannibal in 220, instead of relying on pretexts concerning Saguntum, to have demanded "from the Romans the restitution of Sardinia, and of the tribute which they had so unjustly exacted, availing themselves of the misfortunes of Carthage" (3.15.10). Again, when discussing the issue of war-guilt for the Hannibalic War, Polybius observed: "If, however, we take the cause of the war to have been the robbery of Sardinia and the tribute then exacted, we must certainly confess that [Carthage] had good reason for

69. Dubuisson, "Procédés," 122. Otherwise, of course, Dubuisson's translation would involve the absurdity of the Carthaginians yielding on all points because they thought justice was on their (own) side. Cf. Walbank, "Roman Declaration," p. 16, n. 13.

70. A. Mauersberger, *Polybios-Lexikon* (Berlin, 1956), lists eight such uses of αὐτοὺς as a subject accusative with infinitive in Polybius (including the one at issue here): 1.68.9; 1.85.6; 3.10.1; 6.58.6; 8.33.3; 14.7.7; 31.27.8; and 33.9.1.

entering on the Hannibalic war" (3.30.4). That Polybius, at least, believed the Romans to be in the wrong in 237 could hardly be clearer.

Dubuisson's interpretation stands this on its head when he indicates that the Carthaginians thought the Romans were in the right and that Polybius understood this. The incongruity is especially difficult to accept because Polybius says explicitly in 3.10.3 that his discussion in 3.10.1–2 cannot be understood without reference to what he said earlier—that is, he believed himself to be giving a consistent picture of the crisis, a picture that depicted Roman behavior in 237 in a consistently negative light.⁷¹

Not only does Dubuisson's thesis introduce a startling inconsistency into Polybius' text, one that cannot be reconciled with Polybius' harsh condemnation of Rome in Book 3, but it does not even accord well with the facts of the crisis as related by Polybius. In order to sustain his charge of fraud, Dubuisson must posit some reasonable ground of complaint for the Romans other than Carthage's preparations to retake Sardinia. He suggests Carthage's attitude toward the Sardinian mercenaries, her depredations against Roman traders, and "peut-être d'autres questions encore dont le souvenir ne nous est pas parvenu."⁷² But it is hard to conceive how Carthage could have felt ill at ease about her behavior towards mercenaries who had revolted against her, massacred her representatives, and later had been driven from the island to Italy where presumably they remained until Carthage prepared to retake the island from the Sardinian natives. As for the issue of the traders, Polybius explicitly states, as we have seen, that the matter had been resolved some years before.⁷³ We have no ground, then, to conclude that the Carthaginians "ne se sentent pas, sur tous ces points, la conscience bien tranquille," in such a way that they would immediately concede all points.⁷⁴

There is a more serious objection here as well. If a Roman embassy appeared in Carthage with a *rerum repetitio*, Carthage surely will have realized that Sardinia was at stake, even if the demand for reparations was vague: the Roman ultimatum had followed hard upon Carthage's learning of Rome's expedition to occupy the island, her protest to Rome that Sardinia remained her possession, and her own preparations to regain it.⁷⁵ If on the other hand, the declaration of war was not conditional (that is, if an *indictio belli* actually occurred, as Rich believes⁷⁶), the gravity of the event

71. If my argument is correct, the citation of εἰς πᾶν συγκαταβαίνειν in LSJ, 1662, under Polyb. 3.10 must be amended. There the phrase is translated as "to agree to all conditions" on the strength of parallel instances in a diplomatic context. But I hope to have shown that this definition is untenable in the context of 3.10.

72. Dubuisson, "Procédés," 123.

73. Dubuisson's attempt (121) to resurrect this pretext on the strength of Appian is unconvincing. Polybius (3.28.2–3) shows that the merchant dispute had been resolved long before 237.

74. Dubuisson, "Procédés," 124.

75. Dubuisson, following Walbank ("Roman Declaration," 15–16; *Commentary*, 1.149 and 313–14, n. 20 above), believes that the war vote was conditional, presented by a Roman embassy as an ultimatum to Carthage if reparations for a wrong should be refused, and similar to the embassy reported by Polybius in 218 preliminary to the Hannibalic War (3.33.1–4). But it is worth noting that in 218 the reparations demanded were specific: the surrender of Hannibal and his advisors (3.20.6–8). We have no reason to believe that the procedure, if it was a *rerum repetitio*, would have been different in 237—that is, the relinquishment of Sardinia was demanded openly as the only alternative to war.

76. Rich, *Declaring War*, 67–69 (n. 18 above).

would make it plain that Sardinia was at stake. In either case, there is no suggestion of other issues over which Rome would have threatened war.

Finally, it is unlikely that Roman behavior in 237 would mirror the senate's actions in 149, when there was much to be gained by a gradual disarming of Carthage before the final demand for evacuation of the city. Nothing similar was to be expected in 237 since Carthage had not yet recovered Sardinia and therefore had nothing to relinquish. Dubuisson argues, however, that Rome did gain one advantage by her fraudulent diplomacy: a technical basis for a *iustum bellum*. On this view, Carthage's refusal to accept all conditions after a surrender into the good faith of the Romans provided Rome, as it later did in 149, a justification for war acceptable to the gods and apparently (cf. Polyb. 36.9.11–17) to a section of public opinion. But Carthage's preparations to retake Sardinia, which in Rome's eyes was an aggression against Roman property, already had provided a religiously acceptable basis for a *iustum bellum*. Legal trickery under these circumstances would have gained Rome nothing, practically or juridically.

* * * * *

We are left, then, with a more straightforward picture of the Sardinian crisis. Sardinia was vacant and the usefulness of obtaining it was obvious to the senate. Carthage had been ousted from possession for at least two (and probably three) years when Rome accepted the appeal from the expelled mercenaries. When the Carthaginians learned of Rome's expedition to occupy the island, they immediately protested and informed Rome of their intention to resume possession. The senate chose to view their preparations as aggression against Rome and arranged a declaration of war by the *populus*. The Carthaginians attempted to negotiate, convinced of the justice of their cause, but Rome peremptorily refused. Carthage was forced to yield and executed an addendum to the Treaty of Lutatius, formally surrendering any claim to Sardinia and paying Rome an additional indemnity for her trouble.

The absence in the tradition of any mention of Rome's legalistic pretext should come as no surprise. Roman writers involved in the *Kriegsschuldfragen* of the Punic Wars will have chosen pretexts designed to put Rome in the best light possible. Thus Roman historians relied on Carthage's alleged prior breach of the "Philinus Treaty" at Tarentum in 272 to justify Rome's crossing to Sicily in 264, rather than dealing with the complicated issues surrounding the acceptance of the Mamertines' appeal for aid. And this remained true even after Polybius demonstrated good reasons for believing that the "Philinus Treaty" never actually existed. The alleged breach by Carthage, although certainly an annalistic fiction, was evidently too good an accusation to abandon.⁷⁷ Similarly, the claim that Carthage had

77. Polyb. 3.26. Cf. Livy 21.10.8; *Per.* 14; Dio Cass. frag. 43.1. On the much-discussed problem of the "Philinus Treaty," see E. Badian, "Two Polybian Treaties," *Misc. Manni*, vol. 1 (Rome, 1979), 161–69; S. Albert, "Zum Philinosvertrag," *WJA* 4 (1978): 205–9; and, most recently, B. D. Hoyos, "Treaties True and False: The Error of Philinus of Agrigentum," *CQ* 35 (1985): 92–109.

treacherously seized Roman shipping, or that Sardinia had been surrendered in 241, made for simpler and more effective propaganda than the complicated and—for non-Romans—overly technical argument that Carthage had abandoned Sardinia to occupation by the first comer. A trace of the original Roman attitude may well be seen in Polybius' statement (1.88.10) that the Romans in 237 regarded the Carthaginian expedition to Sardinia as aggression against Rome: how could such a statement be made unless Rome was asserting a legally defensible claim to the island? But that assertion obviously had little moral appeal and was soon abandoned in favor of simpler and more defensible justifications.

Even at the time of the crisis itself, it is unlikely that the Romans bothered to elaborate their declaration of war by legal argument of any type—other than the blunt assertion of Carthaginian aggression against Roman interests.⁷⁸ Nor is there likely to have been much “diplomacy” in the modern sense: the possession of Sardinia was not an issue for discussion since it already had been relinquished by Carthage's long abandonment.⁷⁹ The attitude reveals the rigidity with which Rome could insist on narrow legalisms, similar to Postumius' formalism following the Caudine Forks disaster.

None of this affects the validity of Polybius' judgment on the morality of Roman action. I hope to have shown, however, that Rome was not merely exploiting the weakness of Carthage; had this been the case, an acceptance of the mercenaries' appeal in 240/39 would have suited her purposes far better. In 237 Carthage was stronger than she had been at any time since the conclusion of the First Punic War. Nor was it a question of diplomacy by fraud. The passage of time had severely impaired, in Roman eyes, Carthage's claim to Sardinia, so much so that a renewed appeal by the mercenaries could be accepted by Rome without any apparent concern on her part for infringement of third-party rights. Of course, motives for the seizure of Sardinia were plentiful; not the least of them was a preemption of any possible Carthaginian attempt to regain the island. And Roman defensiveness, which Jerzy Linderski reminds us can be a very aggressive business,⁸⁰ was a principal motive in 237. But Roman aggression in this instance at least is likely to have operated in a legal/religious framework, naturally informed by the senators' own concepts of the *ius civile*. Legalities, concern for a *iustum bellum*, and characteristic Roman intransigence were all in play, but there is no evidence of deceit.⁸¹

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78. In Book 1 Polybius mentions only the pretext of aggression against Rome; the claim that Carthage's capture of Italian merchants justified the seizure of Sardinia is reported and refuted in Book 3. But Polybius does not say in 3.28.3 that the merchant dispute was a pretext the Romans relied upon in 237 itself. His wording seems rather to point to the contemporary propaganda wars alluded to in 1.65.9.

79. The intransigence of the Senate in response to Carthage's “injury” to Roman interests may be reflected in the later tradition that Carthage sent repeated embassies to Rome to overcome the senate's insistence upon war: Dio Cass. frag. 46 (two embassies); Eutrop. 3.2.2 (one embassy); Oros. 4.12.2–3 (three embassies). See Rich, *Declaring War*, 70–71.

80. At “Discussion,” in *The Imperialism of Mid-Republican Rome*, ed. W. V. Harris (Rome, 1984), 189.

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