THE 'LEGES IUDICIARIAE' OF THE PRE-SULLAN ERA

MOMMSEN invented the notion that the ancient sources provide clear evidence for placing the pre-Sullan laws affecting the *iudicia publica* in two distinct categories, i.e. laws affecting courts in general (*leges iudiciariae*) and laws affecting one court (*leges repetundarum*, *maiestatis*, etc.). Fraccaro demolished it, arguing that the term *lex iudiciaria* had no such precise meaning in the ancient authors and that all the laws to which it was applied, before the Lex Aurelia of 70, were, in fact, *leges repetundarum*.[1] But Mommsen's conception is back in fashion. Discussion of the identity of the extortion law partly preserved on the Tarentum Fragment, first published in 1947, and the new picture of judicial developments prior to Sulla, provided by Kunkel in 1962, have revived his distinction—the first principally with regard to the schemes of Q. Servilius Caepio and C. Servilius Glaucia, the second with regard to those of Gaius Gracchus.[2] In two recent works this notion has again been challenged as regards the Gracchan legislation,[3] but that challenge has been ignored.[4] Yet Fraccaro's argument from the vagueness of the terms *lex iudiciaria* and *iudicia* still stands and can be strengthened, while the attempt to follow the terminology of the sources strictly and consistently according to Mommsen's distinction meets with insuperable difficulties. In what follows, I hope to demonstrate the serious vulnerability of the idea that there were such early laws regulating the whole system of public criminal courts.

[1] Th. Mommsen, *Ges. Schrift.* i. 19 ff.; iii. 339 ff.; *Staatsrecht*[3], 530–2. P. Fraccaro, 'Sulle "Leges iudiciariae" romane' (1919), *Opuscula*, ii (1957), 255 ff. Before him, J. L. Strachan-Davidson in *Problems of the Roman Criminal Law* (Oxford, 1912), ii. 81–4 had raised objections to the notion, but did not argue the case in any detail.

[2] On the Tarentum Fragment, see E. Badian, 'From the Gracchi to Sulla (1940–1959)', *Historia*, xi (1962), 197 ff., and literature reviewed there. W. Kunkel, 'Untersuchungen zur Entwicklung des römischen Kriminalverfahrens in vorsullanischer Zeit', *Abh. d. Bayer. Akad. d. Wiss.* (1962); *PW* s.v. 'quaestio' (1963). The notion of 'leges iudiciariae' in the sense discussed is accepted by Badian, Kunkel, and, since then, by P. Brunt, 'The *Equites* in the Late Republic', *2nd Int. Conf. of Econ. Hist. 1962*, i. 117 ff.; A. R. Hands, 'The Political Background of the *lex Acilia de Repetundis*', *Latomus*, xxiv (1965), 225 ff.; C. Meier, *Res Publica Amissa* (Wiesbaden, 1966); R. A. Baumann, *The Crimen Maiestatis in the Roman Republic and Augustan Principate* (Johannesburg, 1967), 38–9 (though in n. 13 he seems to regard Caepio's law as affecting only the extortion court); E. Gruen, *Roman Politics and the Criminal Courts 149–78 B.C.* (Cambridge, U.S.A., 1968); H. Mattingly, 'The Extortion Law of the Tabula Bembina', *J.R.S.* lx (1970), 160–2. C. Nicolet, *L'Ordre équestre à l'époque républicaine*, i (Paris, 1966) attacks the notion on p. 478, n. 32, but appears to accept it on pp. 536, 572. Since this paper was drafted, a posthumous work of A. H. M. Jones, *The Criminal Courts of the Roman Republic and Principate*, ed. J. A. Crook (Oxford, 1972) has presented the view that the ancient authorities used the term *lex iudiciaria* to indicate coverage of all the courts, but that they were wrong to apply this term to the laws of Gaius Gracchus, Caepio, and Glaucia, right in the case of Livius Drusus.

[3] Nicolet, *L'Ordre équestre*, 478, n. 32; Gruen, *Criminal Courts*, 87, 295.

[4] By Badian, 'Quaestiones Variae', *Historia*, xviii (1969), 475, and Mattingly, *J.R.S.* lx (1970), 154 ff.

I

First let us consider terminology. The phrase *lex iudiciaria* is found applied to the laws of C. Gracchus (Plutarch, *C. Gracch.* 5), Q. Servilius Caepio (Cicero, *de Inventione* 1. 92), M. Livius Drusus (Livy, *Epit.* 71), the Lex Aurelia of 70 (Asconius 17 C), and the Lex Pompeia of 55 (Cicero, *in Pisonem* 94).[1] The last two, as the survival of Leges Corneliae regulating the separate *quaestiones perpetuae* shows, were clearly general laws changing the selection of *iudices* for all the permanent courts which remained, in other respects, governed by Sulla's statutes. Now the idea of establishing an *album* of *iudices* to be used by all the courts was a reasonable and natural one once a fairly uniform series of courts existed, though even then various arrangements existed, according to the court involved, for selecting the *consilium* for a particular trial.[2] But are we entitled to assume, on the strength of the adjective *iudiciaria*, that laws regulating a plurality of *quaestiones* in a fundamental way were passed in the piecemeal situation that obtained before Sulla?

To illustrate the vagueness of the term *iudiciaria* in the ancient sources, Fraccaro cited Macrobius' application of it to the law of Tiberius Gracchus giving his land commissioners judicial powers, the same law that the Epitome of Livy calls his second *lex agraria*.[3] Similarly, when that Epitome says of Livius Drusus, 'legibus agrariis, frumentariis latis, iudiciariam quoque pertulit',[4] the term *lex iudiciaria* is clearly being used to indicate general judicial subject-matter, in contrast to the matter of the *leges agrariae* and *frumentariae*. More precise, at first glance, is the use of the phrase by Cicero where he is discussing, among other types of unsuccessful argument, that which causes offence: 'ut si quid apud equites Romanos cupidos iudicandi Caepionis legem iudiciariam laudet.'[5] Clearly here *iudiciaria* is meant to underline the fact that Caepio's law ran counter to equestrian ambitions regarding the courts, but it is by no means obvious that, without the antithetic 'cupidos iudicandi', the adjective *iudiciaria* by itself could even indicate a particular concern with the selection of *iudices*. Certainly nothing suggests that the word is meant to convey anything about the number of courts affected.

Elsewhere this term, indicating, as we have seen, general judicial subject-matter, is definitely applied to laws that affected only one court. Thus Florus, lamenting the corruption of Rome by the wealth coming from her provinces, offers this explanation of the *leges iudiciariae* of the Gracchan and Appuleian eras: 'unde iudiciariis legibus divolsus a senatu eques, nisi ex avaritia, ut vectigalia reipublicae atque ipsa iudicia in quaestu haberentur?' (1. 47. 9). Here, and in 2. 1. 6: 'a senatu in equitem translata iudiciorum potestas vectigalia ... supprimebat', he is clearly thinking of the laws governing the extortion court which gave the *publicani* a hold over senatorial governors and enabled them to usurp the profits of empire. Recently Nicolet, arguing that *lex iudiciaria* has no technical meaning, has pointed to Cicero's description of

[1] On the 'iudiciariae leges Caesaris' of Cicero, *Philip.* 1. 19, see p. 110.

[2] Strachan-Davidson, *Problems*, ii. 76 ff.

[3] Macrobius 3. 16. 6; Livy, *Epit.* 58. Fraccaro's interpretation (*Opuscula*, ii. 256–7) is certainly right. Macrobius is introducing a citation from a speech by Scipio Aemilianus against this law (*O.R.F.*[2], p. 133) which, as it contains an attack on the degeneracy of young Roman *nobiles*, can hardly have been opposing a transfer of the courts from senatorial *iudices*. What its relevance to the *lex agraria* was is obscure; on this see A. E. Astin, *Scipio Aemilianus* (Oxford, 1967), 239.

[4] *Epit.* 71.

[5] *De Inventione* 1. 92.

Antony's proposal to create a third decury as an attack on 'omnes iudiciariae leges Caesaris'.[1] The plural here shows that not only the Lex Julia (mentioned in the next chapter) which abolished the third decury for all the courts is being called a *lex iudiciaria*, but also Caesar's new statutes *de vi* and *de maiestate* mentioned a few chapters later.[2]

Statements that the laws of Gracchus, Caepio, and Drusus affected *iudicia* are often claimed in support of the notion that there were early laws regulating more than one court, and it is on the basis of this word alone that the Lex Plautia of 89 is usually added to the list.[3] Yet *iudicia* is even more of a broken reed than *lex iudiciaria*. The plural can indicate more than one trial or more than one panel of *iudices*, but the number of *quaestiones perpetuae* involved is not thereby revealed.[4] Cicero's remark about the Lex Acilia 'qua lege populus Romanus *de pecuniis repetundis* optimis *iudiciis* severissimisque iudicibus usus est' should warn us against inferring too much from such statements as Cicero's own concerning Caepio's law, 'a quo erant ipsi [equites Romani] propter *iudicia* abalienati'.[5]

These terms then do not tell us anything positive about the content of these pre-Sullan laws. Yet, it may be objected, is not their very vagueness suggestive? If we are told of pre-Sullan laws called *leges iudiciariae* and/or said to affect *iudicia* without any specification as to court, why should we not assume that they covered all courts, especially since they dealt with a matter relevant to all courts, i.e. the selection of *iudices*? One condition that must be met if this objection is to carry any weight at all is the existence of a number of *quaestiones perpetuae* in the period of these laws. For 'quaestiones extraordinariae' were sometimes (perhaps properly) before Gaius Gracchus, and regularly after him, established by *leges* or *plebiscita* which could hardly be bound by a preceding general *lex* or *plebiscitum* in fixing the qualifications of *iudices* (though normally an existing permanent *album* would be used at least as a basis for selection). Of course, the *iudices* could be changed by a subsequent general law of this kind (henceforth called here 'lex iudiciaria' to distinguish the modern concept from *lex iudiciaria* as used in the ancient sources), but that statute would thereby only have a very short-term effective existence, while most of the laws we are considering clearly had, or were expected to have, a long-term effect. The laws setting up the various *quaestiones perpetuae* could similarly define the *iudices* for their several courts without being restricted by any preceding law, but those qualifications could be changed by a subsequent law regulating the requirements for *iudices* of all courts, thereby giving the subsequent law a sphere of application of some duration. The pre-Sullan 'leges iudiciariae' (if they existed) must then have been aimed, like the later Lex Aurelia, Lex Pompeia, and Lex Julia, at the standing courts. This condition for the existence of such laws can be met. It is generally admitted that at least the permanent *quaestio de veneficiis* existed by the mid-nineties, and that for *peculatus* by 86; and a good

[1] Nicolet, *L'Ordre équestre*, 478, n. 32. Cicero, *Philip.* 1. 19.

[2] *Philip.* 1. 20, 22. Nicolet's argument is unaffected, even if the allusion in 23 to laws of Caesar 'quae iubent ei qui de vi itemque ei qui maiestatis damnatus sit aqua et igni interdici' is to Caesar's extortion law and not to two other laws (the view of Kunkel, *PW* 'quaestio', 749).

[3] Asconius 79 C. Cicero, in the passage Asconius is discussing, shows that the law affected the *iudices* who tried cases under another statute, but he does not show that more than the tribunal created by the Lex Varia was affected.

[4] So Fraccaro, *Opuscula*, ii. 281; M. I. Henderson, 'The Process *De Repetundis*', *J.R.S.* xli (1951), 82; Gruen, *Criminal Courts*, 87.

[5] *Verr.* 1. 51; *De Or.* 2. 199.

claim can be made out for the *ambitus* tribunal even earlier, before 116.[1] Kunkel's picture[2] of the development of the *quaestiones perpetuae* as a blend of features of the ancient but still vital private criminal *quaestiones*, with features of the 'quaestiones extraordinariae', which were developing in importance throughout the second century, makes it easy to imagine a quick development of the permanent courts after the first in 149. With this condition met, the existence of early 'leges iudiciariae' is just possible, but it is not very likely. Such laws surely presuppose a uniform system of *quaestiones*, and it is perhaps significant for earlier ways of thinking that, when Sulla finally created something approximating to such a system, he preferred to deal with at least some of the rules for constituting a *consilium* in the separate statutes regulating his courts, rather than reserve them for his 'lex iudiciaria', if indeed he passed one.[3]

II

Aside from the general argument just advanced, there are several important points that can be made against construing the laws of Gracchus, Caepio, Drusus, and Plautius Silvanus as general judiciary laws.

A. Any scheme that aims to include all of these 'leges iudiciariae' conflicts with the remarks of Cicero in the first of the Verrine orations at chaps. 37–8.

B. Any scheme that aims to include all of these 'leges iudiciariae' runs into self-contradiction.

C. Three of these laws, when interpreted as 'leges iudiciariae', conflict fatally with other ancient evidence, and there are difficulties about the fourth, that of Livius Drusus.

A. If Caepio's law of 106 and the Lex Plautia of 89 were general laws affecting all the standing courts (at least the courts for *ambitus*, extortion, and, perhaps, poisoning existed at the time of the first, and those for treason and peculation had been created by the date of the second), and no other general laws were passed between them or before Sulla's legislation to cancel their effect completely, then how could Cicero say that for almost fifty continuous years before the *iudicia* were transferred to the senate by Sulla, the *equester ordo* provided the *iudices*? For Caepio's law instituted mixed senatorial and equestrian panels (as the Livian tradition indicates) or, less probably (as Tacitus has it), senatorial ones, while the Lex Plautia furnished 'senatores cum equitibus'.[4] But can we be sure that no such 'leges iudiciariae' instituting equestrian panels throughout

[1] Kunkel, *PW* 'quaestio', 738–9; Gruen, *Criminal Courts*, 124–5; 261. Gruen (p. 177) suggests that a permanent *quaestio de peculatu* was set up by the faction of Saturninus and Glaucia *c.* 103. But Plutarch's evidence about the trial of the elder Lucullus for κλοπή is too vague to prove that a permanent court then existed. The only real *terminus ante quem* is provided by the evidence regarding Pompey's trial on that charge in 86, which shows that the decision of the *iudices* was binding and that a *iudex quaestionis* presided (Kunkel, *PW* 'quaestio', 739). Gruen thinks that a *terminus post* is provided by the special court set up to deal with Caepio and the gold of Tolosa. But the establishment of an extraordinary tribunal to deal with a public scandal does not, in itself, show that no standing court dealing with the general charge did not exist at the time (R. Seager, 'Lex Varia de Maiestate'. *Historia*, xvi [1967], 40–2; Badian, *Historia*, xviii [1969], 449–50).

[2] 'Untersuchungen zur Entwicklung des römischen Kriminalverfahrens', especially 61 ff.; *PW* 'quaestio', 731–7.

[3] Cicero, *2 Verr.* 2. 77. According to Kunkel (*PW* 'quaestio', 740) no source refers to such a Sullan 'lex iudiciaria', but Cicero in *Pro Cluentio* 55 could be referring to such a law.

[4] For Caepio's law, see the admirably brief summary in Gruen, *Criminal Courts*, 158, n. 9; Cicero *ap.* Asconius 79 C.

the permanent courts were passed in the time of Glaucia and Saturninus or soon afterwards, or, again, during the *Cinnana dominatio*? There can, of course, be no certainty on this point, but it is hard to believe that, given the high proportion of judicial matter in our sources for the period, we would not have heard of such a law of Glaucia or Saturninus or Cinna. After 100, it is unlikely that the *equites* would have risked their real gains in the extortion and treason court by initiating a law that would have broken their renewed concord with the senate. Similarly, the poverty-striken Cinnan regime would not have jeopardized what concord existed in Rome. Nor does Gruen's suggestion[1] that there were few trials in the 80s help much, even if it were secure in the face of our scanty evidence for the period.

Can we then blur the clear contrast Cicero appears to make between the behaviour of equestrian juries and that of senatorial ones, by insisting, with Balsdon, that he does not say that the *equites* sat *alone* on the juries?[2] This is very difficult to maintain, as 'cum equester ordo iudicaret' in ch. 38 clearly balances 'cum senatorius ordo iudicaret' at ch. 40 and must be equally exclusive in meaning. Or can we adopt the suggestion made by Schönbauer that Cicero only meant the extortion court?[3] But that idea is rendered untenable by the fact that the examples of corruption that Cicero gives in chapter 38 include trials for *peculatus* and *ambitus*.

The Ciceronian evidence stands firm against the idea that mixed panels could have been in use for some or all courts for *most* of the period between Gracchus and Sulla. The difficulty becomes even more intolerable if we assume, as has been suggested, that Gaius Gracchus instituted mixed panels in all but the extortion court.[4]

B. If Caepio's law of 106 instituted mixed or senatorial juries in all the permanent courts, then how can we interpret as a general law in the same sense the proposal of Livius Drusus in 91 transferring 'iudicia ab equitibus'?[5] The same problem arises with the Lex Plautia of 89 which was passed to relieve the *nobiles* 'cum equester ordo in iudiciis dominaretur'.[6] To be sure, since Caepio's law two permanent courts, those for *res repetundae* and *maiestas*, had been equipped with equestrian *iudices* by Glaucia and Saturninus; but if we assume that Drusus proposed and Plautius later passed laws changing the equestrian juries in these two courts, but not in all courts, have we really followed the lead of the terms *lex iudiciaria* and *iudicia* more than if we assumed that these laws each affected one court? It seems a Pyrrhic victory for the notion of the 'lex iudiciaria'.

Finally, it should be noted that the theory of Gaius Gracchus' mixed panels in all but the extortion court[7] conflicts with the view of Caepio's law as a general one, on the more probable hypothesis that the latter instituted mixed panels.

[1] *Criminal Courts*, 236, 298–303.

[2] J. P. V. D. Balsdon, 'History of the Extortion Court at Rome, 123–70 B.C.' *P.B.S.R.* xiv (1938), 101. The implication that the *equites* did sit alone is particularly strong if Madvig's reading is adopted (as it is by Klotz in the 1923 Teubner): '⟨in⟩ nullo iudice [equite Romano iudicante] ne tenuissima quidem suspicio . . .', instead of the Oxford text's '⟨in⟩ nullo, iudices, equite Romano iudicante . . .'

[3] E. Schönbauer, 'Die römische Repetundengesetzgebung und das neue Gesetzes-Fragment aus Tarent', *Anz. Wien.* xciii (1956), 37.

[4] This suggestion was made by Brunt, *2nd Int. Conf. of Econ. Hist. 1962*, i. 117 ff.

[5] Vell. Pat 2. 13; Livy, *Epit.* 70.

[6] Asconius 79 C. Its main purpose was to change the *iudices* of the special equestrian Varian tribunal. For a reaffirmation of this traditional view, see Badian, *Historia*, xviii (1969), 475.

[7] See n. 4.

C: 1. *The Law of Gaius Gracchus.* The case against the conception of the Gracchan *lex iudiciaria* as a law regulating the juries for more than one court can be stated briefly: there is no evidence that Gracchus sponsored more than one judiciary law,[1] and there is very good evidence that he was responsible for an extortion law. Appian records that the law was a reaction to scandalous acquittals of provincial governors on charges preferred by provincial embassies. When he goes on to speak of the knights receiving the power, hitherto reserved to senators, of sitting in judgement on all Romans and Italians as well as senators, he is giving his own interpretation (as the γάρ indicates) of the well-known remark attributed to Gaius that he had plunged a sword into the side of the senate:[2] Appian thought that Gracchus attacked the senate by removing all its judicial powers through which it had dominated the state. Poseidonios, much closer to the events, retailed this anecdote in connection with the judiciary law, having made it clear that he had a different interpretation of the law's political aim, i.e. to make the inferior element of the state (clearly, the *equites*) master of the superior (the senate).[3] He had in mind trials in which senators would be subject to equestrian judgement in the extortion court. His version is preferable to Appian's. Fragments of Gaius' speeches also declare his concern with the proper treatment of Rome's subjects and with the unimpeded flow of provincial wealth to the state treasury, both of which he could reasonably expect to follow on the more effective control of senatorial governors: there is his speech against the expulsion act of M. Junius Pennus, his speech on his return from Sardinia, his attack on the Lex Aufeia, his speech protesting about the mistreatment of Italians by Roman magistrates.[4]

The fact that Gracchus sponsored an extortion law then is clear from the literary sources alone, even without the identification (which I believe to be correct) of the Tabula Bembina as a piece of Gracchan legislation.[5]

That identification, of course, creates further difficulties for the idea of a general Gracchan judiciary law, for its definition of the qualifications for *iudices* is so thorough that it is very difficult to suppose that a general law about *iudices* preceded it.[6] Nor can such a law be supposed to have succeeded the extortion law, since all the references in our sources that can plausibly be referred to a general law concern that law of Gracchus that produced a political convulsion, and the inflammatory law must have been the one that first introduced *Gracchani iudices.*

There is, in fact, no real reason for supposing that Gracchus' programme extended to an overhaul of the whole judiciary system. The supposition rests on three points:

(*a*) The description of Gracchus' law as a *lex iudiciaria* and statements that it affected *iudicia.* I hope it has already been shown that this terminological

[1] In Tacitus, *Ann.* 12. 60, 'Sempronіae rogationes' is clearly a rhetorical plural, like 'Serviliae leges' which refers to the Lex Servilia Caepionis.

[2] Appian, *B.C.* 1. 22. 93; Diod. 34/5. 27 (Jacoby, *F.G.H.* iiA, no. 87 [Poseidonios] frag. 111e); 37. 9 (where it is explicitly connected with the judiciary law).

[3] Diod. 34/5. 25 (*F.G.H.* iiA, no. 87, frag. 111b). Appian, *B.C.* 1. 22. 95–6 preserves a trace of the same view.

[4] H. Malcovati, *O.R.F.*², pp. 179–80, 182, 187–8, 190–2.

[5] See Appendix A for a brief discussion of the arguments now presented by Mattingly, *J.R.S.* lx (1970), 154 ff. against this identification.

[6] See Kunkel, *PW* 'quaestio', 750 for various suggestions to meet this difficulty.

argument carries no independent weight and that these statements could all refer to an extortion law.

(*b*) Kunkel's demonstration that Sulla's set of courts was the result of a slow growth rooted in private criminal prosecution and third- and second-century special public tribunals made it reasonable, as we have said, to think that Gracchus either found or could easily have created a series of standing courts. Kunkel himself favoured the latter alternative[1]—for which there is no actual evidence, while Brunt maintained the former on the basis of Cicero's statement in the *Brutus* 106: 'nam et quaestiones perpetuae hoc adulescente [speaking of C. Papirius Carbo] constitutae sunt quae antea nullae fuerunt'. This passage in fact proves nothing of the kind, but rather, as Gruen puts it, 'means that the institution of *quaestiones perpetuae* dated to 149'.[2] There is no reason to think that there was any other permanent *quaestio* in existence at the time of C. Gracchus' legislation: the motive that often prompts the exploitation of Kunkel's theory to this effect is to be found in the well-known conflict of sources that constitutes

(*c*) As regards the dissenting voice of Plutarch about the status of Gracchus' *iudices* (*Gracch.* 5; *Compar.* 2) and the information about a draft of *equites* into the senate provided by Livy's *Epitome* 60, Strachan-Davidson long ago argued that these sources were not worth saving.[3] He pointed out that they contradict each other, the earlier statements of Cicero and Varro, and the circumstantial accounts of Appian and Diodorus. Anyone surveying the history of the jury changes between Gracchus and Sulla should not be surprised that later sources were unclear about what the different laws provided: Plutarch's version of Gracchus' arrangements may well have been realized in the mixed juries of the Lex Servilia Caepionis; the Epitome's in Sulla's dispositions.

The old way of saving these sources was to take what they present as Gracchus' final law and turn these measures into proposals or laws later repealed and replaced by Gracchus himself, and the interpretation of the *lex ne quis iudicio circumveniatur* that made it apply to senatorial jurors seemed to confirm the idea. But the *lex ne quis* was shown to have had a different target (see p. 116). Happily, the notion of multiple courts arrived to suggest another mode of rescue: a 'lex iudiciaria' giving all courts but the extortion court panels including senators. All that can be said for these ideas is that they show a chivalrous attitude towards Plutarch, and, to an extent, the Epitome. Gruen's rejection of the idea of a Gracchan 'lex iudiciaria' deserves acceptance.[4]

2. *Caepio's Law.* The Lex Servilia Glauciae, as all agree, was an extortion law. It therefore can only have cancelled Caepio's law completely if that too was an extortion law. But Caepio's law *was* completely dead by the mid nineties, for at the time of Norbanus' trial for *maiestas*, Antonius, in defending him, had to *renew* the hatred of the *equites* for the elder Caepio.[5] In fact, Caepio's law was dead by 100, for Cicero tells us that at the time of the fall of Saturninus and Glaucia the *equites* 'magnam partem rei publicae atque omnem dignitatem iudiciorum tenebant'. The contrast between 'magnam partem' and 'omnem' here makes it clear that all the courts were equestrian at this time.[6] Welcome

[1] Kunkel, *PW* 'quaestio', 738.

[2] Gruen, *Criminal Courts*, 87 n. 44.

[3] Strachan-Davidson, *Problems*, ii. 77–8.

[4] Gruen, *Criminal Courts*, 86–90, 294–5. I have substantially repeated his arguments here under (*b*) and (*c*) only because they have not convinced Badian nor reached Mattingly (see p. 108 n. 4).

[5] Cicero, *De Orat.* 2. 199.

[6] Cicero, *Rab. Perd.* 20. The inference is drawn by A. E. Douglas in his edition of Cicero's *Brutus* (Oxford, 1966), 124.

confirmation comes from the younger Caepio's attempt to have Marcius Philippus condemned before the *quaestio de ambitu* in 92 as the opening move in his support of equestrian juries against the friends of the condemned Rutilius. Clearly that *quaestio* was manned with equestrian *iudices* at the time.[1] The passage in the First Verrine Oration already discussed also suggests that Caepio's jury arrangements were short-lived, so that it is hard to avoid the conclusion that Glaucia's law cancelled them and that Caepio did not directly regulate the panels for any but the extortion court.

Gruen[2] tries to explain this evidence by saying that Glaucia's extortion law supplanted Caepio's general law *de facto*, because future special and standing *quaestiones* would naturally use the newly established panel of *iudices*. That, of course, would still leave the *quaestio de ambitu* and perhaps one *de veneficiis* (if it already existed) with *iudices* determined by Caepio's supposed general law. In any case, if there were also in existence a law establishing a mixed (or senatorial) panel, why should it have been ignored, even for new courts, in preference to the arrangements set up for two particular courts by two laws (Glaucia's extortion law and Saturninus' treason law) whose authors were dead and whose supporters were politically defeated early in the next decade? It is true that the *equites* remained conscious of what they had gained from these two laws, but the *concordia ordinum* achieved in 100 dictated no new moves by either side: the senate did not stir until the condemnation of Rutilius Rufus; the *equites* would hardly have risked their control of two vital courts by quibbling over the others.

Finally, it is a curious fact that among those who support the idea that Caepio's law was a 'lex iudiciaria' affecting juries throughout the system can be found scholars who regard the Lex Servilia of *Pro Balbo* 54 as the Lex Servilia Caepionis.[3] Yet Cicero makes it clear that the Lex Servilia there discussed was an extortion law when he says that the law offered and had actually conferred rewards for successful prosecution on non-citizens, and that these rewards were only obtainable 'ex senatoris calamitate'. Now prosecution through the efforts of non-citizens was always the distinctive mark of the extortion court, while actual accusation by them was probably an exclusive feature of the pre-Sullan extortion laws:[4] we find it on the Tabula Bembina and Tarentum Fragment. Are we to believe that the Lex Servilia Caepionis regulated all the courts as regards the selection of *iudices* and then added

[1] Florus 2. 5. 5. Gruen, *Criminal Courts*, 206 discusses the trial.

[2] Gruen, *Criminal Courts*, 166. The whole problem is simply ignored by E. J. Weinrib, 'The Judiciary Law of M. Livius Drusus (tr. pl. 91 B.C.)', *Historia*, xix (1970), 414 ff.

[3] Badian, 'Lex Servilia', *C.R.* iv (1954), 101 defended by Gruen, 'Cicero *Pro Balbo* 54', *C.R.* xix (1969), 8 ff. That this identification implies that Caepio's law was a *lex repetundarum* is noted now by Jones, *Criminal Courts*, 53.

[4] Cicero, *Div. in Caec.* 18. Schönbauer ('Das Gesetzes-Fragment aus Tarent in neuer Schau', *IURA* vii [1956], 111 argues that these rewards could be given for successful prosecution in trials for *ambitus* and *maiestas* which could fit Cicero's 'ex senatoris calamitate'—but he does not prove the point: he cites Cicero, *Pro Balbo* 57 and *Pro Cluentio* 98 as examples of rewards whereby what the man condemned for *ambitus* loses the accuser gains, but neither is an example of a reward to a non-citizen (Balbus could have acquired his superior tribe some time after his enfranchisement). In fact, on p. 114, Schonbauer limits the supposed awards concerning *maiestas* to non-citizen *informers*. But Cicero makes it very clear that those rewarded under the Lex Servilia were *accusers*. Brunt ('Provincial Maladministration under the Early Principate,' *Historia*, x [1961], 193–4) thinks that *peregrini* could prosecute under other criminal laws, but does not prove it even for the Empire.

regulations about prosecutors that only applied to the extortion court? Of course, if the Lex Servilia in *Pro Balbo* 54 is the Lex Servilia Glauciae,[1] this passage does not help to confirm that Caepio's law was an extortion law. But the other arguments can stand on their own.

3. *The Proposal of Livius Drusus.* According to Appian and Diodorus, the judiciary law proposed by the tribune of 91 contained a provision for the prosecution of *iudices* who took bribes.[2] At one point in his account, Appian indicates that the *iudices* liable under this provision were new ex-equestrian senators, but Cicero makes it clear that actual *equites* were liable under it.[3] This clause of the law provides a clue as to the nature of the law itself. For the extortion court was certainly the normal one for such prosecutions after Sulla, and Cicero even uses the technical name for the offence of extortion when he refers to the evil that Drusus attacked as 'hoc genus *pecuniae capiendae*'.[4] In fact, the Tabula Bembina (line 28), by explicitly giving its equestrian *iudices* immunity from the extortion law, suggests that, in the period before Drusus, senatorial *iudices* had been prosecuted under the extortion law. Thus, if the *quaestio* that Drusus forged as a weapon against equestrian jurors was, as our two sources say, part of his judiciary law, that law must have been an extortion law. Though Drusus did not interfere with the general immunity of non-senators from that charge, he had a precedent in Glaucia's law for introducing one clause affecting *equites* into a law the rest of which only affected senators.[5]

Yet it has been argued, on the basis of the parallel drawn by Cicero between the trial of the *eques* Cluentius under the *lex ne quis iudicio circumveniatur* and the attempt of Drusus, that Drusus' *quaestio* affecting *equites* was to be created under an extension of the Lex Sempronia *ne quis iudicio circumveniatur*.[6] Against this theory stands the unanimity of our sources in crediting Drusus with only one judicial proposal,[7] and the fact that Cicero, just before drawing the parallel in *Pro Cluentio* 154, describes Drusus' measure as one aimed at 'ei qui rem iudicassent', while the *lex ne quis*, as is now agreed, was directed against the use of improper means to ensure capital conviction and covered the reception of bribes by jurors only incidentally, in the particular case where a bought vote amounted to co-operation in judicial murder.[8] What then is the point of Cicero's parallel? I suggest that Cicero brings in Drusus' proposal at this point in the *Pro Cluentio* neither as an earlier attempt to make the *equester ordo* vulnerable to the very charge on which Cluentius was being tried, nor, at the other extreme, as a previous threat to equestrian immunity of a totally different kind.[9] Cicero,

[1] For discussion of this problem, see Appendix B.

[2] Appian *B.C.* 1. 35. 158; Diod. 37. 10.

[3] *Pro Cluentio* 153; *Rab. Post.* 16.

[4] *Pro Cluentio* 104, 114; *Rab. Post.* 16.

[5] *Rab. Post.* 8–9, 12.

[6] U. Ewins, 'The Lex "Ne Quis Iudicio Circumveniatur"', *J.R.S.* 1 (1960), 104–6; E. Gabba, 'Osservazioni sulla legge giudiziaria di M. Livio Druso', *Par. Pass.* xi (1956), 367 ff.; Gruen, *Criminal Courts*, 208–9.

[7] Particularly significant is the singular in Livy *Epit.* 71: 'legibus agrariis frumentariisque latis, *iudiciariam* quoque pertulit'.

[8] N. J. Miners, 'The Lex Sempronia ne quis iudicio circumueniatur', *C.Q.* viii (1958), 241; Ewins, *J.R.S.* 1 (1960), 94.

[9] The latter is the suggestion of Weinrib, *Historia*, xix (1970), 422 n. 31, who adduces several arguments against the view that Drusus' bribery measure was an extension of the *lex ne quis* (pp. 419–25). The argument on p. 424 that 'ille *nihil aliud* ageret . . . nisi ut ei qui rem iudicassent huiusce modi quaestionibus in iudicium vocarentur' (*Pro Clu.* 153) shows that the sole, or at least primary, purpose of Drusus' measure was to extend liability to *iudices* is vulnerable: Cicero means no more than that Drusus' measure would have the *same* effect as the precedent created by Cluentius' conviction, i.e. the

at this point in his speech, is trying to present the attempt to convict the *eques* Cluentius under a clause that only covered senators, as a threat, not merely to the *equester ordo* as a whole, but, in particular, to the equestrian *iudices* who represented two-thirds of Cluentius' jury. This appeal to the *iudices* explains, in fact, not only the parallel drawn with Drusus' proposal which actually attacked *iudices*, but the more curious representation of the *lex ne quis* as a weapon that Sulla *might* have used against his old enemies, the *veteres iudices*, and that corrupt senators would now *like* to use against *iudices* in particular.[1] Cicero's parallel then does not count against the other evidence that Drusus treated the crime of accepting bribes as a *iudex* as one type of extortion included in his judiciary law. This evidence, and the tradition that Drusus was motivated in proposing his judiciary law by the condemnation of Rutilius Rufus and the threatened trial of Aemilius Scaurus, both for extortion,[2] make it difficult to resist the conclusion that Drusus' proposal was an extortion law. The obscure passage in *De Officiis* 2. 75 in which Cicero, discussing the ineffectiveness of extortion laws and trials in curbing Rome's irresponsible treatment of her subjects, describes the Social War as 'propter iudiciorum metum excitatum' suggests that the *iudicia* feared by the *equites* were for extortion. Diodorus[3] also suggests that the *equites* were to be prosecuted for taking bribes under a law that aimed at protecting the provinces in two ways: first by protecting innocent governors, and second by allowing *publicani* who mistreated the provinces to be caught (if not directly for extortion like senators) through trials for taking bribes as *iudices*—presumably because they would have to be bribed to acquit just governors.

Yet it may be thought strange to suggest that neither Caepio nor Drusus tried to alter the *iudices* serving on the other existing permanent courts (perhaps two for Caepio, four for Drusus). According to Cicero, Licinius Crassus' famous speech supporting the Lex Servilia Caepionis contained some purple passages about the capital punishment inflicted on senators by the *factio accusatorum* and the *factio iudicum*.[4] It is likely that he was thinking of the Mamilian *quaestio extraordinaria* and its *Gracchani iudices* as well as the extortion tribunal.[5] Of course, no extraordinary court like the Mamilian one nor any permanent one not yet in existence could be bound in advance; but would not Caepio and later Drusus have made some attempt to regulate juries throughout the criminal system, especially for the permanent courts already established? Yet, as we have seen, there is strong evidence for their laws being *leges repetundarum*.

A possible solution is suggested by considering how the Mamilian *rogatio*

putting of equestrian jurors before tribunals. The argument that Cicero would have drawn a closer parallel with Cluentius' prosecution if he could have, disappears if my suggestion that Cicero's rhetoric is addressed to the *iudices* at this point is correct.

[1] In *Pro Rabirio Postumo* 14 ff. Cicero similarly uses the parallel with Drusus' bribery provision to bring home to the equestrian *iudices* the threat to the *equester ordo* that the conviction of Rabirius would pose. The distortions there are less, probably because Cato's attempt in 61 to make equestrian jurors liable for taking bribes under the extortion law had made the threat seem real enough, without further rhetoric, in 54.

[2] Florus 2. 5; Asconius 21 C.

[3] Diod. 37. 10. 3. The passage is difficult to interpret (Weinrib, *Hist.* xix [1970], 419, n. 21), but it is likely that 'the plunderers of the provinces' who would be brought to account before courts for bribery are *equites* as the whole passage is about the senate betraying its own interests by opposing Drusus' legislation.

[4] Cicero, *Brutus* 164; *De Orat.* 1. 225.

[5] So Meier, *Res Publica Amissa*, 81, n. 102.

defined its *Gracchani iudices*. Perhaps it neither repeated the relevant clause of the Gracchan extortion law nor referred to that statute by name, but simply ordered the *quaesitores* to use the same panel as was drawn up by the *praetor de repetundis*. If the permanent courts already in existence had their *iudices* defined in this way by their governing statutes, then a change of *iudices* in an extortion law would clearly affect other courts in several different ways. For extraordinary tribunals, not only would a new *album* be made available, but the previous one would cease to exist, and it would clearly be much easier to use the available *iudices* rather than draw up special arrangements for selecting jurors who would only serve for a short time. For new permanent courts there might be more point in making separate arrangements for the selection of *iudices*, but for them, as for the new special tribunals, the custom here posited of defining *iudices* by reference to the extortion court would carry some weight as a precedent. For the existing permanent courts, a new extortion law with altered *iudices* would effectively change the *iudices* of those courts, whose statutes, on this theory, referred to the extortion panel in defining its own. This hypothesis would make it possible to abandon the notion of pre-Sullan 'leges iudiciariae' in the modern sense, while keeping the idea of generality in the aims of Caepio and Drusus. It would also explain how Glaucia was able to bind the *equites* to him by his *lex repetundarum*.[1]

Of course, if we suppose that Drusus could reasonably have expected that his extortion law would affect qualifications for being a *iudex* in all the criminal courts, we are immediately faced by the old problem, most recently discussed by Weinrib, of the definition of Drusus' *iudices*. For if Drusus provided machinery for having *equites* accused, not of the variety of offences included in the *lex ne quis iudicio circumveniatur*, but precisely for taking bribes when serving as *iudices*, he must have had some equestrian *iudices* in mind. Weinrib has shown that these cannot be jurors of a remote future pessimistically imagined by Drusus, nor private *iudices*, nor the past *iudices* who condemned Rutilius Rufus without needing bribes to stimulate their political hostility.[2] As Drusus therefore expected equestrian *iudices* to sit in criminal cases after the passage of his law, he must have equipped his extortion court with mixed panels of *equites* and senators replacing Glaucia's purely equestrian ones. But Weinrib prefers to believe that Drusus proposed a 'lex iudiciaria' providing for exclusively senatorial juries (a mixture of old senators and newly-adlected *equites*) on the courts dealing with extortion, treason, and peculation, but leaving the other permanent courts (those for *ambitus* and murder) with equestrian *iudices* who now, however, became liable to prosecutions for bribery under his law.[3] This view shares the disadvantage of any 'lex iudiciaria' theory, i.e. that it ignores the evidence connecting this bribery clause with extortion. A more satisfactory way of keeping purely senatorial juries in Drusus' plans would be to assume that they were prescribed in his extortion law and that that law did not affect other courts whose equestrian *iudices* would now be liable to prosecutions for bribery. But both of these solutions make Drusus' bribery provision

[1] Cicero, *Brutus* 224. The explanation suggested in the text would run into a difficulty if Saturninus' *maiestas* law preceded Glaucia's extortion law. But that is unlikely.

[2] Weinrib, *Historia*, xix (1970), 426–33.

[3] Because he ignores the evidence for the restitution of equestrian juries by 100, Weinrib assumes that the courts for *ambitus* and murder had mixed panels at this time.

inapplicable to the *iudices* of his extortion court and that runs counter to the evidence of Diodorus (discussed on p. 117) and apparently to that of Cicero, *De Officiis* 2. 75, who seems to think that the cancellation of the arrangements for these bribery trials led to worse exploitation of Rome's subjects.

In fact, there is little to be said against the notion of mixed juries being in Drusus' proposal, and much to be said in its favour, especially if that would involve repeating the arrangements in Caepio's law, for Licinius Crassus passionately supported both measures.

That Livius Drusus' proposal provided 'ut aequa parte iudicia penes senatum et equestrem ordinem essent' is attested by Livy's *Epitome* 71 and does not conflict with the statement of Velleius Paterculus (our best source for these matters) that Drusus *wished* to give the jurisdiction to the senate.[1] In fact, echoes of this statement of intention are found in the Epitome as in Appian.[2] But Appian and the author of *de viris illustribus* indicate that Drusus provided for an all-senatorial *album* to be filled by the senate amplified by the adlection of 300 *equites*.[3] Appian, however, is very confused in this passage: he draws an erroneous inference about the usual size of the senate at that time, and concocts a false explanation for the fact that equestrian *iudices* before Drusus' proposal were not prosecuted for taking bribes. On the very subject of the composition of the juries he contradicts himself, saying at one point that the *iudices* liable under the bribery provision were the new ex-equestrian senators, at another that those who remained *equites* were liable. Finally, he gives away his total confusion by making the *equites* suspect that Drusus' measure was the prelude to the transfer of the courts to the senate alone, implying that the measure allowed a share in the courts to non-senators.[4]

We cannot tell what Livy said. His account, reflected in the Epitome and in *de viris illustribus*, and perhaps more indirectly in this part of Appian's and Velleius' account,[5] could have mentioned adlection *and* mixed panels (which would explain Appian's confusion), or combined adlection with senatorial panels, which indeed could not have been established without an increase in the numbers of the senate even for the extortion court alone. But there is evidence suggesting that if he gave the latter version he was wrong, because Drusus did not propose an enlargement of the senate. Cicero reports the exchange between L. Marcius Philippus and L. Licinius Crassus in September of 91 which culminated in a vote of confidence for the senate against the attacks of Philippus.[6] The occasion for this plenary session of the senate called by Drusus was a speech made by the consul Philippus at a *contio* in which he said that he could not govern the state with the present senate as his *consilium*. Valerius Maximus only makes the point of the Ciceronian passage more

[1] Vell. Pat. 2. 13. 2. For his credibility in these matters, see Balsdon, *P.B.S.R.* xiv (1938), 100.

[2] Appian, *B.C.* 1. 35 .157: σαφῶς μὲν οὐ δυνάμενος ἐς τὴν βουλὴν ἐπανενεγκεῖν τὰ δικαστήρια; Livy, *Epit.* 70: 'Senatus . . . omni vi eniti coepit ut ad se iudicia transferret . . .'

[3] Appian, *B.C.* 1. 35. 158; *de viris illustribus* 66. 10.

[4] Appian, *B.C.* 1. 35. 160: ὅτι . . . πρὸς τὸ μέλλον ἐς τὴν βουλὴν μόνην τὰ δικαστηρια ἀπὸ τῶν ἱππέων περιφέροιτο. Weinrib, *Historia*, xix (1970), 433 cannot be right that the antithesis implied in μόνην is that between some courts and all courts, for Appian says simply τὰ δικαστήρια.

[5] I. Haug, 'Der römische Bundesgenossenkrieg 91–88 v. Chr. bei Titus Livius', *Würzburger Jahrbücher für die Altertumswissenschaft*, ii (1947) 104, 125 ff., 122 ff., 130 ff.

[6] Cicero, *De Orat.* 3. 2 ff.

explicit when he writes of Philippus: 'segnitiem pro rostris exprobrans alio sibi senatu opus esse dixit.'[1] Now this attack on the existing senate and Crassus' defence of it would both have been absurd, as Strachan-Davidson saw long ago, if the point of Drusus' proposal was to change the existing senate by raising it to twice its number.[2] Moreover, it is too little noted that Philippus did not say this in the senate but before the people, and that Crassus, according to Cicero, accused him of robbing the senate of its hereditary *dignitas*. Perhaps he was threatening reliance on another *ordo*—Sulpicius Rufus' ἀντισύγκλητον comes to mind. He might, at this late date, have joined the campaign of his former enemy, the younger Caepio, to keep the courts for the *equites*, or he might have threatened to propose an adlection of outsiders to the senate. Such a threat could explain how this notion of adlection crept into our sources as a part of Drusus' programme.

Drusus' *lex iudiciaria* then was an extortion law, providing mixed juries for the extortion court, and perhaps indirectly changing the juries on the other existing permanent criminal courts and giving a lead to new special or permanent courts.[3]

4. *The Lex Plautia.* The Lex Plautia of 89 was certainly concerned with altering the *iudices* in trials under another statute. But the only trials it is actually stated to have affected are those under the Lex Varia, and there may well have been no other court in operation at the time.[4] To interpret the Lex Plautia as a general law introducing mixed courts throughout the system is enough to render Cicero's discussion in the First Verrine unintelligible (as argued on pp. 111–12 above).

Our conclusion must be that neither the terminology of the ancient sources nor the evidence they produce supports the idea that, in the period before Sulla, there were passed a number of 'leges iudiciariae', that is, laws governing the public criminal courts generally in regard to the *album* of *iudices* (and perhaps other common matters). The Lex Servilia Caepionis was an extortion law, and, as such, was cancelled by the Lex Servilia Glauciae. The Lex Plautia simply changed the *iudices* for 89 in trials under the Lex Varia. The short-lived law of Livius Drusus, devised in reaction to the condemnation of Rutilius Rufus on the extortion charge, was an extortion law. *Quaestiones extraordinariae* and new *quaestiones perpetuae* would have had their *iudices* defined in the statutes governing them, which would normally have used the extortion court as a model. If these statutes actually regulated the constitution of the

[1] Val. Max. 6. 2. 2.

[2] Strachan-Davidson, *Problems*, ii. 79.

[3] I have omitted from the text consideration of Weinrib's suggestion (*Hist.* xix [1970], 417, 419) that the senatorial invalidation of Drusus' judiciary law can only be explained if it provided for an adlection which was unpalatable to that body. But it is a moot point whether the senate would prefer mixed juries to an adlection. In any case, Diodorus and Velleius both indicate that the senate was sacrificing its own interests as regards the courts in rejecting Drusus' legislation. The grounds for invalidation applied to all his laws, which in fact were passed *uno sortitore*, and so all the laws had to be invalidated at once (A. W. Lintott, *Violence in Republican Rome* [Oxford, 1968], 141–2).

[4] Cicero, *Brutus* 304. For the nature of the Lex Varia, see R. Seager, 'Lex Varia de Maiestate', *Historia*, xvi (1967), 37 ff. and Badian, *Historia*, xviii (1969), 447 ff., against Gruen, 'The Lex Varia', *J.R.S.* lv (1965), 59 ff. It is too often forgotten that Cicero has a special motive for describing it as the Lex Varia *de maiestate* in the *Pro Cornelio*. Cicero, as the preceding fragment shows (*ap.* Asconius 78 C), was appealing to the mixed senatorial/equestrian jury for acquittal and draws a parallel between Cornelius' trial *de maiestate* and that of the odious Pomponius (who, presumably, was acquitted).

album for their individual courts by reference to that available to the *praetor de repetundis*, already existing permanent courts would also have been affected by a new extortion law changing that court's *album*. But the reason why the ancient sources refer to these extortion laws by such a general term as *lex iudiciaria* is that these extortion laws were the laws concerning judicial matters that had the greatest political significance: they affected the fate of the most important members of the senatorial class and the profits and power of the *equester ordo*.[1]

Somerville College, Oxford MIRIAM T. GRIFFIN

APPENDIX A

Mattingly has recently (*J.R.S.* lx [1970], 154 ff.) challenged the view, now almost universally accepted, that the extortion law on the Tabula Bembina is part of the legislation initiated by Gaius Gracchus. Having proved, on the basis of his re-examination of the inscription, that the clauses of an extortion law preserved on the Tarentum Fragment are the same as four chapters of the law on the Tabula Bembina (*J.R.S.* lix [1969], 129 ff.), he now argues that both inscriptions preserve parts of the same law and that the law is the Lex Servilia Glauciae.

The case for thinking the laws identical (as opposed to thinking that certain clauses have been taken over from one extortion law to another) is not very strong. It is not necessarily very strange to find the *praetor peregrinus* still involved in publishing the law on the Tarentum Fragment among Italian states and client kings as well as at Rome, even if a *praetor repetundis* had been in charge of the court since the law on the Tabula Bembina took effect. In any case, Daube (*J.R.S.* xli [1951], 69) long ago expressed doubts about the complete termination of the peregrine praetor's connection with this court so early.

But even if the laws are identical, why must we prefer the growing consensus over the dating of the Lex Tarentina to 106–100 B.C. to the long-established consensus over the Gracchan dating of the Tabula Bembina? After all, one ingredient in the first consensus is the assumption that the Lex Tarentina cannot be the Gracchan law, because that is to be found on the Tabula Bembina.

Mattingly tries to establish his preference for a later dating of the Tabula Bembina in two ways: (*a*) by suggesting indications on that inscribed law of a date later than Gracchus' tribunates of 123 and 122: (*b*) by attacking the traditional arguments for the orthodox Gracchan dating. The arguments in group (*a*) on pp. 156–8 are very weak. The Lex Cassia of 104 can only serve as a *terminus post quem* if *iudicium populi*, not *iudicium publicum* is read in line 13, and this Mattingly is unwilling to do because he accepts the identity of the clause in line 13 with that in line 11 where *iudicium publicum* is preserved. It is more likely that these clauses refer to such disqualifications of condemned men required in certain laws setting up criminal courts (cf. the Tabula Bantina,

[1] I am indebted for many helpful criticisms and suggestions to Mrs. Ursula Hall (*née* Ewins) and Mr. Martin Frederiksen.

ll. 1–6). The argument for equating the arrangements whereby the actual panel of *iudices* for each trial was chosen, as given on the Tabula Bembina, with those described in *Pro Plancio* 41 depends on a double correction of the manuscripts of Cicero which there is no other reason to suspect. In any case, the corrections would only serve Mattingly's ends if it were certain that in that passage Cicero is discussing Glaucia's law. But Kunkel (*PW* s.v. 'quaestio', 751) may be right to follow Mommsen in regarding what is described there as a proposal that failed. We know, for example, that in 70 there was talk of a return to purely equestrian juries (Cicero, *Verr.* 1. 50): that would suit the 'nuper' in *Pro Plancio* 41.

Nor are the arguments in group (*b*) very compelling (pp. 159–68).

1. Cicero tells us that Glaucia's law first introduced *comperendinatio*. Before that a case could be decided in one session or postponed. Mattingly tries to revive Carcopino's idea that the Tabula Bembina's penalties for repeated adjournments were '*comperendinatio* in embryo': Balsdon's objection to that view, conveniently quoted by Mattingly (p. 159), is still as unanswerable as it is elegant.

2. The law on the Tabula Bembina refers to the Lex Calpurnia of 149 and to one other extortion law, a Lex Junia. It does not mention the Lex Acilia which, according to Cicero, was a law earlier than Glaucia's equipping the extortion court with equestrian *iudices*. Nor is the Lex Servilia Caepionis mentioned. The obvious explanation is that the law on the Tabula Bembina is earlier than the second of the laws not mentioned, and identical with the first which the stemma of the Acilii allows to be set in the Gracchan era. Mattingly instead argues that these laws are not mentioned because they were not extortion laws, but 'leges iudiciariae'. He identifies the Lex Acilia with Gracchus' 'general' law and denies that he passed an extortion law. I hope I have shown that there probably was no Gracchan general law but that Gracchus was certainly responsible for an extortion law, and that Caepio's law was probably an extortion law too.

3. Cicero tells us that Glaucia's law made it possible to prosecute *equites* who held funds embezzled by senatorial governors after the conviction of a senator for extortion and the fulfilment of certain other conditions (*Pro Rab. Post.* 8 ff.). But there seems to be no trace of such equestrian liability in the Tabula Bembina, where in fact the immunity of equestrian *iudices* is carefully noted (line 28). Mattingly attempts to find traces of equestrian liability, first in lines 61–2 and 67 where 'pecunia quae in aerarium posita est' seems to be distinguished from 'pecunia redacta'. The latter, Mattingly suggests on the basis of *redigeretur* in *Pro Rabirio Postumo* 37, is money reclaimed from accessories just as Glaucia's law required. In fact, the *pecunia redacta* in line 62 could be the same as that *posita* in 61, i.e. that recovered from the sale of the condemned man's property (as the traditional restoration in line 63 presupposes). In line 67 the *pecunia redacta* is either that claimed from sureties in 66 or whatever money is finally in the hands of the quaestor, however collected.

Mattingly sees another trace of these equestrian accessories in line 23 where, among the jurors on the main panel that the accuser is barred from choosing, are mentioned men accused under this or the previous extortion laws. This clause occurs not among the clauses disqualifying ex-magistrates and senators but among the following clauses that apply to non-senators. Hence Mattingly argues that we have here another allusion to equestrian accessories. But, even

if we assume with Mattingly that the chapter is clearly arranged, it is still possible that the men meant are the sons of magistrates, ex-magistrates, and senators (who in line 17 are given a place among the clauses applicable to non-senators) who were liable to accusation under the inscribed law (line 2), not as accessories, but as principals.

4. The law seems to offer rewards to peregrine as well as Latin and citizen prosecutors. But Mattingly takes *Pro Balbo* 54 to refer to the Lex Servilia Glauciae and to show that that law limited such rewards to Latins. Therefore, to keep his identification of the inscribed law with Glaucia's, Mattingly takes the inscribed law to be offering rewards only to *patroni* who, he thinks, had to be Romans or Latins. Few will accept this interpretation of lines 76 ff., but the whole manœuvre is quite unnecessary, since whichever law Cicero means in *Pro Balbo* 54, he does not necessarily indicate a legal restriction of rewards to Latins. Cicero's description of the Lex Servilia as opening 'hanc Latinis, id est foederatis, viam ad civitatem' need not give the scope of the rewards offered, but the actual effect of the law. He is thinking of the two cases he has just cited of awards received and retained, and of awards to Latins offered under another law or laws which also emerged safe from the cruel era of the Lex Licinia Mucia. (See Appendix B for more discussion.)

The old arguments for identifying the extortion law on the Tabula Bembina with that inspired by Gaius Gracchus can stand. In addition to those mentioned, there are two points that support this identification and that Mattingly did not discuss in *J.R.S.* lx. One is the mention of the Lex Rubria. The other is the fact, confirmed by Mattingly himself (*J.R.S.* lix [1969], 138–9), that the Lex Agraria of 111 on the reverse was engraved after the extortion law, which was sacrificed as a defective copy. Are we then to suppose that the Lex Agraria was first engraved for the use of Roman citizens at Forum Sempronii or members of a near-by allied community (as Mattingly suggests) at some time after the passage of Glaucia's law, that is, a decade or so after its passage? Mattingly has now attempted to deal with this obvious objection in 'The Agrarian Law of the *Tabula Bembina*', *Latomus*, xxx (1971), 281 ff. He suggests that just after the copy of the Lex Servilia Glauciae was made and then scrapped as defective, a need to publish the Lex Agraria of 111 opportunely arose with the agrarian proposals of Marcius Philippus in 104 and Appuleius Saturninus in 103. The fear that *ager publicus* would again be subject to examination and distribution by the Roman government led the community that set up the copy (Ariminum is now suggested) to take steps to ensure that its members knew their rights and that Roman politicians took note of those rights. This is an ingenious idea, but it is hard to believe that publication of the Lex Agraria appeared less urgent to the allies in 111 when the Gracchan upheavals were still fresh in their minds than in 105/4 (Mattingly's date for the publication), or more of a practical protection in 105/4 when determined new reformers were about whom no past arrangements would necessarily deter.

APPENDIX B

After so much conflicting discussion about *Pro Balbo* 54, it is unlikely that any way of proving which Lex Servilia Cicero meant can be found. Mattingly has most recently (*J.R.S.* lx [1970], 163 ff.) pronounced for the Lex Servilia

Glauciae, along the lines suggested by Dr. Levick in *C.R.* xvii (1967), 256 ff. More interestingly, he has drawn attention to features of the passage that need further emphasis. He argues convincingly that 'neque ius est hoc reprehensum Licinia et Mucia lege' (however we translate the difficult *reprehensum*, on which see Reid's note on p. 90 of his edition) relates not to chapters of the Lex Licinia Mucia, but to legal challenge before the tribunal it established: that was, after all, the way laws about citizenship worked (*Pro Balbo* 48, 52). Mattingly, at one point (p. 165), takes Cicero to mean that the grant of citizenship to Latins was 'not contested in the courts' set up by the Lex Licinia Mucia, but the conclusion that Cicero draws, 'quo in genere iudicum praemia rata essent' (cf. *ratum* in *Pro Caecina* 96), suggests a more positive confirmation, as does the heading under which these grants to successful prosecutors are discussed: 'populi Romani iudicium multis rebus interpositum atque in maximis causis reipsa atque usu *comprobatum* (ch. 53). The suggestion of a testing and confirmation before the tribunal may also supply the answer to the interesting question Mattingly poses: why does Cicero, trying to strengthen the case for viritane grants to *foederati* (such as Balbus), embroil himself in a discussion of grants to Latins whom he then must, by a patent sophistry involving an appeal to the old *foedus Cassianum*, pass off as *foederati*? Why, when he is speaking of the *iudicium populi* (the view of the people, in contrast to the view taken by *iudices* and the senate) and has just mentioned the admission of many *foederati* to the citizenship (52), does he *choose* to discuss grants to successful prosecutors, if all he had to present were Latins? Mattingly observes (p. 164), 'what he needed perhaps was an actual grant of citizenship to a non-Latin that had been tested and confirmed', and so he had to make the best of what he had. Perhaps we can go further and say that what Cicero needed to cite were actual grants of citizenship to prosecutors that had survived the Lex Licinia Mucia's tribunal, and that he needed such cases because Balbus' accuser had adduced cases of *foederati* who, like Balbus, had received citizenship under a law (not, however, the Lex Gellia Cornelia but a law or laws giving citizenship to successful prosecutors), but subsequently lost it after examination by the tribunal set up under the Lex Licinia Mucia. In answer Cicero hastened to produce some *foederati* whose grants had survived, and the best he could do were Latins.

But why does Cicero, who later implies ('num fundos igitur factos populos Latinos arbitramur aut Serviliae legi aut ceteris quibus Latinis hominibus erat propositum aliqua ex re praemium civitatis?') that other grants to Latins under the Lex Servilia and other laws were also confirmed, name only two Latins who received these grants? There are two possible explanations: 1. The grants to these men were worth singling out, because their descendants were known to the *iudices* before whom Cicero was speaking (ch. 53). 2. These were the only two cases of Latins that actually came to court and which, by surviving the challenge, confirmed all similar grants to Latins. It is compatible with the first explanation that the confirmation of these grants was merely implicit, i.e. grants to *foederati* were examined and rejected; the grants to Latins, including these two, were not challenged. But it is also compatible with the first explanation, and necessary for the second, that the confirmation was explicit, i.e. that some of these grants to Latins were actually challenged and survived. The implicit interpretation can provide no clue as to the identity of the Lex Servilia; and even if we accept the explicit interpretation, it is

hard to say under which law grants made were more likely to be challenged under the Lex Licinia Mucia. The authors of the latter law would be less favourable toward the beneficiaries of Glaucia's law, but accusers picking a test case might prefer the dead Lex Servilia Caepionis, whose benefits might now be queried but which the authors of the Lex Licinia Mucia would feel inclined to uphold (cf. the attempt to embarrass Crassus with the prosecution of Matrinius, enfranchised by Crassus' *adfinis*).

For the identity of the Lex Servilia, the crucial sentence (marked with P for protasis and A for apodosis) runs as follows:

> quod (P) si acerbissima lege Servilia principes viri ac gravissimi et sapientissimi cives hanc Latinis, id est foederatis, viam ad civitatem populi iussu patere passi sunt, (P) neque ius est hoc reprehensum Licinia et Mucia lege, cum praesertim genus ipsum accusationis et nomen et eius modi praemium quod nemo adsequi posset nisi ex senatoris calamitate neque senatori neque bono cuiquam nimis iucundum esse posset, (A) dubitandum fuit quin, quo in genere iudicum praemia rata essent, in eodem iudicia imperatorum valerent?

This is a long *a fortiori* argument, which, as regards the second protasis, is tolerably clear: if the right of citizenship was not impugned (or withdrawn) under the Lex Licinia Mucia, especially when that right was gained at the expense of a senator's ruin—then surely it was not doubtful that the decision of generals on this point would be considered valid. But what is the argument with regard to the first protasis? Gruen (*C.R.* xix [1969], 9) is right to argue that this clause cannot just be another way of saying what the second does, i.e. that the *principes viri* allowed awards under the Lex Servilia to stand when they were in a position to revoke them under the Lex Licinia Mucia, for, in that case, why is the mention of the Lex Licinia Mucia delayed so long and the Lex Servilia given such prominence? Moreover, that view makes *acerbissima* refer to the same features as those later spelled out in the 'cum praesertim . . .' clause, where, on the contrary, Cicero seems to be marking the introduction of a new point. Finally, what, on this interpretation, are we to do with *populi iussu*? It cannot, I think, (despite Gruen) belong to *passi sunt* but must go with *patere* which directly follows it. Yet on this view *lege Servilia* is also being taken with *patere*.

It is surely better to take *acerbissima lege Servilia* with *passi sunt*, i.e. 'they allowed by the Lex Servilia'. Now this is certainly a strange way of describing any kind of support for a law, yet just this sort of description is necessary for the *a fortiori* argument, which can now be construed, with regard to the first protasis, in one of two ways: 1. This law, with the provision that made possible the enfranchisement of Cossinius and Coponius, was not one you would expect the *principes viri* to accept (yet they did), so grants by generals must surely stand. 2. The provision about enfranchisement which benefited Cossinius and Coponius is not one you would expect the *principes viri* to allow in their law (but they did), so . . . etc. The first alternative gives us a deliberately misleading description of the passage of the Lex Servilia Glauciae; the second a loaded description of the passage of the Lex Servilia Caepionis. With the first *acerbissima* relates either to the harshness of Glaucia's law towards senatorial defendants or to its distastefulness to the *principes viri*; with the second, *acerbissima* relates to the harsh attitude of the law towards accusers. The second

seems the simpler solution (it was made by Badian in *C.R.* iv [1954], 101 ff.), as it avoids the duplication of the ideas in 'cum praesertim . . .' and the unbelievable picture of the passage of the Lex Servilia Glauciae. But, against it, Dr. Levick arrayed formidable arguments showing that *acerbissima* is pejorative in meaning and could not be used of a law which, in the same breath, is said to have been approved of by *principes viri ac gravissimi et sapientissimi cives*. It is well to remember, however, that *acerbitas* is used by Cicero in *Pro Plancio* 36 and 42 of fair (*aequum*) and defensible harshness, and that *acerbissima* occurs here in a transitional position between the mention of the Latin accusers who received awards and the *principes viri*. From the point of view of the accusers the Lex Servilia Caepionis was *acerbissima*: Cicero says (*Brutus* 164) that Crassus, urging passage of the law, inveighed against the *factio accusatorum* and Cicero can use the word *acerbus* (*Pro Sestio* 30) in describing how measures expelling *socii et Latini* looked to them. Now Badian suggested that the acerbity consisted in a restriction of the rewards offered to Latins (in contrast with the liberality of the Lex Acilia), but that is not necessary: the end of exclusively equestrian juries would make condemnation for extortion more difficult and *divinatio*, which Caepio's law probably introduced, would make it altogether harder for non-citizens to prosecute. None the less, at least two Latins did succeed: Cicero could be describing the provisions of the law in accordance with the benefits it actually bestowed and which endured.[1]

[1] I have not been able to take account of A. N. Sherwin-White's 'The Date of the Lex Repetundarum and its Consequences', *JRS* lxxii (1972), 83 ff. which appeared after the proofs of this paper had been corrected. That article covers most of the points in Appendix A far more thoroughly and proposes an interpretation of *Pro Balbo* 54 similar in some respects to that in Appendix B.