

CATILINA AND THE VESTAL¹

The trials and acquittals of at least two Vestals *de incesto* are securely dated to 73 B.C., and were a *cause célèbre*.² One defendant and her alleged lover are known for certain—Fabia, half-sister to Cicero's wife Terentia, and L. Sergius Catilina, whose evil repute, according to Cicero, greatly aggravated suspicion.³ The undoubted plurality of cases, however, and lack of any other known context in sources that would not commonly omit such episodes, while not quite proof, certainly strongly support inclusion at this juncture of the case against one Licinia and, as co-defendant, the future dynast M. Licinius Crassus (cos. 70; II 55 B.C.).⁴ If there were any other defendants at this time, nothing is known of them.

In Plutarch, Crassus was released *ὑπὸ τῶν δικαστῶν*, from which it has been argued that the court must have been a specially constituted *quaestio extraordinaria* with a jury, presumably like that created by the Lex Peducaea of 113, or anyhow certainly analogous to that set up in 61 to try P. Clodius *de sacrilegio*.⁵ The Lex Peducaea, however, was clearly an *ad hoc* measure intended to govern the proceedings

¹ I am most grateful to Dr T. J. Cadoux for a sight of his own unpublished paper 'Catiline and the Vestal Virgins' on the trials of 73 B.C., which sharpened my focus on certain details. Some of these matters are also discussed by (among others) E. S. Gruen, *Athenaeum* 49 (1971), 59–61; B. A. Marshall, *Historical Commentary on Asconius* (Columbia, MO, 1985), 309–10; id., *Crassus, A Political Biography* (Amsterdam, 1976). Professor John Richardson, as so often, stirred me to think more precisely about certain aspects of the legal questions, and I had much pleasure and profit from T. J. Cornell, 'Some observations on the *crimen incesti*', in *Le Délit religieux dans la cité antique* (Collection de l'école française de Rome 48 [1981], 27–37). I also have to thank the anonymous referee for certain items of modern bibliography and for incentive in places to adjust the course of the argument. Naturally none of these scholars is to blame for any shortcomings of mine.

² Cic. *Cat.* 3.9 (alleged testimony of Allobrogan envoys to the Senate) '(Lentulum) . . . dixisse fatalem hunc annum esse ad interitum huius urbis atque imperi qui esset annus decimus post uirginum absolutionem, post Capitoli autem incensionem uicesimus'; *Brut.* 236 'Is' (M. Pupius Piso, cos. 61) 'cum satis floruisse adulescens, minor haberi est coeptus postea. Deinde ex uirginum iudicio magnam laudem est adeptus . . .' (etc.); Oros. 6.3.1 'eodem anno' (73 B.C.) '... Catilina incesti accusatus, quod cum Fabia uirgine Vestali commisisset arguebatur, Catuli gratia fultus euasit.' On the burning of the Capitol in 83 and its significance, Appian, *BC* 1.83.378, with E. Gabba's commentary; Plut. *Sull.* 27.

³ Cic. *Or. in Tog. Cand. ap. Asconius* 91C, with Asconius' comment; (cf. *Comm. Pet.* 10); Orosius 6.3.1; cf. Sall. *BC* 15.1, without naming Fabia.

⁴ Plut. *Crass.* 1.2 καίτοι προῖων καθ' ἡλικίαν αἰτίαν ἔσχε Λικιννία συνιέναι τῶν 'Εστιάδων μιᾷ παρθένων· καὶ δίκην ἔφυγεν ἡ Λικιννία Πλωτίου τινὸς δῶκοντος. ἦν δὲ προάστειον αὐτῇ καλὸν, ὃ βουλόμενος λαβεῖν ὀλίγης τιμῆς ὁ Κράσσος καὶ διὰ τοῦτο προσκεκίμενος αἰετῇ γυναικὶ καὶ θεραπεύων, εἰς τὴν ὑποψίαν ἐκείνην ἐνέπεσε· καὶ τρόπον τινὰ τῇ φιλοπλουτίᾳ τὴν αἰτίαν τῆς φθορᾶς ἀπολυσάμενος ὑπὸ τῶν δικαστῶν ἀφέειθη. Τὴν δὲ Λικιννίαν οὐκ ἀνῆκε πρότερον ἢ τοῦ κτήματος κρατῆσαι. (Cf. *Mor.* 89E Κράσσος δὲ τῶν ἱερῶν μιᾷ παρθένων αἰτίαν ἔσχε πλησιάζειν, χωρίον τι καλὸν ὠνήσασθαι παρ' αὐτῆς βουλόμενος καὶ διὰ τοῦτο πολλάκις ἐντυγχάνων ἰδίᾳ καὶ θεραπεύων, and *Comparison of Nikias and Crassus* 1.2 . . . καὶ γυναῖκα περιύων . . .). Probable evidence for Licinia's connection with L. Murena, cos. 62, in Cic. *Mur.* 73 is acutely observed by Marshall (n. 1), 22, n. 86; A. M. Ward, *Marcus Crassus and the Late Roman Republic* (Columbia and London, 1977), 188, n. 52; already implied at *MRR* 2.135.

⁵ So A. W. Zumpt, *Das Criminalrecht der römischen Republik* 1.1 (Berlin, 1865), 117–18; so too E. Rawson, *Phoenix* 28 (1974), 208. On the Lex Peducaea, see below, pp. 142–3.

of 113 only, and not those of all future such investigations,⁶ and it would have required another similar law to institute a *quaestio extraordinaria* with a jury—and its existence turns solely on interpretation of Plutarch's reference to *δικασταί*. Even if, however, Plutarch is not simply mistaken, or at best importing his own tendentious interpretation of his information, there is no reason why the term *δικασταί* should not be used in this context to refer to the Pontifices, constituted in 73 in the traditional manner as they normally would have been (and were in 114) as a *iudicium* of *iudices* (or *δικαστήριον* of *δικασταί*) to try the cases put to them—and indeed we have explicit testimony from Cicero for their competence and powers to function as *iudices*.⁷ On balance, although a jury-court—at any rate for the case of Crassus and Licinia—cannot be excluded with absolute certainty, it is more probable that in 73 it was the traditional pontifical court which tried and acquitted the Vestals.

It appears that jurisdiction in such cases normally fell to the Pontifex Maximus, presiding over the College of Pontifices as his *consilium*—that is as the *iudices*, jurors, or assessors.⁸ This is certainly attested for the original hearings concerning the last previous batch of cases. Late in 114 the Pontifex Maximus L. Metellus Delmaticus and his College condemned the Vestal Aemilia and at least some of her lovers, but widespread disbelief and outrage at the acquittals of Licinia and Marcia occasioned legislation by a tribune, Sex. Peducaeus, early in 113 to establish a specially constituted court under L. Cassius Ravilla (cos. 127) for retrials of these two, and probably others, who under his relentlessly severe jurisdiction were condemned and, with those men found guilty of their seduction, duly executed as prescribed by tradition.⁹ A few more details of this highly scandalous episode are to hand. Their perusal yields some useful points about procedure to confirm what might in any case be regarded as reasonable *a priori* supposition in such cases. First, Macrobius' evidence (from Fenestella) for trials in the pontifical court on different dates for Aemilia, condemned on 16 December 114, and for Licinia, ordered to stand trial on the 18th, shows that each suspect Vestal was

⁶ Cic. *ND* 3.74, citing it alongside laws establishing special courts to try the cases of Hostilius Tubulus; the theft of the Gold of Tolosa; the 'conspiracy of Jugurtha'. See also Cornell (n.1), 37.

⁷ Cic. *Har. Resp.* 13 'Nego umquam . . . ulla de re, ne de capite quidem uirginum Vestalium, tam frequens conlegium iudicasse. Quamquam ad facinoris disquisitionem interest adesse quam plurimos (ita est enim interpretatio illa pontificum, ut eidem potestatem habeant iudicium), religionis explanatio uel ab uno pontifice perito recte fieri potest (quod idem in iudicio capitis durum atque iniquum est), tamen sic reperietis, frequentiores pontifices de mea domo quam umquam de caerimoniis uirginum iudicasse.'

⁸ Th. Mommsen, *Römisches Strafrecht* (Leipzig, 1899), 20, based chiefly on Plut. *Numa* 9–10; Dion. Hal. *AR* 2.67–9, 8.89, 9.40.3–4, further illustrated e.g. in Livy 4.44.12, 8.15.7; Ascon. 45–6C; cf. Cic. *Har. Resp.* 13, quoted above, n. 7.

⁹ Evidence in Greenidge–Clay² (rev. E. W. Gray [Oxford, 1961]) 58–60, notably Ascon. 45–6C 'quo tempore Sex. Peducaeus tribunus plebis criminatus est L. Metellum pontificem maximum totumque collegium pontificum male iudicasse de incesto uirginum Vestalium, quod unam modo Aemiliam damnauerat, absoluerat autem duas, Marciam et Liciniam, populus . . . Cassium creauit qui de eisdem uirginibus quaereret. Isque et utrasque eas et praeterea complures alias nimia etiam, ut existimatio est, asperitate usus damnavit.' Since at any one time there were only six Vestals in office, this seems to indicate retrospective trials of retired Vestals also. Licinia had been at odds with authority ten years earlier (Cic. *Dom.* 136). Although the condemnations are ascribed to Cassius alone as *quaesitor*, it is virtually certain (cf. Cic. *Har. Resp.* 13 on the patent injustice of sole jurisdiction in capital cases) that he operated with a *consilium* or panel of assessors analogous to the *iudices* or jurors of a *quaestio publica perpetua* chosen *ex albo iudicum*—as indeed they may well have been for this very court, though we have no explicit evidence on the point. Val. Max. 3.7.9 terms Ravilla *praetor*, which cannot be correct if he is the consul of 127. On mode of execution, Plut. *Numa* 10; Oros. 4.2.8; Dion. Hal. *AR* 2.67.3–5.

separately indicted and separately tried.¹⁰ Separate consideration of the case of each individual, male or female, is also strongly suggested, if not quite absolutely proven, by evidence that the advocates known to have participated are mentioned as spokesmen for single defendants, not couples or groupings.¹¹ Certainly alleged paramours were invariably also indicted before the same court, and their cases, while each an independent component, with its own pleas and testimony for prosecution and defence, would plainly have to be tried at the self-same hearings as those for each Vestal—always the focal point of any such process—in respect of whom they were cited. Certainly it was a clear legal necessity that verdicts could be reached and declared only upon individual defendants: none could be collective. This is all the more evident from the range of possible outcomes. Even if no male at all could be cited to stand trial, a Vestal would normally have to be condemned where pregnancy or childbirth was credibly attested,¹² and even less cogent evidence might suffice. Or in the case of any one Vestal there might be a single male defendant or several, any or even (however improbably) all of whom might in theory be acquitted, even if the verdict on the Vestal was adverse. On procedure much else remains obscure, but it should also be taken as a virtual certainty that no verdict on a male defendant could be declared before that on the Vestal concerned, for his condemnation would constitute a blatant *praeiudicium* against her.¹³ It is, on the other hand, by no means clear that the converse could also be maintained—namely that the prior declared conviction of a Vestal amounted to a *praeiudicium* against any male defendant, even if there were only one. It remains therefore impossible to be sure whether it was regarded as normal, or anyhow acceptable, practice to declare the verdict on the accused Vestal before making a decision—or perhaps even hearing the case—on any male defendant; or whether the regular practice was for all pleas and testimony to be presented, and then a vote taken on the fate of the defendants all at once in a single secret ballot. Only one outcome was plainly a logical impossibility, whatever the procedure—save in the all but impossible case of proven rape—for a Vestal to be found innocent and any male co-defendant of hers guilty. This array of possibilities, together with the very considerable variety of types and sources of evidence and pivotal issues, and consequently of jurisprudential options open to the parties and their advocates, does however suggest that in some matters at least a certain measure of discretionary flexibility and latitude in procedure was desirable and available to the presiding officer (*quaesitor*), as in other courts, where not circumscribed by law.

With this preamble in mind, it is time to return to the questions raised by the Vestal trials of 73 B.C. They were evidently well remembered, and do exhibit various notable features, including, it may be argued, at least one procedural curiosity. It is convenient here to rehearse the directly attested facts. (i) From this *iudicium* an intelligent but hitherto somewhat unassertive advocate, M. Pupius Piso (cos. 61), won a big reputa-

¹⁰ Macrob. *Sat.* 1.10.5 ‘... Fenestella confirmat, dicens Aemiliam uirginem xv Kalendarum Ianuariarum esse damnatam . . . Deinde adicit “sequebatur eum diem Saturnalia”. Mox ait “postero autem die, qui fuit Kalendarum Ianuariarum, Liciniam uirginem ut causam diceret iussam”.’

¹¹ In 113, C. Scribonius Curio (pr. c. 121) for Ser. Fulvius (Cic. *Brut.* 122; *Inv.* 1.43); L. Licinius Crassus for Licinia, in vain, it seems (Cic. *Brut.* 159, 161); in 73, apparently M. Pupius Piso for Fabia: see further below, pp. 145–6.

¹² Not that there are any known cases. Presumably the only defence, even with a male defendant indicted desperately hard to sustain, and without one virtually impossible, would be rape.

¹³ Against which, again, only the desperate plea of rape, it would seem, could be attempted.

tion.¹⁴ (ii) M. Crassus, if this indeed, as is highly likely, was the court which tried him for *incestum* with the Vestal Licinia, was evidently acquitted by it, and so too was she.¹⁵ (iii) This court quite certainly delivered an explicit verdict of acquittal on the Vestal Fabia, accused *de incesto* with L. Sergius Catilina.¹⁶ (iv) Catilina, on the other hand, although he evaded condemnation, had no formal verdict of acquittal pronounced upon him. This is guaranteed not so much by Orosius' parlance (*euasit*) as by two later references by Cicero, in two different speeches some six years apart (in 61 and 55) to Catilina's acquittal on capital charges on *two* occasions, and not more—which on any undistorted view of the evidence can only be those in 65 *de repetundis* and in 64 *inter sicarios*.¹⁷ (v) This oddity was brought about, or at the very least assisted, by the decisive intervention, whatever its intention or motivation, of Q. Lutatius Catulus (cos. 78).¹⁸ In this case one variation on established practice could not be avoided. Normally, it seems—certainly if the trials of 114 are any guide—the Pontifex Maximus would have presided over the pontifical court. In 73 that was impossible, for he was Q. Metellus Pius, at the time embattled against Q. Sertorius in Spain.¹⁹ The identity of his deputy, however, is readily detectable. Senior among the known Pontifices of that date was none other than that same Q. Lutatius Catulus, also at the time charged with the task of overseeing reconstruction of the Capitoline temples after the disastrous fire of 83/2 B.C.—surely the obvious candidate for the task of convening the court and supervising and controlling its proceedings.²⁰ It is clear enough, anyhow, that Catulus held some position of vantage from which he could exert influence in this case.²¹

To make better sense of the known facts we require an acceptably coherent and economical hypothesis and a minimum of conjecture. Some points are reasonably clear. The acquittal of Crassus is in one sense readily explicable, and was probably won with some ease. Crassus, we are told, paradoxically owed it to his most notorious vice—that is, to his avarice, pleading successfully that his frequentation of the wealthy Licinia, who owned a suburban estate which he wished to acquire, had been motivated not by lust but by lucre. Confirmation came, after both had been released, with completion of the sale, and that was the end of the matter.²² Not only did he present an entirely credible, if somewhat disreputable defence, but also as praetor (almost

¹⁴ Cic. *Brut.* 236, quoted above, n. 2.

¹⁵ Plut. *Crass.* 1.2, quoted above, n. 4. Licinia is found alive and well in 69 (Macrob. 3.13.11) and in 63 (Cic. *Mur.* 73). In any case, this tribunal evidently acquitted more than one Vestal, if the plural *uirginum* is to be taken seriously at Cic. *Cat.* 3.9; *Brut.* 236.

¹⁶ Ascon. 91C 'Fabia . . . eratque absoluta'; cf. Cic. *Brut.* 236; *Cat.* 3.9.

¹⁷ Cic. *Att.* 1.16.9 'bis absolutum esse Lentulum, bis Catilinam, hunc tertium iam esse a iudicibus in rem publicam immissum. Erras, Clodi: non te iudices urbi sed carceri reseruant . . .'; Cic. *Pis.* 95 'at contra bis Catilina absolutus, emissus etiam ille auctor tuus provinciae, cum stuprum Bonae Deae puluinaribus intulisset.' On the trials of 65 and 64, Cic. *Att.* 1.1.1, 2.1–2; Ascon. 89, 91, 92C (*MRR* 2.155; 162); Orosius 6.3.1 'Catilina . . . euasit'. Further comment below, p. 147.

¹⁸ Oros. 6.3.1; Sall. *BC* 35.1. See further below, n. 26.

¹⁹ *MRR* 2.83 and n. 3, 86, 89, 93, 98, 104, 111, 117, 123 (triumph, 71).

²⁰ *MRR* Index of careers; s. *ann.* 73, 60, Pontifices; Liv. *Per.* 98; Val. Max. 6.9.5; Varro *ap.* Gell. *NA* 2.10.2; *ILS* 35–6. For that matter, he would have been equally suitable as president (*quaesitor*) of a *quaestio extraordinaria*, on the model of L. Cassius Ravilla in 113, if that hypothesis is preferred. For his seniority in the Pontifical College, L. R. Taylor, *AJPh* 63 (1942), 391ff.; *MRR* 2.114 on the listings in Macrob. *Sat.* 3.13.11; Cic. *Har. Resp.* 12.

²¹ Oros., loc. cit. (n. 17): *gratia*.

²² Plut. *Crass.* 1.2, quoted above, n. 4. Licinia was indicted by one Plotius. Whether he also conducted the case against Crassus, roundly asserted (to the exclusion of Licinia) by E. S. Gruen, *The Last Generation of the Roman Republic* (Berkeley/Los Angeles, 1974), 41, is unknown.

certainly) for that year had the good sense to waive his (probable) right to evade trial during his magistracy, thus demonstrating his complete confidence that no fair hearing could possibly result in his condemnation—and he may even have dispensed with the services of advocates.²³ At any rate, even if he had a part in it,²⁴ it does not look as if this was the *causa* which won fame for M. Pupius Piso.

With the case of Fabia and Catilina, however, obscurities persist. It was this man's well-known array of vices, coupled with his attendance upon Fabia, which placed him—and indeed her—in considerable danger. There is not the least whiff of suspicion that Piso appeared for Catilina: it must have been his defence of Fabia, and in particular his skill in repelling the very real threat to her posed by Catilina's evil character, which did so much to enhance his own reputation. Further, it is beyond all reasonable doubt that the explanation of Catilina's release without a formal verdict of acquittal must be that Fabia was pronounced innocent before any vote on his case was put to the court, with the consequence that proceedings were abruptly terminated forthwith.²⁵

At this point, however, relative simplicity ends and complexities and nagging questions obtrude. Unfortunately, uncertainties inherent in the evidence generate various possibilities, without obvious criteria for simple decision among them.

(i) On the assumption that this outcome resulted from the normal, standard procedures of this court, it is not perhaps too difficult to accommodate the notion that the case against Catilina may not yet even have been opened, if Fabia's prosecutor(s) had already presented evidence that put him in grave peril. (ii) But what, on this view, had Catulus done by way of exercising *gratia* which ensured Catilina's escape, and which Catilina later represented as conduct of outstanding *fides*?²⁶ Could it have been simply his insistence on upholding the verdict and its consequences—perhaps against expressions of disbelief and objection?²⁷ If that answer is acceptable, yet even so some explanation is also required for the fact that the procedure in the case of Licinia and Crassus evidently differed in that formal verdicts of acquittal—at any rate on the face of it—were delivered on *both* of them.²⁸

²³ Plut. *Crass.* 1.2, quoted above, n. 4. Observe the middle voice of the participle in *τρόπον τινὰ τῇ φιλοπλουτίᾳ τὴν αἰτίαν τῆς φθορᾶς ἀπολυσάμενος*—he dispelled the accusation for himself. In similar circumstances and with similar astuteness, the future great orator M. Antonius as quaestor in 113 had hastened to present himself for trial *de incesto* before L. Cassius Ravilla under the Lex Peducaea, even though technically exempt, having reached Brundisium on his way to serve in Asia, and so being *absens rei publicae causa* (Val. Max. 3.7.9; cf. 6.8.1).

²⁴ So G. V. Sumner, *The Orators in Cicero's Brutus* (Toronto, 1975), 127, unwarrantably.

²⁵ Whether by order of the presiding officer or simply because the prosecutor(s) abandoned the case.

²⁶ Oros. 6.3.1 'eodem anno' (73 B.C.) 'apud Romam Catilina incesti accusatus, quod cum Fabia uirgine Vestali commisisse arguebatur, Catuli gratia fultus euasit'. This interpretation requires full value to be placed upon *fultus*, and especially upon the meaning and tense of *arguebatur*. Those who hesitate to press the language of Orosius or doubt his reliability in detail at this juncture (as notably Gruen (n. 1), 51, n. 28, after D. R. Shackleton Bailey) may reflect that these two words (along with *euasit*) support each other, and that the proposition is substantially guaranteed by the opening of Catilina's letter of 63 to Catulus, quoted verbatim by Sallust, *BC* 35.1 "'L. Catilina Q. Catulo. egregia tua fides, re cognita, grata mihi magnis in meis periculis . . . '". From Ascon. 91C it appears that the case against Catilina was based, as with Crassus, on presupposition of guilt from (allegedly) excessive frequentation, but in Catilina's case with little or no convincing explanation of innocence. For the association, without naming Fabia, Sall. *BC* 15.1. For Catilina's evil reputation, Sall. *BC* 14–15; Ascon. 82–94, esp. 91C.

²⁷ Sallust (*BC* 15.1), at any rate, apparently held to a version which believed Catilina guilty. On Plut. *Cat. Min.* 19.3, however, see further below, p. 147.

²⁸ Plut. *Crass.* 1.2, quoted above, n. 4; cf. n. 15.

(iii) One fairly obvious solution is to hack through the Gordian knot by supposing that the procedural anomaly is illusory, and that in fact, exactly as in the case of Fabia and Catilina, Crassus' release was a consequence of Licinia's prior formal acquittal, but has been misleadingly represented by Plutarch as 'discharge by the *dikastai*'—which in a sense it was, albeit only indirectly.²⁹ This, however, may seem a somewhat crude and cavalier approach to the evidence.

(iv) If something more subtle is required, we might contemplate the possibility that it was the acquittal of Licinia and Crassus which was in accord with standard procedural norms—*ex hypothesi* by a simultaneous ballot of the court on both together—and the prior acquittal of Fabia and consequent failure of the accusation against Catilina which was not. In that case Catulus' intervention will have been to use his position, whether as president of the court or merely as senior Pontifex, to get the unorthodox procedure adopted in the trial of Fabia and Catilina for what he saw as good reason. As it developed, two contrary factors would have become starkly clear—the brilliance of M. Pupius Piso's advocacy in Fabia's defence, and on the other hand the ever more menacing weight and mounting credibility of the evidence against her alleged seducer, with the deadly threat that it posed to her. The sources offer no grounds for supposing that Catulus' *gratia* and *fides* were a matter of doing personal favours for either of them: it is far easier to suppose that a man of Catulus' well-known probity and intelligence was moved by nothing more sinister than the pleas (and just conceivably the petition) of Piso and more particularly his own sense of plain justice, as he saw it.³⁰ The evidence was, after all, so far as we know, essentially circumstantial—the known bad character of Catilina and his alleged frequentation of Fabia's company.³¹ For a man like Catulus it would be a matter of personal honour (*fides*) to insist on strict justice, to seek to nullify any threat to it by any acceptable means, and to make (or at the very least promote) a ruling to redress the balance—that is, that the court's verdict on Fabia alone should be declared immediately before any decision were taken about Catilina, and perhaps, indeed, before the pleadings in his case were complete or even begun. That would at least give Fabia the fairest possible trial, and if the villainous Catilina should go free as a result of her acquittal, that too, would not be legally improper, or even in relation to the charge unjust.³²

(v) Those who find this hypothesis extravagantly imaginative may prefer its equally possible converse—that is, that the trial and acquittal of Fabia and its outcome for Catilina were governed by standard procedure for the court, and that disquiet over Catilina's escape, if not also Fabia's, was met by a change in procedure to deal with Licinia and Crassus, so that a simultaneous vote on both defendants together resulted

²⁹ Plut. *Crass.* loc. cit. ὑπὸ τῶν δικαστῶν ἀφείθη.

³⁰ It is most improbable that he had any partiality for Catilina. At all events Orosius 5.21.2 attributes to Catulus (as other sources do to others) a plea to Sulla in 82/1 to repress the savagery of his head-hunters, among whom Catilina at the time was prominent (Ascon. 84C; *Comm. Pet.* 9–10). Of course Oros. 6.3.1 'Catilina . . . Catuli gratia fultus euasit' need not imply that it was Catulus' express purpose to help Catilina.

³¹ Ascon. 91C; cf. 66C, 82–94C *passim*; Sall. *BC*, esp. 14–15. There is no sign of servile evidence, for example, which in such cases was evidently admissible: see Cornell (n.1), 34.

³² There is some temptation to add the modest speculation that Catulus, undoubtedly well aware that any such initiative on his part could and probably would be construed as biased, did what he could to counter suspicion by making a public declaration (or perhaps even taking an oath) that he took it *ex fide sua*, *salua fide sua*, *bona fide*, or the like—a formula perhaps tendentiously taken up by Catilina in his letter to Catulus in 63, as recorded by Sall. *BC* 35.1 "Egregia tua fides, re cognita, grata mihi magnis in meis periculis . . .". For the possibility of criticism, above, n. 27.

in formal acquittal for both. If so, then while this in itself might instance Catulus' *fides* if he was responsible for amending the rules, Catilina's reason for appealing to it in 63 (however tendentially) was most probably the senior Pontiff's insistence that the original verdict on Fabia must stand, and that her case could not be reopened and retried under the new dispensation.

However that may be, one conclusion does emerge with complete clarity. We should accept that no formal verdict on Catilina was ever delivered. Only on this hypothesis can we without further unsupported suppositions explain the evidence as it stands, and in particular why later Cicero could attribute only *two* acquittals to Catilina (namely those of 65 and 64). Conversely, it can be argued that if Catilina had been accorded a formal acquittal in 73, for Cicero deliberately to suppress (or even to appear to suppress) mention of it in meetings of the Senate in 61 and 55³³ would be to suggest to the ill-disposed there, who were numerous and knowledgeable, that he was himself convinced of Catilina's guilt, and therefore of that of his wife's half-sister Fabia. That not once but twice in considered denunciations of widely differing dates he avoided doing anything of the kind argues decisively against any formal acquittal at all of Catilina in 73. By contrast, in the *Oratio in Toga Candida* of 64 Cicero could hardly exclude some reference to Catilina's part in that episode, but contrived to use it as evidence of his evil reputation and the damage it did in provoking the indictment in the first place, without mentioning his formal acquittal (since there had been none). At the same time he also carefully avoided incriminating Fabia⁴³ by seeming to question the verdict on a *res iudicata*: still less, on the eve of the consular election of 64, would he have wished to appear to challenge the past conduct of that still powerful *nobilis* Q. Lutatius Catulus.

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For the sake of completeness it may be helpful to add a rider on one further item. With no indication of date, Plutarch relates, as an instance of assiduous devotion to public duty on the part of M. Cato (the Younger), his effective opposition to P. Clodius when the latter, while seeking to set in train a major revolutionary movement, was levelling slanderous accusations in *contiones* at sundry priests and priestesses—among whom Fabia, 'sister' to Cicero's wife Terentia, was thus put at risk. Cato reacted by so thoroughly disgracing Clodius that he was forced to slink away from the city, but when Cicero sought to offer his thanks replied that they were due rather to Rome, to whose welfare all his political activity was directed.³⁵ From this it has sometimes been inferred that Clodius was one of the prosecutors in 73.³⁶ This

³³ Cic. *Att.* 1.16.9; *Pis.* 95, quoted above, n. 17, which must refer to the trials of 65 and 64 (*MRR* 2.155, 2.162, on Cic. *Att.* 1.1.1, 2.1–2; *Ascon.* 89, 91, 92C).

³⁴ *Ascon.* 91C 'cum ita uixisti ut non esset locus tam sanctus quo non aduentus tuus, etiam si nulla culpa subesset, crimen adferret. Fabia uirgo Vestalis causam incesti dixerat, cum ei Catilina obiceretur, eratque absoluta. Haec Fabia quia soror erat Terentia Ciceronis, ideo sic dixit: etiam si culpa nulla subesset. Ita et suis pepercit et nihilo leuius inimico summi opprobrii turpitudinem obiecit.'

³⁵ *Plut. Cat. Min.* 19.3 ἐνστάς δέ ποτε Κλωδίῳ τῷ δημαγωγῷ κινουῦντι καὶ ταραττοντι μεγάλων ἀρχὰς νεωτερισμῶν καὶ διαβάλλοντι πρὸς τὸν δῆμον ἱερεῖς καὶ ἱερεῖας, ἐν οἷς καὶ Φαβία Τερεντίας ἀδελφή, τῆς Κικέρωνος γυναικὸς, ἐκινδύνευσε, τὸν μὲν Κλωδίον αἰσχύνῃ περιβαλὼν ἠνάγκασεν ὑπεκστῆναι τῆς πόλεως. Τοῦ δὲ Κικέρωνος εὐχαριστοῦντος, τῇ πόλει δεῖν ἔχειν ἔφη χάριν αὐτόν, ὥς ἐκείνης ἔνεκα πάντα ποιῶν καὶ πολιτευόμενος.

³⁶ So e.g. B. A. Marshall, *Comm. ad Ascon.* 91C, 309; J. L. Moles (ed.), *Plutarch, Lives: Cicero*, 175 ad *Plut. Cic.* 29.3. In 73 Clodius was probably only nineteen years of age (no younger), but, as

proposition cannot be sustained. Clodius' extreme youth at that time—with his quaestorship in 61, he should have been nineteen—would not have debarred him from the rôle, but it is simply not that which Plutarch ascribes to him: mere slander or accusation, true or false, in a *contio*³⁷ is neither *nominis delatio* nor presentation of a case in court. Besides, his targets were not only priestesses, but also priests—and there is no evidence that either Catilina, or even Crassus, had been appointed to any priesthood by 73. It can much more reasonably be suggested that while the priestesses in question, since they included Fabia, were (or included) Vestals suspected of misconduct in 73, the priests were the Pontifices who acquitted them, and that Clodius' 'slandorous allegations' were against the conduct and outcome of the trials. It does not, however, follow, despite the possibility, even likelihood, that the result of the Fabia–Catilina case occasioned disquiet, perhaps dissent, that this move by Clodius was part of any such immediate reaction, to be dated in 72 or even late 73 and interpreted as an attempt on Clodius' part to follow the example set by Sex. Peducaeus in 113 in seeking a retrial at the earliest possible moment. Plutarch, be it noted, explicitly abstracts the anecdote from any specific chronological context:³⁸ used to highlight character and disposition, it is displaced in the overall chronological framework of this *Life*. The accruing 'risk' or 'danger' to Fabia might seem the greater the earlier it is dated—that is, the closer in time to her acquittal; but if Clodius was seriously seeking to force a retrial it would be no less real ten or more years later—and no less real, for that matter, if Clodius intended something less deadly, such as mere denigration of character.³⁹ Further, to associate these calumnies with an alleged danger of major political upheavals on Clodius' initiative might or might not be plausible in itself, according to context, but seriously to ascribe such designs to him in 73/2, at the age of nineteen or so, is not plausible at all. It is equally implausible that M. Cato, at that date aged twenty-two or twenty-three, should have ventured so pompously discourteous an answer to Cicero, already an ex-quaestor, senator and some eleven years his senior—or at any rate, if that be thought none the less in character, that he should have laid claim at that age and stage in his career to anything so grandiose as 'a policy' or significant 'political activity'.⁴⁰ Finally, from Cicero's letters to Atticus we learn that it was unquestionably the Pontifices and Vestals in 61 who, when the matter was referred to them by the Senate, decided that an act of *nefas* had been committed when a man was reported to have infiltrated the rites of the Bona Dea, and unquestionably Cato who, initially at any rate, kept up the pressure on Clodius to which he could respond with nothing more effective than *contiones miseras*, in which he tried to savage five leading consulars—three of them members of the top priestly colleges.⁴¹ The parallel with Plutarch's notice is

Dr Cadoux reminds me, that of itself would not debar him from prosecuting: see J. Marquardt, *Privatleben der Römer*² (Leipzig, 1886), 134 on Cotta, who prosecuted immediately upon taking the *toga virilis* (Val. Max. 5.4.4; Cic. *Div. in Caec.* 24, with Ps.-Ascon. 192 St) with further examples—M. Scaurus' accusation of Cn. Dolabella, pr. 81, at (probably) twenty; C. Caesar against Cn. Dolabella (cos. 81) at twenty-three; Ap. Claudius Pulcher (Clodius' elder brother) against M. (?) Varro at (probably) twenty.

³⁷ Plut. loc. cit. διαβάλλοντι πρὸς τὸν δῆμον.

³⁸ Plut. loc. cit. ποτε.

³⁹ Or ἐκινδύνευσε could even signify some new charge *de incesto*, working on the previous barely won acquittal?

⁴⁰ Plut. *Cat. Min.* 19.3 ὡς ἐκείνης ἕνεκα πάντα ποιῶν καὶ πολιτευόμενος.

⁴¹ Cic. *Att.* 1.13.3 (25 January, 61) 'Credo enim te audisse, cum apud Caesarem pro populo fieret, uenisse eo muliebri uestitu uirum, idque sacrificium cum uirgines instaurassent,

(unsurprisingly) not exact, but close enough to cast grave doubts on the proposition that Clodius had already attempted anything so very similar some eleven years earlier. The 'doublet' is not of course logically impossible, but in terms of historical probability can only be regarded as distinctly implausible. All things considered, it seems preferable to assign Plutarch's evidence on Cato's clash with Clodius to the events in Rome of early 61—but the previous industry and acuity of other modern commentators removes the need for the present enquiry to argue the case further.⁴²

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mentionem a Q. Cornificio in senatu factam (is fuit princeps, ne forte aliquem nostrum putes); postea rem ex senatus consulto ad uirgines atque ad pontifices relatum idque ab iis nefas esse decretum; deinde ex senatus consulto consules rogationem promulgasse; uxori Caesarem nuntium remisisse . . . Boni uiri precibus Clodi remouentur a causa, operae comparantur, nosmet ipsi, qui Lycurgeti a principio fuissimus, cotidie demitigamur, instat et urget Cato. Quid multa? Vereor ne haec neglecta a bonis, defensa ab improbis, magnorum rei publicae malorum causa sit.' Cf. *ibid.* 1.14.5 (13 February 61) 'Senatus Ἀρειος πάγος; nihil constantius, nihil seuerius, nihil fortius. Nam cum dies uenisset rogationi ex senatus consulto ferendae, concursabant barbatuli iuuenes, totus ille grex Catilinae, duce filiola Curionis, et populum ut antiquaret rogabant. Piso autem consul lator rogationis idem erat dissuasor. Operae Clodianae pontis occuparant, tabellae ministrabantur ita ut nulla daretur "VTI ROGAS". Hic tibi in rostra Cato aduolat, conuicium Pisoni consuli mirificum facit, si id est conuicium, uox plena grauitatis, plena auctoritatis, plena denique salutis . . .' (etc.—support from Hortensius and Favonius; a massive vote in the Senate to promote judicial proceedings) ' . . . Clodius contiones miseras habebat, in quibus Lucullum, Hortensium, C. Pisonem, Messallam consulem contumeliose laedebat; me tantum "comperissem" omnia criminabatur.' For the Vestals' part in the rites of the Bona Dea, *Plut.* *Cic.* 19.4 (cf. *Caes.* 9); *Dio* 37.45.1; *Ascon.* 49C. Of the consulars attacked by Clodius, no priesthood is attested for C. Piso, Cicero himself held none until 53, Q. Hortensius and L. Lucullus were augurs, M. Messalla Niger was a Pontifex: see *MRR*, Index of Careers. The MSS of *Cic. Att.* have merely *Lucullus*, which just might allow identification as his brother Marcus, cos. 73, who was a Pontifex, but this is not the likelier option. Note also the continued involvement of Q. Catulus (Pontifex), with his acid remark somewhat later on the outcome of Clodius' trial, *ibid.* 1.16.5 'quorum' (the thirty-one jurors who voted for Clodius' acquittal) 'cum uidisset quendam, "Quid uos," inquit, "praesidium a nobis postulabatis? An ne nummi uobis eriperentur timebatis?"'. Finally, for Cicero's notion that the Republic was threatened (cf. Plutarch's on incipient 'revolution') by Clodius' initiatives in seeking to defend himself, observe *ibid.* 1.13.3 *ad fin.* (cf. 14.5), 16.6ff.

⁴² Drummann-Groebe, *Geschichte Roms* (Berlin 1899–1929), 5.165, opt for 65, not very plausibly; in particular and better, for 61 B.C., Ph. Moreau, *Clodiana Religio* (Paris, 1983), 232–9.