HOW MANY ROMAN SENATORS WERE EVER PROSECUTED? THE EVIDENCE FROM THE LATE REPUBLIC

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I. THE PROBLEM

HOW LIKELY WAS IT that a Roman senator in the Late Republic was ever prosecuted during his lifetime? Lily Ross Taylor implies that it was a very frequent occurrence:[1] "A man expected from his friends not only support at the polls but aid in the perils of public life, the unending prosecutions brought from political motives by his personal enemies, his *inimici*, his rivals in the contest for office and for the manifold rewards of public life." P. A. Brunt attempts to refute her contention. After quoting part of Taylor's statement above, he writes:[2] "Yet most of the *principes* in Cicero's time had never been arraigned in the courts." The purpose of this article is to propose a solution to this debate on the frequency of prosecution by marshalling and analyzing the facts at our disposal.

These two opposing statements have quantitative implications, although neither uses actual numbers. Taylor claims that men in general (and it is clear from the context that she means nobles) had to deal with politically motivated prosecutions aimed against them. Brunt counters that

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The following works will be cited by author's name alone or in abbreviated form: Michael C. Alexander, *Trials in the Late Roman Republic, 149 B.C. to 50 B.C.* (Toronto 1990, *Phoenix* Supp. 26) = *TLRR*; A. E. Astin, "Roman Government and Politics, 200–134 B.C.," *CAH*^{2} 8 (1989) 163–196; E. Badian, *Studies in Greek and Roman History* (Oxford 1964) = *Studies*; T. Robert S. Broughton, *The Magistrates of the Roman Republic* vols 1 and 2 (Cleveland 1951–52, Philological Monographs of the American Philological Association 15) and vol. 3, *Supplement* (Atlanta 1986) = *MRR*; P. A. Brunt, "'Amicitia' in the Late Roman Republic," *PCPS* NS 11 (1965) 1–20 = "'Amicitia,'" reprinted in Robin Seager (ed.), *The Crisis of the Roman Republic* (New York 1969) 199–218 = *Crisis*, and reprinted with revisions in P. A. Brunt, *The Fall of the Roman Republic and Related Essays*, (Oxford 1988) 351–381 = *Fall*; David F. Epstein, *Personal Enmity in Roman Politics, 218–43 B.C.* (London 1987); A. H. J. Greenidge, *Infamia: Its Place in Roman Public and Private Law* (Oxford 1894) = *Infamia*, and *The Legal Procedure of Cicero's Time* (Oxford 1901) = *Legal Procedure*; Th. Mommsen, *Römisches Strafrecht* (Leipzig 1899); Lily Ross Taylor, *Party Politics in the Age of Caesar* (Berkeley 1949, Sather Classical Lectures 22).

[1] Taylor 7.

[2] Brunt, "'Amicitia'" 14, *Crisis* 212. In the revised version (*Fall* 374) he adds the words, "nor arraigned others." This article will not discuss the frequency with which senators served as prosecutors. It is worth noting that Brunt has somewhat changed the basis of the argument here by looking at *principes*, rather than nobles. This study will concentrate on still a third group, senators, for reasons which will be explained below (245–246).

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most *principes* in fact never underwent even one prosecution.[3] So it would seem reasonable that these two statements are amenable to confirmation or refutation through quantitative analysis, if the necessary information is available. Ideally, in order to evaluate these opposing statements, we need the names of all the members of the group under consideration, and the court records from the period in which that group was active; we could then calculate precisely what percentage of the members of that group were ever prosecuted.[4]

Of course, not all such evidence is extant. We do have, however, two compilations which are useful in making this calculation, one for the magistrates (*MRR*) and one for the trials (*TLRR*). Although neither of these publications contains a complete list of, respectively, all magistrates and all trials, they are our most comprehensive sources. If we do have enough evidence to make a judgment whether Brunt's view, or Taylor's, or neither is right, then *MRR* and *TLRR* ought to provide this evidence.

The answer to this debate, if one can be found, has important implications for our understanding of the interaction between criminal trials and Roman politics. Since the heyday of the "prosopographical" school, there has been a debate over the question—to put it in cruder terms than either the "prosopographers" or their opponents do—as to whether Roman criminal trials had any legal substance, or whether they merely reflected political struggles waged in a forensic setting. The attempt to use the information from Roman criminal trials to elucidate the politics of the Late Republic was part of the so-called "prosopographical school," which flourished in the 50s, 60s, and 70s. Although no one claimed that all trials were motivated by political considerations, historians sought, and were inclined to see, connections and correlations between political groupings and judicial activity.

Three meanings of "political trial" need to be distinguished. A trial could be "political" in the sense that the prosecutor's *motive* was to harm a

[3]Cicero himself was able to say in 57 that he had never suffered a prosecution (... *in me, cui dies dicta numquam est, qui reus non fui* ... *Dom.* 83), and, as far as we know, was never prosecuted throughout his whole life. His statement, while technically correct, is admittedly somewhat disingenuous, since it glosses over the fact that Cicero fled Rome because it had become clear that Clodius was going to succeed in passing a law renewing the Gracchan sanction against the capital punishment of anyone without condemnation by the people, and that Cicero was almost certain to be prosecuted and convicted under this law. Nevertheless, the lack of actual prosecution in the case of someone so controversial certainly creates the impression that prosecution was not the norm for a senator, especially since we know so much about this particular individual. But the purpose of this article is to see whether we can go beyond impressions.

[4]It should be admitted that this test is a little like measuring the level of sexual activity by finding out how many people are virgins; that is, it does not distinguish between a solitary prosecution and frequent prosecutions. See below (Section II) for some discussion of frequency for a given individual.

political enemy, or "political" in the sense that it had political *consequences*: the expulsion of a significant politician from Roman life, or the acquisition of glory for the successful prosecutor. (An example of the latter phenomenon is Cicero's prosecution of Verres, where Cicero had substantial legal grounds for prosecution but also had the political motive of advancing his own career, as the trial did, at the expense of Hortensius [Cic. *Brut.* 319].) But the question on which the following discussion may shed some light is whether criminal trials had a political *basis*: was it seen as normal and acceptable for trials to revolve around political considerations, so that prosecutors could dispense with finding adequate *legal grounds* for their cases, or at least could believe that they could dispense with them? To be more specific, since the outcome of trials was decided by jurors, were jurors swayed by political considerations, or legal arguments?

The statistical analysis presented here cannot provide a definitive answer to the general problem of the political nature of trials. For even if we could discover exactly what percentage of Roman senators were prosecuted, there would still be room for doubt. If the percentage were high, the reason might be that Roman senators often committed crimes. If the percentage were low, it would still be possible to argue that those trials that did occur were politically motivated and lacked a firm legal basis. Yet an understanding of the frequency of prosecution can shed light on this question, even though it does not provide a definitive answer to it. After all, it is clear that both Taylor's and Brunt's treatments imply that their discussion has something to do with the political nature of trials. For Taylor these trials are set in the context of "the fierce strife of the nobles for political advancement" (7). Brunt's remarks are part of an argument that political competition did not betoken or cause personal hostility.[5] Taylor's portrait of Roman political life is much more plausible if trials were a constant occurrence, and Brunt's portrait is *pari passu* more plausible if a trial was the exception rather than the rule in a senator's life.

"Political" Trials in Recent Scholarship

Perhaps the most influential single exemplar of the prosopographical approach to trials was Badian's brilliant article, "Caepio and Norbanus: Notes on the Decade 100–90 B.C.," which set a standard that later scholars tried to emulate.[6] In this article Badian uses an analysis of the trials of Caepio and

[5]Brunt, *Fall* 370–371; cf. "'Amicitia'" 13, *Crisis* 211: "To prosecute or testify against a man on charges involving his *caput* or *existimatio* was necessarily a hostile act .... All the more striking therefore is the reluctance and infrequency with which such prosecutions were undertaken."

[6]E. Badian, *Historia* 6 (1957) 318–346 (= *Studies* 34–70). It is only fair to point out that this article did not claim to present a general method.

Norbanus (*TLRR* no. 86 and no. 88) to argue for the existence of a *factio nobilitatis* functioning in the 90s B.C. The two most important monographs to embody the prosopographical approach to Roman trials were written by Erich S. Gruen; the outlook embodied in these works is expressed as follows:[7]

The criminal prosecution as a political weapon in the years under scrutiny occurs with such *frequency and regularity* [my emphasis] that it may legitimately be regarded almost as an institution. To a surprisingly, perhaps alarmingly, large extent, the business of politics was carried out not in the *comitia* or in the *curia*, but in the courts .... A systematic analysis of the struggle over the courts and of the lengthy series of criminal laws and prosecutions will do much to illuminate the course of politics.

Waging of political warfare in the criminal courts had a long history. The *quaestiones perpetuae* were born in politics. From their inception the interests of justice were tempered with a generous mixture of politics. Two generations prior to the Ciceronian age established that pattern. It persevered to the end of the Republic.

At present the pendulum has swung away somewhat from this approach. Gruen himself warned against an overly rigid application of this method.[8] Broughton, in a sober evaluation of the whole prosopographical school, comes down in the middle:[9]

Political use of the criminal courts was frequent and is clearly attested, but one must always allow something for the actual guilt or innocence of the accused, for the young orator's effort to win personal distinction, or the ability of some leading aristocrat in peril in the courts to bring patrons of opposing views together in his defense.

More recently, Astin has also struck a middle course. Referring to the years 200–134 B.C., he writes (178):

Another area into which the rivalries of political figures intruded was that of prosecutions. The bringing of prosecutions and the presentation of defences against them were important activities among senators in that period .... It would be unreasonable to assume that such judicial clashes were primarily or frequently political in their motivation, or that they were normally expressions of rivalry and personal resentment more than of general concern about the substance of the charges .... Yet it is not likely that the participants maintained a rigid separation

[7]E. S. Gruen, *Roman Politics and the Criminal Courts, 149–78 B.C.* (Cambridge, Mass. 1968) 6, and *The Last Generation of the Roman Republic* (Berkeley 1974) 260.

[8]E. S. Gruen, "Pompey, Metellus Pius, and the Trials of 70–69 B.C.: The Perils of Schematism," *AJP* 92 (1971) 1–16.

[9]T. Robert S. Broughton, "Senate and Senators of the Roman Republic: The Prosopographical Approach," *ANRW* I.1 (1972) 250–265, at 253–254.

between these concerns on the one hand and their rivalries and concerns for power on the other.

These judicious formulations that politics sometimes but not always played a part in criminal prosecutions suggest the desirability of some statistics. The most basic statistic one would like to possess, though of course it may be unobtainable, is the frequency of prosecution.

Literary Evidence

It is not the purpose of this article to examine all the evidence which bears on the reasons for prosecution. The *locus classicus* is Cic. *Off.* 2.49–51, which lists three acceptable motives for prosecution: 1) the desire for glory on the part of *adulescentes*, who prosecuted for the good of the state, 2) revenge, and 3) the *patrocinium* over a province. None of these three allowable motives is political in the general sense of the term. The example of revenge which Cicero cites (*TLRR* no. 71) makes it clear that revenge in the strict sense is meant, not just political competition.[10] It might be thought that the phrase *rei publicae causa* is so broad as to allow almost any political motive, but Cicero goes on to condemn under any circumstances the prosecution of an innocent man on a capital charge, although he does allow the defense of a guilty defendant. He gives three examples of this kind of justifiable prosecution *rei publicae causa*: the prosecution conducted by L. Licinius Crassus (*cos.* 95) against C. Papirius Carbo (*TLRR* no. 30), an enemy of the *boni* (see Cic. *De or.* 2.170), the prosecution conducted by M. Antonius (*cos.* 99) against Cn. Papirius Carbo (*TLRR* no. 47) for his disastrous defeat at the hands of the Cimbri, and the prosecution conducted by P. Sulpicius Rufus against C. Norbanus (*seditiosum et inutilem civem*, *TLRR* no. 86). The inference can be drawn that these trials do not represent the normal cut-and-parry of politics, but the attempt to rid the state of individuals who endanger its survival. This is an activity appropriate mainly for *adulescentes*, and Cicero is at pains to emphasize that prosecution should be conducted sparingly (*semel igitur aut non saepe certe*); otherwise, the members of the prosecution will acquire a bad reputation as overly zealous prosecutors.[11] The emphasis is on the limited acceptability of prosecution,[12] and if we take Cicero's testimony as reflecting a typical at-

[10]The distinction between personal *inimicitiae* and political motives is made by Epstein 94, 100–101. His chapter on "*Inimicitiae* and the Courts" (90–126) contains a valuable analysis of its subject.

[11]Other important passages are Cic. *Rab. Post.* 2 and *Cael.* 73. For further sources and discussion of the motives for prosecution, see my thesis, *Forensic Advocacy in the Late Roman Republic* (diss., Toronto 1977) 200–222.

[12]Cicero does say that many defendants were prosecuted and convicted under the extortion laws (*tot rei, tot damnati*, 2.75), but his point here is that these trials were necessitated by the frequent commission of the crime (cf. 3.36).

titude, we would have to conclude that the Romans of Cicero's time did not accept prosecution as a normal part of political warfare.[13] Of course, this kind of prescriptive statement can always be viewed as a protest against a common practice, rather than as a reflection of current reality. It is partly because of the ambiguity of such statements that the following discussion will focus on what actually happened, as far as the evidence allows us to discern the facts, rather than on ancient statements of what ought to happen.

II. CONTINUAL PROSECUTIONS OF INDIVIDUAL SENATORS

Before the main statistical argument is made, one important aspect of Taylor's thesis needs to be disposed of. It posits *continual* prosecution as the norm for each senator. This aspect of her thesis is *prima facie* implausible for two reasons. First, it seems highly unlikely that the Roman criminal justice system could have handled the hundreds of trials that "unending prosecutions" of each senator would have entailed. Specifically for the post-Sullan Republic, when the *quaestiones perpetuae* were almost exclusively the courts in which senators were arraigned, there simply were not enough courts to handle this level of judicial activity.[14] Second, the likely consequence of a pattern of continual prosecution would be eventual conviction. If prosecution was a fact of daily life, it would be almost inevitable that virtually all senators would eventually be convicted, since it would be almost (but not entirely) impossible even for an upright and blameless man to avoid conviction in some trial; even the best judicial situation cannot be fair one hundred per cent of the time.[15] Under the Roman system, conviction meant expulsion from the citizen body. In some of the *quaestiones publicae*, the result of a conviction was capital, even though this might in

[13]It is notable that in his *De amicitia* Cicero nowhere claims that *amici* normally carried out factional political warfare in the courts on each other's behalf. The political use of the term *amici* is an important element in Brunt's discussion (above, n. 2); also, J. G. F. Powell makes some very sensible remarks on the political implications of *amicitia* in his introduction to his translation and commentary on Cicero's *De amicitia* (Warminster 1990) 21–23.

[14]The creation of supplementary *iudices quaestionis*, as in 66 B.C., may have served to increase the caseload which the courts could handle, especially the *quaestio inter sicarios et de veneficis* and the *quaestio de vi*, which may have had the most cases to judge. But this device does not appear to have been employed enough to enable the hearing of hundreds of cases each year, and it appears to have been used less for the sort of cases in which senators were the likely defendants.

[15]For the period 80 to 50 B.C., there were just slightly more convictions than acquittals, in the cases where we know the verdict. It is still quite possible that in fact acquittals were more common than convictions, since convictions naturally had greater consequences, and therefore, it may reasonably be argued, gained more notoriety. But the argument still holds if the conviction rate was as low as in the range of ten per cent.

fact mean exile rather than actual execution.[16] In other cases, where the punishment was pecuniary, the amount assessed could be so high that exile was almost inevitable, even if it was not legally required.[17] But whatever the penalty, the result of a conviction in a *quaestio publica*, or a *iudicium publicum*, would probably be *infamia*.[18] As a result, virtually all political careers would have ended eventually with a conviction in a major criminal trial. Given that the kind of trials for which evidence survives are primarily for offenses of a kind which only a senator or well-placed individual could commit, it is inherently unlikely that, after one conviction, a defendant would be prosecuted again and again for many years to come, since he would no longer be in a position to commit those crimes, or to be tried at Rome.[19] The logical consequence of the kind of continual prosecution which Taylor envisages would therefore be eventual conviction, perhaps sooner for scofflaws, and later for those who tried to obey the law and were therefore harder to convict—but conviction nevertheless. The idea of continual prosecution leads to the implausible conclusion that the Roman senators knew that they were almost certain to be convicted eventually. As a result, there would have been little incentive to obey the laws, since the same fate lay in store for all senators, or almost all senators: conviction and exile. The incentives for obedience to the law would have had to be solely extra-legal, such as a sense of shame, or family honor.

Not surprisingly, the historical evidence at our disposal for this period does not support the contention that senators normally suffered the fate of continual prosecution. The case of Cato the Elder in the previous century, who was prosecuted forty-four times and never convicted, is clearly seen by the three sources which mention this fact[20] as highly exceptional.[21] Some frequently prosecuted senators from this period, as far as we know, were Catiline (four times [*TLRR* nos. 212, 379, 217, and 223] and never actually convicted) and Clodius (three times [*TLRR* nos. 236, 261, and 307, though the last is an *actio ad exhibendum*], and also not convicted). Normally, one would expect that a conviction led to the end of further prosecutions,

[16]This was the case since, at least for the upper classes, self-exile was allowed in the place of actual execution. The *locus classicus* is Polybius 6.14.7–8; see Mommsen 69–73.

[17]For *repetundae* convictions, see my article, "Compensation in a Roman Criminal Law," *University of Illinois Law Review* (1984) 521–539, at 530.

[18]Greenidge (*Infamia* 28–29) stresses that we should not expect uniform penalties from the *quaestiones*, since each one was established by its own *lex*. See also his *Legal Procedure* 508, and Mommsen 998–1001.

[19]Under certain circumstances it was possible for new trials to follow immediately upon a conviction, as, e.g., happened to Milo in 52. See James S. Ruebel, "The Trial of Milo in 52 B.C.: A Chronological Study," *TAPA* 109 (1979) 231–249, and *TLRR* nos. 310, 311, and 312.

[20]Pliny *HN* 7.100; Plut. *Cato Maior* 15.4, 29.5; Aur. Vict. *Vir. Ill.* 47.7.

[21]Astin 178.

as with L. Calpurnius Bestia (*aed. pl.* ca 59?), possibly convicted in 56 after five acquittals (*TLRR* nos. 249, 250, 251, 252, 268, and 269), or A. Gabinius (*cos.* 58), convicted in 54 after two acquittals (*TLRR* nos. 380, 296, and 303).

In what follows, Brunt's view that most senators were never prosecuted will be opposed to a modified version of Taylor's view, namely, that most senators were at some time prosecuted, although not necessarily often, or even more than once, in the case of any given senator.

III. PERCENTAGE OF SENATORS EVER PROSECUTED

"Population at Risk"

In discussing the frequency of prosecutions, Taylor is chiefly concerned with nobles, which she defines as members of the families which had held the consulate (3). This could include those who themselves never reached the consulate, but whose fathers or grandfathers, and perhaps even more distant ancestors, had held this office. Brunt refers to *principes* in Cicero's time. Neither of these groups constitutes a satisfactory basis for the kind of analysis which this study is attempting. We need a category for which a clear definition existed, whereby one can say (provided adequate information is available) that someone either does, or does not, belong to the group. Since both nobles and *principes* lack a totally clear definition as groups, it will be best to begin by looking at consulars. In any given case, it will be possible to say that a given individual either had, or had not, served as consul. At first glance, if we consider the forty-two consuls who served in the years 80–60,[22] sixteen of them, or 38%, were prosecuted at some point in their life; the others were not, at least so far as we know.[23] This result seems at first glance to confirm Brunt's statement and disprove Taylor's.

But in fact Brunt's attempt to refute Taylor contains an error in statistical logic. It fails to allow for the possibility that there were many politicians who never became consuls, or nobles, or *principes*, precisely because at an early stage in their careers they were prosecuted and convicted, and, therefore, their careers came to an end. In other words, if we look only at

[22]I have used these dates in order to be consistent with my calculations below; see 246–247.

[23]If we count all those who were *elected* to the consulate in this period, then there are forty-four, and eighteen of them were prosecuted, yielding a higher percentage (41%). The discrepancy is caused by the addition of P. Cornelius Sulla (*cos. des.* 65) and P. Autronius Paetus (*cos. des.* 65), both of whom were convicted of bribery in their consular campaigns, and never served. I prefer to exclude them, since the fact that there were four elected consuls in 66 is related to the fact that the first two were tried and convicted.

successful politicians, we might fail to give proper weight to those for whom prosecution and conviction caused an end to their political careers. To use the terminology of demographics, we need to define a "population at risk," and follow the experience of the members of that population over a period of time, in this case experience with regard to being prosecuted.[24]

It is necessary in a study such as this to have a clear definition of the "population at risk." "Nobles" and "*principes*" are terms too imprecise to serve as categories clear enough for statistical purposes. The membership of the Senate, however, was clearly defined. In addition, senators constituted a larger group than either nobles or *principes*, and therefore an analysis of that group is more likely to provide large enough numbers to produce statistically meaningful results. If we wish to determine what percentage of senators were ever prosecuted, we should define the "population at risk" as those Romans who entered the Senate. After Sulla in 81 B.C. made the quaestorship the automatic qualification for membership in the Senate (Tac. *Ann.* 11.22),[25] there was a definite starting point for admittance to the Senate. In this study, the population at risk will be those people who were elected to the quaestorship between the years of 80 and 60, counting inclusively. These years not only form a coherent historical period, starting with the Republic as reconstituted by Sulla, and ending with the formation of the so-called First Triumvirate, but also provide us with a large enough sample to produce meaningful statistics. Moreover, the terminal date of 60 B.C. allows those who entered the "population" at the end of the period to have a chance to be prosecuted before the fall of the Republic, when conditions, and particularly legal conditions, changed drastically. To avoid confusion, it should be emphasized that there are two different periods of time at play here; we are looking at people elected to the quaestorship be-

[24] A non-technical account of the application of demographic method to historical problems can be found in Daniel Scott Smith, "A Perspective on Demographic Methods and Effects in Social History," *The William and Mary Quarterly* ser. 3, 39 (1982) 442–468. The discussion found on pp. 446–448 is particularly relevant to the method outlined here.

[25] R. Syme, *Sallust* (Berkeley 1964, Sather Classical Lectures 33) 28, maintains that it may have been possible to skip the quaestorship and enter the Senate through the tribunate after Sulla's restrictions on the tribunate were overturned in 70 B.C. T. P. Wiseman, *New Men in the Roman Senate 139 B.C.–A.D. 14* (Oxford 1971) 98–99, suggests that this may have been the case even while these restrictions were still in force. R. G. Austin, in his third edition of the *pro Caelio* (Oxford 1960) 145–146 claims that Caelius may have passed over the quaestorship in defiance of prevailing custom. G. V. Sumner, "The Lex Annalis under Caesar," *Phoenix* 25 (1971) 246–271 and 357–371, at 247–248, argues to the contrary both on the general question and on the specific individual. Broughton, *MRR* 3.44 follows Sumner with some reluctance. In any case, the omission of the quaestorship, even if it was possible, appears to have been so unusual that it would affect the statistics presented here only if the individual's later senatorial career was unknown to us. It is therefore unlikely that an omitted quaestorship would affect the statistics to be presented to any significant extent.

tween 80 and 60, and calculating what percentage of those people underwent prosecution between 80 and 50.[26]

Limits of the Historical Evidence: Quaestorians

In order to find out what percentage of senators were ever prosecuted under criminal charges, one would ideally compile a list of quaestors within a given time period, and count how many were ever prosecuted, and how many were not. Although in relatively few cases do we know that someone was a quaestor in a specific year, we can use our understanding of the Roman *cursus honorum* to establish the date *by which* someone was quaestor. We know that each praetor must have held the quaestorship at least nine years previously, and that each consul must have held the quaestorship at least twelve years previously. For aediles and tribunes, this calculation is more difficult to make, since the date for holding this office was not fixed in the *cursus honorum*,[27] but for the sake of simplicity the pattern of Cicero's office holding has been taken as typical, and so it has been assumed that a tribune or aedile had been quaestor six years before.

Between 80 and 60 B.C. (21 years), with twenty quaestorships a year, 420 men were elected quaestor. Of these 420, we can identify 240 individuals, or 57% of the total. There may well be some errors for the beginning dates (e.g., we might suppose that an aedile of 73 had been quaestor in 79, whereas he was really quaestor in 81, outside the period), but this error will have no significance unless such a person is more or less likely to have been prosecuted than someone who genuinely belonged to the group, and there is no reason to think that this is the case.

We can now compare this list of quaestors with the list of defendants indexed in *TLRR* (215–219).[28] Of the 240 quaestorians, we know that 59

[26]See discussion of this problem below (253–254). In doubtful cases I have interpreted the data so as to count every possible prosecution as a prosecution, thereby maximizing the number of prosecutions. I have adopted this procedure since I lean to Brunt's point of view, and want to give Taylor's argument every possible advantage. In fact, many pieces of information, both about trials and magistracies, must be qualified by question marks, and different scholars making the collations which I make here would probably arrive at slightly different results. I do not believe, however, that these variations would justify significantly different conclusions.

[27]See E. Badian, "Caesar's *Cursus* and the Intervals between Offices," *JRS* 49 (1959) 81–89 (= *Studies* 140–156).

[28]Since those merely threatened with a prosecution are listed in this index, as well as those actually prosecuted, the entry for the trial has to be checked to make sure that the case was an actual prosecution. Prosecutions that are merely threatened are not used in the calculations of this study because the seriousness of a threatened prosecution varied considerably. Such a threat could be as specific and immediate as the prosecution of Quintus Cicero threatened by a Claudius for his actions as governor of Asia (*TLRR* no. 263), or as vague as the Marcus Cicero's threat to prosecute Verres in other courts, should his extortion prosecution fail (*TLRR* nos. 178, 179, and 180), which may have represented more of a rhetorical flourish than a planned course of action. The fact

were prosecuted at some time. For the other 181, we have no evidence of a prosecution. Therefore, we can say that, of those people who we have reason to believe became quaestor in the years 80 to 60, we know that about 25% of them, or one quarter, underwent a prosecution at some time in their careers.[29] Of course, this figure is a minimum; if there were many prosecutions of which we now know nothing (see below, 250), the percentage could be much higher.

This conclusion would seem to support Brunt over Taylor; most senators, one might conclude, were never prosecuted. But such a conclusion would be somewhat rash at this stage of the argument. We do not know how representative the 240 quaestorians[30] are of the whole group of 420 quaestorians created during the period, and, as Hahn and Leunissen have reminded us,[31] a fragmentary sample is not the same as a random sample. It is possible that the 240 known quaestorians might be significantly different in some relevant way from the 180 unknown quaestorians. For example, the known quaestorians may have been more successful than their unknown counterparts, since the failure of the latter group might account for their disappearance from the sources. One also cannot exclude the logical possibility that the unknown quaestors are all unknown precisely because a successful prosecution destroyed their careers and civil status at Rome. (As a converse to this argument that unknown quaestorians are more likely to have been prosecuted, one might argue that in fact they were far less likely to have been prosecuted than their known counterparts, since they were such insignificant figures that no one would have bothered to prosecute them.) In any case, the simpler and far more likely explanation for the disappearance of some quaestorians from the record is that the *cursus honorum* allowed for a diminishing number of seats at higher levels (twenty quaestors, fourteen aediles and tribunes combined, eight praetors, and two consuls), and so it was only natural that many quaestorians never progressed politically, and therefore receive no attention in our sources.[32]

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that threatened prosecutions are not counted should not be interpreted as a denial that such threats might be serious, and, in fact, the conclusion of this article is quite to the contrary (below, 254–255).

[29] It should be emphasized that the date of such a prosecution is not limited to the period 80 to 60; a date in the 50s is quite likely.

[30] Note that "quaestorian" is used here to refer to anyone who held the quaestorship, *including* those who went on to higher office.

[31] Johannes Hahn and Paul M. M. Leunissen, "Statistical Method and the Inheritance of the Consulate under the Early Roman Empire," *Phoenix* 44 (1990) 60–81, at 74.

[32] Death furnishes another explanation for the disappearance of some quaestorians before reaching the praetorship. According to Hopkins, who uses modern comparative data, if the average life expectancy at birth was 30 years, of 100 individuals at age 30, 83 could have been expected to survive to age 40. See Keith Hopkins, *Death and Renewal* (Cambridge 1983, Sociological Studies in Roman History 2) 148, Table 3.12

Although we cannot establish a percentage of all quaestorians, known and unknown, who were prosecuted, we can establish statistical parameters. If all unknown quaestorians were prosecuted, then we must add 180 names to the 59 who we know were prosecuted, and thus 57% of the whole group (239 out of 420) would have been prosecuted. Again, the figure could be higher if many *known* senators underwent *unknown* prosecutions. At the other extreme, if none of the unknown quaestorians was ever prosecuted, then only 14% (59 out of 420) were prosecuted. The truth is likely to lie somewhere between these two extremes, and it is at least plausible that the unknown quaestorians were no more likely to be prosecuted than the known quaestorians, and that the figure arrived at before—about 25%—holds for the whole group of 420, as well as for the 240.[33]

Limits of the Historical Evidence: Trials

So far, the only element of doubt which has been considered is uncertainty as to who served as quaestor. Clearly, since we do not possess the records of the Roman courts, another substantial element of doubt relates to the incompleteness of our knowledge of trials for the Late Republic. If one argues that this is a relatively well-documented period, and that we know something about most trials, then this element of doubt will be minor. The proportion of senators prosecuted might be raised from one quarter to one third, but not much higher than that. But if we argue that the known trials represent only the tip of the forensic iceberg, then obviously our uncertainty would be much greater; conceivably, all quaestorians could have been pros-

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(containing information which can be used here in spite of the fact that it is designed for the Principate). Therefore, assuming for the sake of argument that quaestors were elected *suo anno*, and therefore held office in the year in which they reached age 31, then approximately three of the twenty in each cohort could be expected to have died by age 40, the minimum age for holding the praetorship. According to Frier, who uses the evidence of Ulpian (cited by Aemilius Macer in *Dig.* 35.2.68 pr.), as well as modern comparative data, mortality may have been even higher: of 100 30-year-olds, only 79 could be expected to reach age 40. Thus, four of the twenty quaestors in every cohort could be expected to have died before being eligible to run for the praetorship. See Bruce Frier, "Roman Life Expectancy: Ulpian's Evidence," *HSCP* 86 (1982) 213–251, at 245, Table 5.

[33]Note that the statement that most senators were never prosecuted is not the same as saying that senators were no more likely to be prosecuted than non-senators. In fact, senators must have been far more likely to be prosecuted than non-senators, because if a quarter of *all* Romans had been prosecuted, the courts—including whatever summary jurisdiction existed for ordinary crime—would have completely broken down because of overload. It stands to reason that senators were especially prone to prosecution, first because they were the ones likely to commit such offenses as extortion, electoral bribery, and embezzlement of state funds, and second because their prominence would make them targets worth the effort of prosecution, which under the Roman system, of course, had to be undertaken by private individuals rather than state officials.

ecuted at some time. In other words, conceivably our available evidence indicates only a 25% prosecution rate, but if lost evidence were found, we would know that it was normal for a senator to be prosecuted.[34]

This counter-argument rests on a belief that there are major gaps in our knowledge. Clearly, there must have been many trials of which we know nothing. We have two major types of sources for the trials of this period: 1) the forensic speeches of Cicero, and 2) the letters of Cicero. Neither source can be expected to provide consistent coverage. Cicero mentions in his speeches those other trials which are in some way relevant to his case, but not others; thus, we are well informed on the penumbra of cases relating to the trial in which Cluentius was the prosecutor (*TLRR* no. 149) in 74 B.C. and the one in which he was the defendant (*TLRR* no. 198) in 66 B.C. Were it not for the survival of the *pro Cluentio*, our knowledge would be much more limited. In the case of his letters, we have detailed accounts of forensic events at Rome only when the distance between Cicero and his main correspondents, primarily Atticus, Quintus, and Caelius, makes it necessary for Cicero (or Caelius) to describe events at Rome in detail. Sometimes, however, these letters seem to contain an exhaustive account of news and gossip involving prominent individuals at Rome. Thus, in the course of telling Atticus (*Att.* 4.15.4–9) what was going on at Rome in July of 54 (*Nunc Romanas res accipe*), Cicero mentions six trials at various stages (*TLRR* nos. 284, 285, 286, 289, 290, 295). In a similar fashion, Caelius writes Cicero (*Fam.* 8.4.1–2) about events at Rome from the summer of 52, including four trials (*TLRR* nos. 329, 330, 331, 332). This detailed reporting, when it does occur, gives the impression that the trials of leading Romans at any given time can be encompassed in a letter; in other words, it appears that at any given time most senators are *not* being prosecuted. It would be rash to make any positive assertion about what precise proportion of the actual trials are known to us; the most we can say is that the Late Republic is the period for which we have the *most* evidence about actual Roman trials, even if it is still deficient in many ways, and so this period gives us the *best* picture of Roman forensic activity.

Prosecution of Senators Holding High Rank at Time of Trial

Another counter-argument which will suggest itself to some readers should be discussed at this point, and rejected. Is it not possible, one might ask, that only *successful* senators were likely to commit the sort of actions which could form the basis of a prosecution? Therefore, the fact that so many senators were never prosecuted can be explained by the fact

[34]It should perhaps be kept in mind that each additional trial would not necessarily add to the number of senators who were ever tried, since the defendant might be a senator whom we already know to be one of those who were tried.

that it was primarily praetorians and consulars who were prosecuted.[35] For example, only governors (ex-praetors and ex-consuls) were likely to be prosecuted for extortion, and perhaps only candidates for high office were worthwhile targets for an *ambitus* trial. Moreover, it might be these higher-ranking senators, as opposed to the *pedarii* in the Senate, whom Taylor and Brunt have in mind when they speak of, respectively, nobles and *principes*. Therefore, the argument might run, we should put aside senators who never reached at least the praetorship (whom I will term the "less successful senators") and therefore look at the 167 men elected praetor during these 21 years (whom I will term the "more successful senators.")[36]

Such an argument conveys a salutary reminder that prosecutors are unlikely to have launched their cases without some attention to legal grounds, or the lack thereof. One reason why someone was never prosecuted might be that he was never in a position to do the sort of thing which could form the basis of, say, an extortion case, or that he avoided any improprieties when he was in such a position.

Conversely, one might argue that most senators *were* prosecuted, except for the highest-ranking senators, who were too dangerous and powerful to prosecute. This is the view expressed by Epstein, in his analysis of this disagreement between Taylor and Brunt.[37]

But, in fact, we do not need to settle the question of whether more successful senators or all senators are the relevant group, since the statistics are about the same for both. We know the names of most of the senators elected praetor between 80 and 60 B.C., 115 out of a total of 167. Of these 115 senators, 28 were at some time prosecuted—24%, in fact, almost precisely the same as for those who had obtained the quaestorship. (Again, for the moment we are ignoring unknown prosecutions of known praetorians, so the figure 24% is a minimum for known praetorians.) Using the same method we used before to establish parameters, we can say that we know the names of 115 of those created praetor during this period, and are ignorant of the names of the other 52. If all of the unknown praetorians were at some time prosecuted, 48% (80 out of 167) were prosecuted at some time; if none of the unknown praetorians was ever prosecuted, then the figure is 17% (28 out of 167) (again [see above, 248] ignoring the problem of

[35]It should be noted that this argument constitutes an *explanation* of the statistical conclusion, rather than a *refutation* of it.

[36]The number is 167 rather than 168 (21 × 8) because P. Cornelius Lentulus Sura (*cos.* 71) was praetor twice, in 74 and 63.

[37]Epstein 94: "... the most powerful Romans, who had the most extensive resources for damaging their *inimici*, generally were not prosecuted. Any fruits gained from a prosecution were not worth the price of an undying feud with a man capable of exacting the most harmful revenge." He concludes that, while Brunt is right that *principes* were rarely prosecuted, "The exemption noted by Brunt is better interpreted as the exception that proves Taylor's general rule" (94).

unknown prosecutions of known praetorians). The parameter percentages for praetorians are therefore roughly the same as for quaestorians (57% and 14%, respectively, above, 249).

It should not be surprising that a more successful senator would run about the same risk of prosecution as a less successful senator. For it does not appear to have been the case that senators of praetorian rank and higher were much more likely to have been prosecuted than senators below that rank.[38] In the period 80 to 50 B.C.,[39] there were 148 known cases in which a senator was defendant; in 73 of them (49%), he was beneath the rank of praetor; in 75 of them (51%) he was praetor or above. This percentage might seem somewhat lower than what one would expect if lower-rank senators and higher-rank senators were equally likely to be prosecuted. Since of every twenty men elected quaestor, only eight reached the praetorship, the proportion of the two groups is 12:8, and it might seem that 60% (12 out of 20) of the senatorial population at any time were lower-rank. But if one takes into account the fact that of the original 20 quaestors, three or four might be expected to have died before reaching the age to run for praetor (above, n. 32), the ratio becomes 9:8, or even 8:8. Nor is it surprising from a legal standpoint that less successful senators were sometimes prosecuted. While it is true that more successful senators were more likely to be prosecuted for *repetundae* and *ambitus*, than less successful senators,[40] in other *quaestiones perpetuae*, such as *de vi*, and other sorts of courts, such as the *iudicia populi*, senators below praetorian rank were often prosecuted, as well as others lower on the social scale.

Prosecutions of Senators who During Lifetime Achieve High Rank

One might prefer to look not at praetorian-rank defendants but at defendants who at some point at their lives became praetorian, even though they might not have yet attained the praetorship at the time of their trial, on the grounds that the Roman political system, with its bias in favor of certain families, made it fairly easy to calculate which senators were the figures worth prosecuting (or, according to the opposite logic, who should be avoided as too powerful), and which senators would remain *pedarii*. Of the 148 senatorial defendants, 57 (39%) were senators who never reached the praetorship, and 91 (61%) senators who did at some time reach the

[38] Admittedly, the prosecution rate for those who reached the consulate is significantly higher (38%); see above, 245.

[39] It should be remembered that we are looking at prosecutions which occurred during these three decades (see above, n. 29).

[40] Actually, some lower-rank senators were prosecuted for *repetundae* (*TLRR* nos. 170, 172, 205, and possibly 181) and for *ambitus* (*TLRR* nos. 161, 185, 202, 238, 279, and 332). Our text of the Lex Repetundarum (*FIRA*^{2} I no. 7, line 2) makes it clear that all senators were liable for prosecution.

praetorship. To assess whether this result indicates that defendant status correlates with eventual attainment of the praetorship, one would have had to calculate what percentage of the Senate's membership was *either* praetorian *or* going-to-be-praetorian. If, for example, it was 61%, then there would be no correlation between political success and defendant status. The argument based on life expectancy (above, n. 32) points to a figure of something like 50%, that is, about half of all quaestorians could expect to reach the praetorship, if they survived to the minimum age. If that is correct, senators who had reached the praetorship or were going to reach the praetorship were somewhat more likely to suffer a prosecution than their colleagues who were fated to remain among the *pedarii*. But this discrepancy could also be accounted for by the fact that our sources are more likely to tell us about the prosecutions of ultimately successful senators than the prosecutions of perpetual *pedarii*.

Length of Time "At Risk"

One more logical objection needs to be confronted. Someone who became senator in 80 faced 30 years of possible prosecution, whereas someone who became senator in 60 faced only ten years of prosecution, since the data base of trials stops at 50 B.C.[41] Therefore, one would expect that a higher percentage of the earlier senators underwent a prosecution at some point up to 50 B.C. than the later senators. In fact, however, this does not seem to be the case. If we divide the senators into four cohorts, according to the date when they entered the Senate, of those who entered the Senate in the period 80–76 B.C., 6 were prosecuted and 25 were not, for a prosecution rate of 19%. Of those who entered the Senate in the period 75–71 B.C., 18 were prosecuted and 51 were not, for a prosecution rate of 26%. For those who became senators in the period 70–65 B.C.,[42] 11 were prosecuted and 35 were not, for a prosecution rate of 24%. Finally, for those who became senators between 64 and 60 B.C., 18 were prosecuted and 52 were not, for a prosecution rate of 26%. (Twenty-four senators whose entry dates are dubious are omitted.)

There are two possible explanations for this rather constant prosecution rate. One is that, if a senator was going to be prosecuted at some point in his life, this would happen relatively early in his political career,[43] and so it would not make much difference if we look at twenty years or five years after a quaestorship. Another is that the 50s were a decade with an unusually high number of prosecutions, or at least with a high number of prosecutions

[41]The justification for this end date is that the subsequent decades represent a fundamentally different period in both political and legal terms. See above, 246.

[42]This period contains six years rather than five.

[43]Of course, some senators were prosecuted late in their careers, but we do not necessarily know if they had been prosecuted earlier.

known to us from the sources. We know of about forty-three prosecutions datable to the 60s, seventy-three for the 50s. Therefore, those who entered politics in the late 60s were, as it turned out, as likely to face a prosecution by 50 B.C. as those who had entered in the early 70s. If this is the case, then we must recognize that the goal of this article—the prosecution rate for senators—might have varied over time. These two explanations are not mutually exclusive.

IV. CONCLUSION

This study has looked at the people who became quaestor between 80 and 60 B.C., and asked how many of them were ever prosecuted. Taylor's view that most senators were routinely prosecuted on an almost continual basis is rejected, first because the courts could not have sustained such an enormous caseload, second because it implies that most senators would have eventually been convicted, all to just about the same *de facto* punishment, exile, and that therefore there would have been no incentive to obey the law, and third because it is not supported by the historical evidence.

The more interesting question is whether Taylor's thesis in modified form, that most senators were at some time prosecuted, is right, or whether Brunt is closer to the mark in suggesting that prosecutions were fairly rare. The available evidence indicates that about 25% of all senators were prosecuted at some point in their careers, and while it certainly is conceivable that the correct figure should be somewhat higher, the extant evidence does not allow us to state that it was normal for a senator to be prosecuted. Brunt's statement, though its logic is flawed, is closer to the truth than Taylor's; unless the unknown senators were prosecuted far more often than the known senators, or a great number of the known senators underwent many unknown trials, most senators never were the object of a criminal prosecution.

But it would be wrong to dismiss Taylor's primary point, namely, that a politician needed to cultivate his *amici* to protect him from "the perils of public life," by which she refers to prosecutions. Even if a politician's chance of being prosecuted was only, say, one out of three, nevertheless those odds represent a significant risk, considering how high the stakes were.[44] The result of a conviction in a *quaestio* was personal and political disaster (above, 243–244). It behooved a senator to cultivate *amici* in case he found himself, at some point in his life, perhaps only once, in the dock and in need of friendly *patroni*, *advocati*, witnesses, and jurors. It should be stressed again (see above, n. 33) that even if most senators were never

[44] A similar point regarding the flogging of slaves in the American South is made by Herbert G. Gutman, *Slavery and the Numbers Game: a Critique of* Time on the Cross (Urbana, Ill. 1975) 19–20.

prosecuted, it must have been the case that senators were much more likely than the Roman population at large to be prosecuted.

Therefore, while the surviving evidence suggests that Brunt is closer to the truth than Taylor in positing a limited number of trials, Taylor is still correct in her fundamental claim that senators in general faced a real danger of prosecution. It seems quite likely that prosecutions and subsequent convictions happened often enough that senators might have both tried to avoid prosecutions by following the law, or at least appearing to do so, and at the same time strengthened their defenses against the very real possibility of prosecution, by cultivating *amici* who could help them as *patroni*, *advocati*, witnesses, jurisconsults, and presiding magistrates. But, on the other hand, convictions did not happen so often that virtually every senator faced prosecution during his lifetime. So the *threat* may have loomed large in the senator's mind, even if a count of his senatorial colleagues would have shown him that most never suffered that fate. Prosecution then appears as an extraordinary and perilous ordeal—worthy of the ostentatious grief that defendants and their families customarily displayed[45]—rather than the normal daily business of senatorial life.

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[45]E.g., *pro Murena* 88–90. See Greenidge, *Legal Procedure* 472. Almost any speech of Cicero for the defense ends with a description of this practice, which is referred to in Val. Max. 6.4.4 and App. *BCiv.* 2.24. Milo's failure to obey this custom is said by Plutarch (*Cic.* 35) to have contributed to his conviction.