

## ON THE PROSECUTION OF C. ANTONIUS IN 76 B.C.

### I. The Problem

In his speech *in toga candida*, Cicero belittles his competitors for the consulship as follows: *quem enim aut amicum potest habere is qui tot cives trucidavit, aut <clientem> qui in sua civitate cum peregrino negavit se iudicio aequo certare posse?*<sup>1</sup> The second half of the sentence refers to his ultimate colleague in the office, C. Antonius, as Asconius informs us:

*Clientem autem negat habere posse C. Antonium: nam is multos in Achaia spoliaverat nactus de exercitu Syllano equitum turmas. Deinde Graeci qui spoliati erant eduxerunt Antonium in ius ad M. Lucillum praetorem qui ius inter peregrinos dicebat. Egit pro Graecis <C. Caesar><sup>2</sup> etiam tum adulescentulus, de quo paulo ante mentionem fecimus; et cum Lucillus id quod Graeci postulabant decrevisset, appellavit tribunos Antonius iuravitque se ideo eiurare quod aequo iure uti non posset. Hunc Antonium Gellius et Lentulus censores [70 B.C.] sexennio quo haec dicerentur senatu moverunt titulosque subscripserunt, quod socios diripuerit, quod iudicium recusarit, quod propter aeris alieni magnitudinem praedia manciparit bonaque sua in potestate non habeat<sup>3</sup> (Asc. Tog. 84.12–25 Clark).<sup>4</sup>*

This paper had its origins in E. Badian's seminar on Julius Caesar at Harvard University in the fall of 1991. Our thanks go to Professor Badian, whose questions, criticisms and guidance contributed materially to the argument we advance here.

- 1 Asconius *Tog.* 83.26–84.3 Clark. *Clientem* is supplied in this lemma from Asconius' comment (quoted just below). All references to Asconius are to Clark's edition by page and line number.
- 2 Plutarch's report (see note 4 below) supports the insertion of Caesar's name here. Asconius had referred to Caesar in his *argumentum* to this speech (83.4) and again at 83.18.
- 3 From the primary sequence verbs here it looks as though Asconius is reproducing the "charges" either as they were formulated by the censors (perhaps changing the mood, but not the tense) or as Cicero reported them in his speech (a distinct possibility, given the vivid *diripuerit* – a favorite word with Cicero – and the tricolon format).
- 4 This is the only reliable information on the case. Plutarch gives a version (ὁ δὲ Κάϊσαρ ἀμειβόμενος τὴν Ἑλλάδα τῆς προθυμίας συνηγόρευεν αὐτῇ Πόπλιον [sic!] Ἀντώνιον διωκούση δωροδοκίας ἐπὶ Λευκούλλου Μάρκου τοῦ Μακεδονίας [sic!] στρατηγοῦ. καὶ τοσοῦτον ἴσχυσεν, ὥστε τὸν Ἀντώνιον ἐπικαλέσασθαι τοὺς δημάρχους, σκηψάμενον οὐκ ἔχειν τὸ ἴσον ἐν τῇ Ἑλλάδι πρὸς Ἑλληνα [Plut. *Caes.* 4.2]), but is unreliable. Even if we leave aside his giving Antonius the praenomen Publius, Plutarch has misunderstood

The exact nature of the matter brought before Lucullus is not self-evident and has not, we think, been sufficiently elucidated. Since Antonius had plundered the allies, one might suppose that he should have been haled before the *quaestio de pecuniis repetundis*, yet the Greeks whom he despoiled lodged their complaint with the peregrine praetor. Some decision on the part of the praetor seemed so unjust to the college of tribunes that they quashed the case despite Antonius' apparent guilt (the censors later thought his guilt so manifest that they threw him out of the senate even though he had not been convicted), and since there is no further mention of the case before the judgement of the censors, it would seem that the case was dropped after the tribunes' ruling. What was the charge against Antonius? What was the decision of Lucullus which was so unsettling? Investigation of the matter should start by determining in what capacity Antonius carried out his depredations.

## II. Antonius' Position in Greece

According to Asconius, Antonius' activities took place while Sulla was in Greece – that is to say between 87 and 83. We do not know Antonius' age exactly, but the year 105 is the latest possible for the birth of a consul of 63; he is likely to be older – probably in his twenties during the eighties B.C.<sup>5</sup> Nor do we know when he was quaestor, only that he must have held the office before his expulsion from the senate in 70. However, it is very unlikely that he was quaestor before 87 and it is likewise unlikely that a quaestor elected under the *dominatio Cinnae* would be found serving Sulla in Greece. Hence we can conjecture that he served in some capacity below that of quaestor.

the case, thinking that Lucullus was praetor in Macedon and that Antonius claimed he could not receive justice when tried for plundering Greeks in Greece. This garbling is most likely Plutarch's own attempt to explain a situation he did not understand. One cannot determine his precise source here, but according to H. Peter (*Die Quellen Plutarchs in den Biographien der Römer* [Halle 1865] p. 129) it "scheint nicht zu den schlechtesten gehört zu haben." Plutarch can't have used Asconius unless he could completely misconstrue *qui ius inter peregrinos dicebat* and think it means "in Greece". Not only that, but he "knows" that Caesar was taking the case as a favor for the Greeks, and that bribery was involved. On δωροδοκία, see p. 52 below. The author of the *Commentariolum petitionis* ascribed to Q. Cicero was probably familiar with the facts only as reported in Cicero's speech (and even then he oversimplifies – see note 55 below), but because of our scrappy knowledge of that speech we are grateful for his confirmation of Asconius' report of the censorial nota: *eorum alterius bona proscripta vidimus, vocem denique audivimus iurantibus se Romae iudicio aequo cum homine Graeco certare non posse, ex senatu eiectum scivimus optima censorum aestimatione* (*Com. pet.* 8).

5 His elder brother (Plut. *Ant.* 1) M. Antonius Creticus (*RE* 29) was not praetor until 74 and could have been born at the latest in 113.

His control of cavalry units suggests a *praefectura equitum*. The precise phrase used to define his command – *nactus de exercitu Syllano* – is peculiar, however; it sounds as if it ought to refer to someone from outside the army who had gained the use of the *turmae equitum*. If Antonius had been a legitimate officer of Sulla's army in Greece, one might expect Asconius to have said something like *nam is praefectus equitum in Achaia multos spoliavit*.<sup>6</sup> The phrase Asconius does use may mean either of two things. Antonius may simply have gained the services of these *equites* for his depredations, presumably through the cooperation of their commander. Cicero, however, refers to Antonius with the phrase *in exercitu Sullano praedo*.<sup>7</sup> We can reconcile these apparently contradictory pieces of evidence by supposing that Antonius got himself appointed as their commander and then used them for his own purposes.

There is a parallel for the latter case. During Cicero's proconsulship in Cilicia, Brutus recommended to him two *negotiatores*, M. Scaptius and P. Matinius, to whom he claimed a debt was owed by the town of Salamis in Cyprus.<sup>8</sup> Scaptius sought from Cicero a *praefectura equitum* with which to force the Salaminians to repay the debt. Having obtained just such a post from Cicero's predecessor Ap. Pulcher, he had been using his *turmae aliquot equitum* to besiege the bouleuterion when Cicero entered his province and cancelled the commission.<sup>9</sup> Cicero refused Scaptius the appointment he sought, having from the outset of his proconsulship made it his policy to grant no prefectures to *negotiatores*.<sup>10</sup> Not every governor showed such restraint, however, and the position of Scaptius, who, despite the fact that he was a businessman pursuing private interests (interests that Cicero protested were very much contrary to the well-being of the province<sup>11</sup>), was given a prefecture and control of *equites*, is

6 On Asconius' penchant for specifying in what capacity a man acted as he did, see C. Damon, *HSCP* 94 (1992) 231–34.

7 Asc. *Tog.* 88.21 Clark.

8 *Ad Att.* 5.21.10, 6.1.5. The affair is the topic of *ad Att.* 5.21.10–12, 6.1.3–7.

9 *Appius noster turmas aliquot equitum dederat huic Scaptio per quas Salaminos coereret, et eundem habuerat praefectum (ad Att.* 5.21.10); fuerat enim [sc. Scaptius] praefectus Appio et quidem habuerat turmas equitum quibus inclusum in curia senatum Salamine obsederat, ut fame senatores quinque morerentur (*ad Att.* 6.1.6).

10 *Negavi me cuiquam negotianti dare quod idem tibi ostenderam (Cn. Pompeio petenti probaram institutum meum, quid dicam Torquato de M. Laenio tuo, multis aliis?) (ad Att.* 5.21.10); id vero per te exceperamus ne negotiatori [sc. praefecturam deferrem]; quod si cuiquam, huic tamen non (*ad Att.* 6.1.6). The verb *exceperamus* indicates that Cicero stated this intention in his provincial edict. It turns out rather to the detriment of Cicero's vaunted integrity that he was not opposed to handing out such prefectures, so long as they were exercised outside of his province: *ego tamen quas per te Bruto promiseram praefecturas, M. Scaptio, L. Gavio, qui in regno rem Bruti procurabant, detuli; nec enim in provincia mea negotiabantur (ad Att.* 6.1.4).

11 *At ille [sc. Scaptius] profert senatus consultum Lentulo Philippoque consulibus UT QUI CILICIAM OBTINERET IUS EX ILLA SYNGRAPHA DICERET. cohortui primo; etenim erat interitus civitatis (ad Att.* 5.21.11–12).

probably a good parallel for that of C. Antonius in Achaia in the mid-eighties.<sup>12</sup> Scaptius owed his appointment to the governor of the place in which he wanted to make use of the forces; the man responsible in the mid-eighties for what Asconius calls Achaia was of course Sulla.<sup>13</sup> We must now consider the *lex de repetundis* in order to assess the options for redress open to the victimized Greeks.

### III. Antonius and the Law on Extortion

Starting from 171 the Romans instituted special *ad hoc* courts to deal with accusations of wrongdoing on the part of Roman magistrates in the provinces.<sup>14</sup> In 149 L. Calpurnius Piso Frugi established the first permanent *quaestio*, the *quaestio de repetundis*.<sup>15</sup> The senatorial juries of the court proved themselves incapable of punishing fellow senators and in 123 Gaius Gracchus transferred jury duty in this court to the *equites Romani*. Substantial fragments of his law are preserved on the *tabula Bembina*.<sup>16</sup> In a move which was to lead to much

12 Similar appointments to legateships were apparently not uncommon; see Cic. *Leg.* 3.18: *iam illud apertum est profecto, nihil esse turpius quam quemquam legari nisi rei publicae causa. omitto quem ad modum isti se gerant atque gesserint, qui legatione hereditates aut syngraphas suas persecuntur. in hominibus est hoc fortasse vitium, sed quaero, quid reapse sit turpius quam sine procuratione senator legatus, sine mandatis, sine ullo rei publicae munere? quod quidem genus legationis ego consul, quamquam ad commodum senatus pertinere videbatur, tamen adprobante senatu frequentissimo, nisi mihi levis tribunus plebis tum intercessisset, sustulissem.*

13 In 88, Sulla was allotted as his province Asia and the *bellum Mithridaticum* (Vell. 2.18; App. *Mithr.* 22, *BCiv.* 1.55). The tribune P. Sulpicius Rufus carried a law transferring command of the war to Marius (references in *MRR sub anno* 88). After Sulla's flight to his army and return to Rome he had Sulpicius' law annulled, apparently arguing that his measures had been passed *per vim* (Cic. *Phil.* 8.5, cf. Plut. *Sulla* 8.2–3) – as in fact they were! Whatever later enactments were passed regarding Sulla's position under the *dominatio Cinnae* were doubtless quashed retroactively after Sulla's return in 83. At this period there was no fixed province of Achaia; rather, when necessary it was overseen by the governor of Macedonia (see S. Accame, *Il dominio romano in Grecia dalla guerra acaica ad Augusto* [Rome 1946] 147–56). Plut. *Sulla* 11.5 shows that the terms of Sulla's command gave him precedence over the governor of Macedon in Boeotia (or at least that this is what Sulla's quaestor L. Lucullus argued on his behalf in a confrontation). All evidence indicates that in the 70s, Sulla must have been viewed as the legitimate commander in Achaia in the 80s.

14 For discussion of early procedure *de repetundis*, see W. Eder, *Das vorsullanische Repetundenverfahren* (Munich 1969) 24–57, and C. Venturini, *Studi sul 'crimen repetundarum' nell'età repubblicana* (Milan 1979).

15 Eder, *op.cit.* (n. 14) 58–119.

16 This Gracchan law is almost certainly a *lex Acilia*, though both the identification of the *tabula Bembina* as the Gracchan law and the Gracchan law as the *lex Acilia* are much disputed. For a modern discussion with bibliography, see A. Lintott, *Judicial reform and land reform in the Roman Republic* (Cambridge 1992).

quarrelling in later years, Gaius restricted the application of his law to elected magistrates of the Roman people and their sons, thereby exempting members of the equestrian order from liability to charges of extortion.<sup>17</sup> In 54, when the *eques* C. Rabirius Postumus was indicted under the *quo ea pecunia pervenisset* clause of a later *lex de pecuniis repetundis* (the *lex Iulia*) this exemption was still valid, as Cicero repeatedly insisted in his speech on behalf of Rabirius.<sup>18</sup> The version of the law that would have been in effect in 76 B.C. was Sulla's, some of the provisions of which are discussed below.

Could the charge against C. Antonius in 76 have been extortion? At one point in the *Strafrecht* Mommsen views the case as an instance of a *repetundae* charge brought before the peregrine praetor.<sup>19</sup> But later in the same work he indicates that the action simply illustrated the non-citizen's right to lodge before a civil court a case which might also have fallen to the *quaestio de*

17 Line 2 describes those subject to the law as [... *quei dic. cos. pr. mag. eq. cens. aid. tr. pl. q. iivir cap. iivir a.d.a. tribunus mi*](*itum*) (*egionibus*) *III primis aliqua earum fuerit, queve filius eorum quoius erit, quoius pater senator siet*. The higher part of the list can be supplemented from Lines 8 and 16 (*Dic., cos., pr., mag. eq., [...]; ...tr. pl., q., IIIvir. cap., tr. mil. I. III primis aliqua earum, triumvir a.d.a....*); only the offices of censor and aedile must be conjectured. The restriction of the law to only the military tribunes of the first four legions indicates that the category represented was *magistratus populi Romani*; as is well known, only those military tribunes were elected, the rest being appointed by the consuls. Mommsen emended the part of the preserved text reading *quoius pater senator siet* to *<queive> quoius<ve> pater senator siet*, arguing that this part was parallel to the preceding one bringing the sons of magistrates within the law's compass and that the emended part ought to include the magistrate's fathers. It is not clear how exactly Mommsen intended his emendation to be understood, the second *-ve* in particular being puzzling. It is clear, however, that the clauses are not parallel: the second has *siet* in place of *erit* and a present subjunctive is not parallel to a future indicative. One can make better sense of the received text by understanding the *siet* clause as a relative clause of characteristic whose antecedent is the *filius* of the preceding clause. The law then restricts itself to the "sons of any of them (*sc.* the aforementioned magistrates) whose father is a senator." In this case the law exempts the sons of those magistrates who were not senators, the offices below aedile not automatically leading to admission to the senate.

18 *Datur tibi tabella iudici. Qua lege? Iulia de pecuniis repetundis. Quo de reo? De equite Romano. At iste ordo lege ea non tenetur* (*Rab. Post.* 12, and see note 30 below).

19 With regard to his assertion that sons were liable for funds they extorted during their fathers' magistracies ("wegen der während der Funktion ihrer Väter empfangenen Gelder"), Mommsen comments in a footnote, "Dies scheint das Gesetz Sullas abgeändert zu haben; denn im J. 678/76 wurde gegen den Sohn des M. Antonius Consuls 655/99 C. Antonius die gleiche Klage bei dem Peregrinenprätor angestellt... Schwerlich ist, wo die Quästion zulässig war, anstatt derselben die Privatklage angestellt worden." Th. Mommsen, *Römisches Strafrecht* (Leipzig 1899) 711 n. 5. Mommsen seems here to be connecting C. Antonius' case in some way with his father. But clearly the case arose from events in Greece in the 80s having nothing to do with M. Antonius *cos.* 99 (and killed by Marians in 87).

*repetundis*.<sup>20</sup> This view, however, has little evidence to speak for it and derives from Mommsen's idiosyncratic view that the *quaestio de repetundis* developed from *iudicia publica*, that is special civil cases "in geschärften Formen".<sup>21</sup>

In an article arguing against Mommsen, Buckland challenged his interpretation of Antonius' case on two grounds.<sup>22</sup> First, Antonius was not a magistrate with *imperium*, so that case cannot serve as an instance of the prosecution of ex-magistrates under civil jurisdiction. Buckland's second argument is that a governor's extortionate subordinates were brought before a civil court, not before the *quaestio de repetundis*.<sup>23</sup> He cites two instances. The first is the case of C. Verres, whom M. Aemilius Scaurus coerced into appearing as a witness in Scaurus' case of *repetundae* against Cn. Cornelius Dolabella by threatening to use against Verres evidence which Scaurus preferred to use against Dolabella.<sup>24</sup>

20 He states, "Der Nichtbürger kann zwar in gleicher Weise in dem gewöhnlichen Prozeß sein Recht geltend machen," and in the accompanying note adds, "Dieser Privatprozeß war, wie das acilische Gesetz zeigt, nicht an die lästigen Termine der Quästion ... gebunden, und er mochte auch unter Umständen praktisch sich mehr empfehlen als die immer politische Aktion des öffentlichen Verfahrens. Der ... Prozeß gegen C. Antonius gehört in diese Kategorie." Mommsen *op.cit.* (n. 19) 722 with n. 3. This conception is directly contradicted by Cicero who asserts in the *divinatio in Q. Caecilium* that while the citizen could seek redress in the civil courts, the *quaestio de repetundis* was erected especially for the succour of provincials: *quasi vero dubium sit quin tota lex de pecuniis repetundis sociorum causa constituta sit; nam civibus cum sunt ereptae pecuniae, civili fere actione et privato iure repetuntur* (18).

21 Mommsen, *op.cit.* (n. 19) 706–09, 721–27; *Römisches Staatsrecht* (Leipzig 1885–87) 1.168, 2.223ff., 583, 3.359. Basically, Mommsen argued that the term *iudicium publicum*, later simply a synonym for *quaestio*, originally referred to special civil cases in which the public interest was concerned and the state intervened in the proceedings. He saw the institution of the *quaestio de repetundis* in 149 as the time when the *iudicium publicum* was merged with the investigatory *quaestio*. However, his conception that there was such a special civil procedure before 149 is almost certainly wrong. His evidence (mainly § 95 of the *lex Ursonensis* [Bruns 27]; also the official delivery of witnesses in § 55 of the *lex Mamilia Roscia Peducaea Alliena Fabia* [Bruns 15] and the aqueduct edict of Venafrum [Bruns 77.66ff.]) is Caesarian or later and doubtless shows the influence of the *quaestiones perpetuae* on civil procedure rather than vice versa. For a criticism of Mommsen's conception of the development of the *quaestio de repetundis*, see W. Kunkel, *Untersuchungen zur Entwicklung des römischen Kriminalverfahrens in vorsullanischer Zeit* (Munich 1962) 12–14, 52–54.

22 W. W. Buckland, "Civil Proceedings against Ex-magistrates in the Republic", *JRS* 27 (1937) 37–47.

23 This may have been true under the Empire but seems dubious in the Republic. For imperial evidence see Mommsen, *Strafrecht* (n. 19) 713.

24 *Quae omnia, etiamsi voluntate Dolabellae fiebant, per istum [sc. Verrem] tamen omnia gerebantur... Itaque M. Scaurus, qui Cn. Dolabellam accusavit, istum in sua potestate ac ditione tenuit. Homo adulescens cum istius in inquirendo multa furta ac flagitia cognosset, fecit perite et callide; volumen eius rerum gestarum maximum isti ostendit; ab homine quae voluit in Dolabellam abstulit; istum testem produxit; dixit iste quae velle accusatorem putavit* (Verr. 2.1.97).

Yet Cicero tells us that Verres was a *proquaestor*; hence he was liable to the *quaestio de repetundis* (and not a civil court) in his own right.<sup>25</sup> Admittedly Cicero says that he himself could use the same tactics to procure a “large number” of witnesses against Verres’ governorship, and at first sight this would seem to imply that many people, presumably not all of them magistrates, were liable to the *lex de repetundis*.<sup>26</sup> However, as Buckland’s second example will show, non-magistrates could be charged in civil cases and Cicero may be referring to them. Cicero’s “large number” of witnesses would then resemble Verres only in that they too could be threatened with prosecution; the specific charges would not be under the same law.

This second example, one rather more relevant to our case, is Q. Apronius, Verres’ partner in pillaging Sicily. Apronius was the leader of the equestrian *publicani* who collected the tithe in Sicily.<sup>27</sup> Being an *equus Romanus* and not an elected magistrate, Apronius was not subject to the *quaestio de repetundis*, but was haled before the court of Verres’ successor in Sicily, L. Metellus. A senator, C. Gallus, accused Apronius under a provision of Metellus’ edict, the *formula Octaviana*, which allowed for the restoration of property extorted through the threat of violence.<sup>28</sup> As it turned out, Metellus, who was acting in Verres’ interest, rejected Gallus’ suit – not, however, as being inapplicable to Apronius, but in order not to prejudice any eventual case against Verres.<sup>29</sup> Buckland was not interested in clearing up the details of the “obscure story” of C. Antonius’ trial beyond proving Mommsen’s interpretation untenable, so he did not go on to investigate other cases which give us information about the general liability of subordinates.

#### IV. The Accountability of Subordinates

Cicero gives evidence that junior subordinates were not subject to the *lex de repetundis*. He reports that in 55 Pompey brought the matter of the law’s scope

25 *Pro quaestore vero quo modo iste commune Milyadum vexarit... non est necesse demonstrare* (Verr. 2.1.95).

26 *Quo ex genere mihi testium qui cum isto furati sunt, si uti voluissem, magna copia fuisset qui ut se periculo litium, coniunctione criminum liberarent, quo ego vellem descensuros pollicebantur* (Verr. 2.1.97).

27 *Eorum omnium qui decumani vocabantur princeps erat Q. ille Apronius* (Verr. 2.3.22). Indeed 2.3.135–36 suggests that the problem was not that Apronius was a subordinate of Verres but that Verres was a partner of Apronius!

28 *Adventu L. Metelli praetoris... aditum est ad Metellum; eductus est Apronius. Eduxit vir primarius, C. Gallus senator; postulavit ab L. Metello ut ex edicto suo iudicium daret in Apronium, Quod per vim aut metum abstulisset, quam formulam Octavianam et Romae Metellus habuerat et habebat in provincia* (Verr. 2.3.152).

29 *Non impetrat [sc. Gallus], cum hoc diceret Metellus, praeiudicium se de capite C. Verris per hoc iudicium nolle fieri* (Verr. 2.3.152).

before the senate and that only a few senators dared suggest that military tribunes, prefects, scribes and the whole retinue of the governor be made accountable under the *lex Iulia de repetundis*.<sup>30</sup> Since this move to expand the law failed in 55, it is most unlikely that subordinates who were not themselves magistrates were liable under the *lex Cornelia*.

Since the procedure *de repetundis* was fundamentally one of restoration (though it carried with it criminal implications), there might seem to be no reason to provide for further prosecution of subordinates if the lucre wound up in the possession of the magistrate in charge. However, this was clearly not always the case (think of Catullus' Mamurra – *quis potest pati ... Mamurram habere quod Comata Gallia/habebat uncti et ultima Britannia* [29.1–4] – for an example close to hand). And in the case brought by Scaurus against Dolabella responsibility for extortion might have been imputed to either the proquaestor Verres or the propraetor Dolabella. A provision introduced into the extortion law by C. Servilius Glaucia covered cases in which the subordinates themselves received a cut; they (and anyone else into whose hands such money came) were liable under the clause *quo ea pecunia pervenerit*.

The workings of this clause are illustrated by the *causa Serviliana* of the 50s B.C.<sup>31</sup> M. Servilius, who had been on the staff of C. Claudius Pulcher in Asia in 55–53, was charged under the *quo ea pecunia pervenerit* clause of the *lex Iulia de repetundis*, a clause which was invoked when a promagistrate had been found guilty of extortion (as Pulcher had been), but had effectively blocked recovery of the money by one means or another (Pulcher went into exile without leaving behind a sufficiency of attachable funds). In such circumstances, the plaintiffs were entitled to seek payment from anyone to whom the money had gone (*quo ea pecunia pervenerit*), and the restriction of liability to elected magistrates no longer applied.<sup>32</sup> Furthermore, Cicero makes clear in the

30 *Nam cum...consule Cn. Pompeio, de hac ipsa quaestione [sc. de repetundis] referente, existerent nonnullae sed perpaucae tamen acerbae sententiae, quae quidem censerent ut tribuni, ut praefecti, ut scribae, ut comites omnes magistratum hac lege [sc. Iulia de repetundis] tenerentur, vos ipsi... et senatus frequens restitit...huic ordini [sc. equestri] ignem novum subici non sivistis* (*Rab. Post.* 13). This question of Pompey's presumably did not come out of the blue and suggests that the *lex Iulia* had been phrased in such a way as to be interpreted as allowing the prosecution of *equites*. Since the issue of equestrian immunity was so contentious, one doubts that such a rewording of the earlier statute could have been inadvertent. In any case, even if Caesar had wished to allow for such an interpretation, clearly equestrian opposition was too great.

31 For a discussion of the stages of the proceedings against M. Servilius, see D.R. Shackleton Bailey on *ad Fam.* 8.8.3.

32 The pronoun *ea* indicates that the same money was being sought in both trials, and in fact hearings stemming from the *quo ea pecunia* clause were held before the same *iudices* as had heard the *repetundae* case and had given the *litis aestimatio*. The only other Republican case in which this procedure is thought to have been invoked is the mysterious trial of C. Manilius in the last days of 66 (see J.T. Ramsey, "The prosecution of C. Manilius in 66



*pro Rabirio Postumo* that the clause *quo ea pecunia pervenerit* depended upon the prior conviction of someone under the *lex de repetundis*.<sup>33</sup> Cicero also argues that the clause was only applied to those cited in the *litis aestimatio*, though his wording indicates that this was an argument based on earlier cases, not on the actual formula of the law itself.<sup>34</sup> What is certain, however, is that this *appendicula causae iudicatae*, as Cicero calls the clause, was operative only as the result of a prior conviction and that in the absence of such a conviction and ensuing *litis aestimatio* no case could be lodged under the *quo ea pecunia* provision. Moreover, Cicero informs us that this clause was transferred verbatim from the *lex Servilia* (doubtless Glaucia's) to the *lex Cornelia*, whence it was once more transferred to the *lex Iulia*.<sup>35</sup> We can thus be certain that the state of affairs described by Cicero in 54 would have been the same in 76. When the praetor refused (for reasons which are not entirely clear<sup>36</sup>) to give the provincials an action against Servilius under the *quo ea pecunia pervenerit* clause, Q. Pilius instituted a charge *de repetundis* against him in his own right. From this we can conclude that Servilius held an elective post.

But if Servilius and the youthful Verres were liable in their own right to the *repetundae* charge, such was not the case with C. Rabirius Postumus, the Roman *eques* from whom repayment was sought under this same *quo ea pecunia pervenerit* clause after the conviction (and withdrawal into exile) of A. Gabinius on a *repetundae* charge deriving from his governorship of Syria in 57–54. Cicero tries to get around Rabirius' liability under the clause *quo ea pecunia pervenerit* by arguing that given the special circumstances of this case a conviction under the terms of the clause was tantamount to a conviction on the full *repetundae* charge, but he does not actually deny that Rabirius was liable under the clause. What he does do, however, is reveal that the normal defense for equestrian members of a governor's entourage was the claim that ultimately responsibility, like authority, lay with the governor:

B.C. and Cicero's *pro Manilio*", *Phoenix* 34 [1980] 323–36). So little is really known about this case that it cannot help us with our investigation of Antonius' trial.

- 33 *Est enim haec causa QUO EA PECUNIA PERVENERIT quasi quaedam appendicula causae iudicatae atque damnatae... Iubet lex Iulia persequi ab eis ad quos ea pecunia, quam is ceperit qui damnatus sit, pervenerit (Rab. Post. 8).*
- 34 *Erat enim haec consuetudo nota vobis quidem omnibus, sed, si usus magister est optimus, mihi debet esse notissima... Ita contendo, neminem umquam QUO EA PECUNIA PERVENERIT causam dixisse qui in aestimandis litibus appellatus non esset (Rab. Post. 9).* It is clear that if the law itself explicitly restricted the clause's operation to those mentioned in the *litis aestimatio*, Cicero would have said so instead of arguing from prior application of the law.
- 35 *Hoc totidem verbis translatum caput est quot fuit non modo in Cornelia sed etiam ante in lege Servilia (Rab. Post. 9).*
- 36 The same praetor did allow the action when Pulcher's son came forward with allegations of collusive prosecution against Servilius, which supports Shackleton Bailey's suggestion that insufficient evidence was the reason for his initial refusal.

*nam si Postumo fraudi fuerit, qui nec tribunus nec praefectus nec ex Italia comes nec familiaris Gabini fuit, quonam se modo defendent posthac qui vestri ordinis cum magistratibus nostris fuerint his causis implicati (Rab. Post. 19, cf. the list of subordinates at § 13: tribuni, praefecti, scribae, comites magistratum).*

Much the same point can be demonstrated from the *Verrines*. At 2.2.26 Cicero turns to address the argument that some of the crimes he ascribes to Verres were in fact committed only by his subordinates – *praefecti, scribae, accensi, medici, haruspices* and *praecones*<sup>37</sup> – and that the money was paid to them and not to Verres.<sup>38</sup> Cicero grants this but argues that these *comites*, Verres' *manus*, could have extorted money only through collusion with Verres.<sup>39</sup> Cicero asserts that this defence must be rejected because if it became necessary to prove that the magistrate was directly involved, no one would ever be convicted.<sup>40</sup> Verres' attempt to shift responsibility to his subordinates was, it appears, a novel ploy: *quae ista defensio est? Utrum adseveratur in hoc an temptatur? Mihi enim res nova est.*<sup>41</sup> Though Cicero is no doubt capable of distorting the truth, it seems hard to believe that he would have chosen to say this if it was generally the case that the accused would attempt to place the onus of his crimes on the subordinates who carried them out. The very fact that this dispute about the liability of subordinates was possible suggests that the *lex Cornelia* did not explicitly define the status of such men. Cicero's claim that the defence was a new ploy certainly implies that in the past their misdeeds had been imputed to their commander. The generality of his response suggests that Verres' defense had made a vague assertion without any precedents cited to back it up. It would seem then that while the status of subordinates was not directly spelled out in the *lex Cornelia*, normally subordinates who were not magistrates were not liable for prosecution. Rather their deeds were imputed to their commander.

37 *Comites illi tui delecti manus erant tuae; praefecti, scribae, accensi, medici, haruspices, praecones manus erant tuae (Verr. 2.2.26).*

38 *At enim ad Verrem pecunia ista non pervenit (Verr. 2.2.26).*

39 *Nam si ista Verri numerata pecunia? Adiuvo te; mei quoque testes idem dicunt... nego tibi ipsi ullum nummum esse numeratum; sed cum ob tua decreta, ob edicta, ob imperia, ob iudicia pecuniae dabantur, non erat quaerendum cuius manu numerarentur, sed cuius iniuria cogerebantur (Verr. 2.2.26).*

40 *Nam si hanc defensionem probabit, 'Non accepit ipse,' licet omnia de pecuniis repetendis iudicia tollatis. Nemo umquam reus tam nocens adducetur qui ista defensione non possit uti; etenim cum Verres utatur, quis erit umquam posthac reus tam perditus qui non ad Q. Muci innocentiam referatur, si cum isto conferatur? (Verr. 2.2.27).*

41 2.2.26. Cf. Verr. 2.2.27: *neque nunc isti mihi Verrem defendere videntur quam in Verre defensionis temptare rationem.*

## V. The Praetor's Formula and the Prosecution of C. Antonius

We can now return to Antonius, whose case was brought before the peregrine praetor and whose trial was pronounced *iniquum* by the tribunes acting as a body. Why? What if Antonius had in fact received an appointment as *praefectus*? As we have seen, Asconius speaks of Antonius as if he were not a member of Sulla's army, yet his control of the *equitum turmae* suggests that he was a *praefectus*, most likely having acquired control over the *equites* through a sham prefecture, just as Scaptius did under Pulcher and wished to do under Cicero. In such circumstances, the promagistrate ought to have been held accountable,<sup>42</sup> but the promagistrate from whom Antonius obtained his prefecture was long since out of the reach of any secular court. Not even the *quo ea pecunia pervenerit* clause was open to the Greeks in 76, since Sulla (unlike Pulcher and Gabinius) had never been convicted on a *repetundae* charge. Faced with this situation, what could be done about this man who, it seems, had not only abused his connections in Greece but had made himself pretty thoroughly objectionable in Rome as well (cf. Cicero's summary in the speech *in toga candida: in exercitu Sullano praedonem, in introitu gladiatorem, in victoria quadrigarium*, together with Asconius' comments, *Asc. Tog.* 88.21–29<sup>43</sup>)?

It is clear from Asconius' account that Lucullus had accepted the case. What we hear of Lucullus' decision is consonant with the procedure of *condictio* or claim of property under the formulary system.<sup>44</sup> There were two stages to this procedure. The first part took place before the magistrate and was termed *in iure*. Here, in the *postulatio actionis*, the plaintiff requested the magistrate to authorize trial on the basis of a particular formula. The formula could either derive from the inherited stock of formulae which the magistrate set out in his edict at the start of his term of office or be an entirely new formula made up to suit the particular occasion.<sup>45</sup> If the magistrate accepted the case, he framed the formula as he saw fit and authorized with the words *iudicium do* the actual trial

42 One might cite the prosecution of P. Rutilius Rufus, *legatus* of P. Mucius Scaevola (whatever the date of Scaevola's proconsulship). However, Scaevola left after nine months (*Cic. ad Att.* 5.17.5) and Rutilius must have been prosecuted for his three months as *legatus pro praetore*, taking upon himself the responsibilities of the absent proconsul; for this position the office of *legatus pro praetore*, see Th. Mommsen, *Staatsrecht* (n. 21) 2,700.

43 It is unclear at what point in a long and unattractive career Antonius acquired the tag "Hybrida", which, as Pliny tells us, was applied to men who were half-wild, like the mixed progeny of wild and domestic swine (*N.H.* 8.213).

44 For a description of this system, see H. Jolowicz, *Historical Introduction to the Study of Roman Law*, 3rd ed. (Cambridge 1972) 199ff.

45 Jolowicz, *op.cit.* (n. 44) 201–2.

of the case.<sup>46</sup> This trial formed the second part of the *condictio*. It took place before a judge agreeable to both parties who reached his decision on the basis of the formula chosen by the praetor; this trial was termed *apud iudicem* or *in iudicio*. But if the formula chosen was unacceptable to the defendant, he could refuse it and back up his refusal through appeal to the tribunes.<sup>47</sup> This is exactly what Antonius did.<sup>48</sup> The verb *eiorare* (also appearing in the form *eierare*) often means to reject a judge as unfair,<sup>49</sup> but in this instance Antonius rejects not the *iudex* but the *iudicium* itself, that is the phraseology of the formula granted by the praetor.<sup>50</sup> When he appealed to the college of tribunes (*appel-lavit tribunos*), it reviewed the case and pronounced in his favor.

46 The expression used is *in ea* (vel sim.) *verba iudicium postulare* (from the plaintiff's point of view) or *dare* (from the praetor's): Cic. *Verr.* 2.2.31, 2.3.69; *Quinct.* 63–64; *Tull.* 12, 31, 38, 41.

47 For a similar *appellatio*, cf. *Asc. Mil.* 47.2–9 (*L. Novius tr. pl. ... cum ... tribuni de appellatione cognoscerent, ita sententiam dixit: ... iudicium tollam*), ... *quid attinet te tam multis verbis a praetore postulare ut adderet in iudicium INIURIAM, et, quia non impetrasses, tribunos pl. appellare et hic in iudicio queri praetoris iniquitatem, quod de iniuria non addidisset?* *Tull.* 38; also Cic. *Vat.* 33 (*edixerit ne C. Memmius praetor ex ea lege [sc. Licinia et Iunia] ut adesses die tricesimo? cum is dies venisset, fecerisne quod in hac re publica non modo factum antea numquam est, sed in omni memoria est: omnino inauditum? appellarisne tribunos plebis ne causam dices?*). Less closely related are the *appellationes* mentioned at *Verr.* 2.2.100 and *Quinct.* 63–65 (*fatetur enim [sc. Hortensius, Cicero's opposing counsel] ... Alfenum [the procurator of Cicero's client] ... iudicium quin acciperet in ea verba quae Naevius edebat non recusasse*, Cic. *Quinct.* 63). Sulla, for all the restrictions he imposed on the tribunate, did leave the college its *ius auxilii* (*Sullam probo, qui tribunis plebis sua lege iniuriae faciendae potestatem ademerit, auxilii ferendi reliquerit*, Cic. *Leg.* 3.22). Tribunal intercession in judicial matters is discussed by Mommsen, *Staatsrecht* (n. 21) 1.274ff., M. Kaser, *Das römische Zivilprozessrecht* (Munich 1966) 125–26, L. Thommen, *Das Volkstribunat der späten römischen Republik. Historia Einzelschriften* 59 (Stuttgart 1988) 233–41.

48 Note that one of the censors' reasons for expelling Antonius was *quod iudicium recusarit*, almost exactly the same words as Cicero used of Quinctius' agent Alfenus (see preceding note). A.H.J. Greenidge, *The Legal Procedure of Cicero's Time* (Oxford 1901) 266 n. 4 correctly recognized the nature of Antonius' rejection.

49 *OLD* sv 2; note esp. Cic. *de Or.* 2.285: *cum ei [sc. Scipioni qui Ti. Gracchum perculit] M. Flaccus multis probris obiectis P. Mucium iudicem tulisset, 'eiero,' inquit, 'iniquus est'; cum esset admurmuratum, 'ah,' inquit, 'patres conscripti, non ego mihi illum iniquum eiero, verum omnibus'*. Also *Verr.* 2.3.137 (when a *sponsio* involving himself is brought before Verres, he refuses to grant the plaintiff Scandilius' request that Verres choose the *recuperatores* from among the local traders): *Scandilius postulare de conventu recuperatores. Tum iste negat se de existimatione sua cuiquam nisi suis commissurum. Negotiatores sibi putant esse turpe id forum sibi iniquum eierare ubi negotientur; praetor provinciam suam sibi totam iniquam eierat*.

50 Note that in 59, when Antonius was on trial again, the Caesarian tribune Vatinius was careful to prevent him from enjoying the benefits of his new *lex de alternis consiliis reiciendis*, which modified the procedure of jury selection in favor of defendants (*postea quam ille [sc. Antonius] est reus factus, statim tuleris in eum 'qui tuam post legem reus factus esset,' ut homo consularis exclusus miser puncto temporis spoliaretur beneficio et aequitate legis tuae?* *Vat.* 27). Perhaps this is a reflection of Caesar's frustration with

According to Asconius, Antonius swore to the tribunes that he rejected the *iudicium quod aequo iure uti non posset*. What exactly does *aequum ius* mean? Cicero seems to use the phrase exclusively to protest against situations in which civil procedure, especially the wording of the formula, has been manipulated to the disadvantage of one of the litigants.<sup>51</sup> He even uses the same phrase as that of Asconius, *aequo iure uti*, in connection with the fact that whereas Verres used an unusual formula as urban praetor (having been bribed, according to Cicero, by one of the litigants to do so), he inserted the normal one in his *edictum* in Sicily.<sup>52</sup> Cicero asks Verres *utrum digniores homines existimasti eos qui habitant in provincia quam nos qui aequo iure uteremur, an aliud Romae aequum est, aliud in Sicilia?*<sup>53</sup> The fact that the tribunes sustained Antonius' objections strongly suggests that there must have been a case against the *iudicium* that Lucullus was setting up, and the phrase *ius aequum* suggests that the objection concerned the wording of the decree.<sup>54</sup>

That it was a specific decision of Lucullus' which led to Antonius' appeal is clear from Asconius' phrase *cum Lucullus id quod postulabant decrevisset*.<sup>55</sup>

Antonius' evasion in 76. On the trial *de pecuniis repetundis* in 59, see E. S. Gruen, "The trial of C. Antonius", *Latomus* 32 (1973) 301–10.

- 51 After Verres incites the *palaestritae* of Syracuse to contest an inheritance against a Sicilian named Heraclius, *Heraclius cum advocatis adit et postulat ut sibi cum palaestritis, hoc est cum populo Syracusano, aequo iure disceptare liceat* (*Verr.* 2.2.38). The next sentence shows that the dispute is over a matter of procedure: while the *palaestritae* ask that those men be given as judges *qui Verri viderentur*, Heraclius wants them chosen in the customary manner *ex lege Rupilia* (cf. *Top.* 23.8 *valeat aequitas, quae paribus in causis paria iura desiderat*). In another passage of the *Verrines*, Cicero decries that section of Verres' *edictum* in which he stated that he would award the *decumani* as much as they claimed a farmer owed them (*Verr.* 2.3.25–26). He ironically wonders, *venient [sc. aratores] Syracusas ut te praetore videlicet aequo iure Apronium, delicias ac vitam tuam, iudicio recuperatorio persequantur?* Although it is not stated explicitly what is meant by *aequum ius*, the context makes it clear that the issue is the wording of the formula they would be granted. In another passage of the same speech, when Cicero feels compelled to justify his prosecution of Verres, he insists (via a rhetorical question) that any just person would loathe Verres: *qui iure aequo omnis putat esse oportere, is tibi non infestissimus sit, cum cogitet varietatem libidinemque decretorum tuorum?* This seems to be another use of *ius aequum* in reference to Verres' perversion of the formula system (see *Verr.* 2.1.104–127).
- 52 *Verr.* 2.1.114–18.
- 53 *Verr.* 2.1.118.
- 54 In the *pro Tullio*, Cicero records a very similar set of events. His opponents had argued at great length that the praetor should add the word *iniuria* to the formula; after the praetor refused to do so they took the matter up with the tribunes (... *quid attinet te tam multis verbis a praetore postulare ut adderet in iudicium INIURIAM, et, quia non impetrasses, tribunos pl. appellare et hic in iudicio queri praetoris iniquitatem, quod de iniuria non addidisset?* *Tull.* 38).
- 55 At this point one might note the clever way in which Cicero misrepresents the situation (a dozen or so years after the fact) when he "quotes" Antonius in the *in toga candida*, saying

The meaning of the verb *decernere* in civil procedure has caused some of the confusion about the details of this case. Buckland thought the praetor accepted Antonius' name for trial by a *quaestio*, but there was no *quaestio* under his control and the verb *decerno* is not used of such praetorian decisions.<sup>56</sup> M. Alexander's statement that Antonius was convicted in this trial is another misinterpretation of *decernere*.<sup>57</sup> It is clear, however, from a passage in the *pro Quinctio*, that *decernere* can be used of a procedural decision (not a final verdict): *decernit ... iubet [sc. Cn. Dolabella praetor] P. Quinctium sponsonem cum Sex. Naevio facere: si bona sua ex edicto P. Burrieni praetoris dies xxx possessa non essent (Quinct. 30)*. In the passage from the *pro Tullio* referred to just above *decerno* actually describes the praetor's decision in framing the wording of the formula: *at quibus verbis in decernendo Metellus usus est ceterique quos appellasti? (Tull. 39)*.<sup>58</sup> Furthermore, *postulare* is the verb used for the plaintiff's request for a formula.<sup>59</sup> It was Lucullus' formula, then, that was objectionable. But in what particulars?

As we have seen, as a prefect Antonius was not liable to a *repetundae* charge in his own right, and without a prior conviction of Sulla could not be prosecuted under the *quo ea pecunia pervenerit* clause. There was thus no recourse open to the Greeks through public law. What of civil law? Obviously, this was not available to the Greeks as Greeks, since the *ius civile* was restricted

*in sua civitate cum peregrino negavit se iudicio aequo certare posse*. While Antonius claimed that he could not receive justice (*aequo iure uti*), Cicero presents him as claiming that he cannot litigate (*certare non posse*) in a fair trial (*iudicio aequo*). By adding the seemingly harmless prepositional phrase *cum peregrino* Cicero makes the alteration even more effective: not only could Antonius not prevail in a fair trial, but not even in a fair trial against a foreigner! Only the most careful listener would have noticed how completely the subtle changes in wording subvert Antonius' argument. For *certare* with an ablative stating the basis of a trial cf. Cic. *Verr.* 2.2.32 (*ut quod civis cum cive agat domi certaret suis legibus*), 2.2.39 (*ius esse certum Siculis inter se quo iure certarent*), *CIL* I<sup>2</sup> 600.5 (*SEI IS ... D(E) R(E) IUDICIO CERTARE <VOLET>*), Ulpian *Dig.* 25.3.5.18 (*quo minus praeiudicio certare possit*). The author of the *Commentariolum petitionis* rephrases the insult inaccurately (*vocem denique audivimus iurantis se Romae iudicio aequo cum homine Graeco certare non posse* [8]): now *iudicio aequo* appears in a somewhat peculiar collocation with *Romae* and *cum homine Graeco* as one of the advantages Antonius has over his opponent.

56 W. W. Buckland, *op.cit.* (n. 22) 43.

57 *Trials in the Late Roman Republic*, 149 B.C. to 50 B.C. (Toronto 1990) 71–72. His notion that Antonius' goods were sold as a result of the conviction must be a deduction from the censors' reference in Asconius to Antonius not having possession of his property (but that is explicitly ascribed to debt: *quod propter aeris alieni magnitudinem praedia manciparit bonaque sua in potestate non habeat*).

58 F. Serrao, *La 'iurisdictio' del pretore peregrino* (Milan 1954) 85 understood the implications of the verb for the situation, but did not elaborate on the nature of Antonius' case.

59 Cf. Cic. *Quinct.* 25, 30, 36 et passim, *Verr.* 2.2.38, 2.2.59, *Tull.* 38, *Inv.* 2.59; see Jolowicz, *op.cit.* (n. 44) 201.

to citizens. However, the civil law had been opened up for the claims made by and against foreigners through the *fictio*, a device whereby something not true is assumed, for reasons of equity, to be true for the purposes of litigation.<sup>60</sup> Gaius explicitly mentions a *fictio* which pretended that peregrines were citizens in order to allow them to lodge complaints or have complaints lodged against them in cases involving theft and wrongful damage.<sup>61</sup> For Varro Lucullus to grant the Greeks (or rather, a Greek, cf. Cicero's phrase *cum homine Graeco*) access to the civil law, he had to agree to grant a *fictio* of citizenship for him. This action itself might be the decision of Lucullus which led to Antonius' appeal to the tribunes. Cicero informs us that while the *lex de repetundis* had been created to provide justice to Rome's allies, citizens normally recovered monies extorted from them through the civil law.<sup>62</sup> Antonius could have claimed that there was a properly constituted *quaestio* to cover the kind of claim made by the Greeks: actions committed by Sulla's army should be imputed to the commander. If Sulla had not been indicted yet and was no longer indictable, that was not Antonius' fault. Antonius could further point to the dangers inherent in allowing the prosecution by provincials of even the most insignificant junior commander in civil court once the commander was dead.<sup>63</sup>

We cannot tell whether this attempt by provincials to seek redress against a former official through the civil law instead of the *quaestio de repetundis* was a novel approach or whether it had been attempted before, but Cicero's statement that the latter court was specially instituted for the allies' sake and the fact that no other such attempt by provincials to use the civil courts is known to us suggest that Lucullus' *decretum* was in fact a novelty. Varro Lucullus might well have had full information about the activities of the prefect Antonius (his

60 *Fictiones* are discussed by Gaius *Inst.* 4.34–8. For *fictiones* preserved in Republican documents, see *lex Rubria* (Bruns 16) 1.22–25, 32–35; the *tabula Contrebiensis* 6 (most accurate text published by G. Fatás, *Antiquity* 57 [1983] 13). The *fictio* in the latter is discussed by J. S. Richardson, "The Tabula Contrebiensis: Roman Law in Spain in the Early First Century B.C.", *JRS* 73 (1983) 38–8, and P. Birks, A. Roger, J.S. Richardson, "Further Aspects of the Tabula Contrebiensis", *JRS* 74 (1984) 52–54, though their conclusions are unacceptable: see E. Badian and C. Mackay, "Notes on the Contrebia Bronze", in *Homenaje al Profesor Blázquez* (forthcoming).

61 *Item civitas peregrino fingitur si eo nomine agat aut cum eo agatur, quo nomine nostris legibus actio constituta est. si modo iustum sit eam actionem etiam ad peregrinum extendi ... item si peregrinus furti agat, civitas ei Romana fingitur. similiter si ex lege Aquilia peregrinus damni iniuriae agat aut cum eo agatur, ficta civitate Romana iudicium datur* (Gaius *Inst.* 4.37).

62 ... *quasi vero dubium sit quin tota lex de pecuniis repetundis sociorum causa constituta sit; nam civibus cum sunt ereptae pecuniae, civili fere actione et privato iure repetuntur* (Cic. in *Caec.* 17–18).

63 One might compare the argument used by Cicero in *Rab. Post.* 13–19 regarding the dangers of the precedent of convicting the equestrian Rabirius under the *lex de repetundis*.

brother L. Licinius Lucullus having been Sulla's dutiful and capable quaestor), and may have felt that Antonius' apparently outrageous behavior deserved special treatment.

If Lucullus did allow the Greeks access to the civil courts, he obviously granted them some specific formula. It is interesting to note that the only other fact known about Lucullus' praetorship is his famous improvement upon the *lex Aquilia*. Whereas the *lex Aquilia* dealt with *damnum iniuria datum*, Lucullus' new formula – QVANTAE PECVNIAE PARET DOLO MALO FAMILIAE P. FABI VI HOMINIBVS ARMATIS COACTISVE DAMNVN DATVM ESSE M. TVLLIO – was a response to the lawlessness of the Italian countryside in the 70s and dispensed with the adverb *iniuria* in an attempt to make conviction easier.<sup>64</sup> This new formula clearly concerned the sphere of Roman citizens and it has long been a source of consternation among the students of Roman law how the peregrine praetor should have established a formula concerning citizens. Perhaps Lucullus held both the urban and peregrine praetorships.<sup>65</sup> If Lucullus was willing to find new solutions for the problems of the Italian countryside, it should not be surprising if he was open to the possibility of innovations in the area of provincial corruption.

Wlassak, followed by Serrao, suggested that it was precisely Lucullus' own new formula which the Greeks asked him to apply to their own situation. This would of course require a retroactive application of the edict, and Cicero is very harsh on Verres for having done just this at *Verr.* 2.1.107ff. But Cicero also mentions an 'escape clause' which might well have been invoked in connection with the depredations of Antonius: *neque in ulla [sc. lege] praeteritum tempus reprehenditur nisi eius rei quae sua sponte tam scelerata et nefaria est ut, etiamsi lex non esset, magnopere vitanda fuit*. Another formula that Lucullus might have used is the *formula Octaviana* QUOD PER VIM AVT METVM ABSTVLISSET which was requested against Verres' henchman Apronius.<sup>66</sup> This formula, which allows for exactions made by virtue of *metus* as well as actual violence, would perhaps square better with Plutarch's δωροδοκία. We have seen that Plutarch's story is garbled, but δωροδοκία would not be out of line as a translation of *dona capere*, and Mommsen stated long ago that *donum captum* is what the author of the *tabula Bembina* meant by *conciliatum* in the list of

64 Cic. *Tull.* 8–12 explains Lucullus' motivations and the historical setting that impelled his action.

65 Only two years before, L. Sisenna held both praetorships (*CIL* I<sup>2</sup> 588); apparently Sulla's new regime of *quaestiones perpetuae* brought a shortage of praetors in its wake. M. Voigt, *Römische Rechtsgeschichte* (Leipzig 1892–1902, repr. 1963) 1.721 with n. 18 recognized this explanation, but the lawyers seem resistant; see B. Frier, *The Rise of the Roman Jurists* (Princeton 1985) 52 n. 38, A. Watson, *Law Making in the Later Roman Republic* (Oxford 1974) 65–67, L. Labruna, *Vim fieri veto: alle radici di una ideologia* (Naples 1971) 19 n. 41.

66 See note 28 above.



actions liable in cases of extortion (*ablatum captum coactum conciliatum aversum*, § 3).<sup>67</sup> Venturini has a fuller discussion on the meaning of *conciliatum*, and shows how it is frequently paired with *captum*, with the first referring to the agent who did the coercing, the second to the eventual receiver.<sup>68</sup> As, for example, in one of Cicero's letters about the panthers that Caelius wanted so badly: ... *docuique nec mihi conciliare pecuniam licere nec illi capere, monuique eum, quem plane diligo, ut cum alios accusasset cautius viveret; illud autem alterum alienum esse existimatione mea, Cibratas imperio meo publice venari* (*ad Att.* 6.1.21). Of course we have gone to great lengths to show that technically speaking Antonius was not charged with extortion, but nevertheless the incidents involved were clearly comparable with those appearing in *repetundae* cases.<sup>69</sup> If Plutarch did not care to reflect the legal technicalities that we have been describing in this paper, he might well have described Antonius' exactions as δωροδοκία.<sup>70</sup>

We have examined the nature of the charge brought against Antonius in 76 and suggested some expedients by which the plaintiffs and praetor might have gotten around Antonius' non-liability to the *repetundae* charge. There remains the question of why the case was brought at this particular moment so long after the events for which Antonius was being prosecuted. Antonius took part in

67 *Gesammelte Schriften* (Berlin 1905) 1. 48. *Donum capere* is one of the actions forbidden to senators and magistrates by Cicero at *Leg.* 3.11: *donum ne capiunto neve danto neve petenda neve gerenda neve gesta potestate* (cf. *Dig.* 1.18.18. pr.1). Note also *Hor. Carm.* 3.8.25–28, where the phrase *dona capere* helps sharpen the contrast between public responsibilities and private relaxation: the *privatus* can do what the public figure cannot, *dona capere*.

68 Venturini, *op.cit.* (n. 14) pp. 292–303.

69 A particularly good example of the sort of thing he is likely to have been involved in is described at *Verr.* 2.1.95–6: *pro quaestore vero quo modo iste commune Milyadum vexarit, quo modo Lyciam, Pamphyliam, Pisidiam, Phrygiamque totam frumento imperando, aestimando, hac sua, quam tum primum excogitavit, Siciliensi aestimatione adflixerit, non est necesse demonstrare verbis: hoc scitote, cum iste civitatibus frumentum, coria, cilicia, saccos imperaret, neque ea sumeret proque iis rebus pecuniam exigeret – his nominibus solis Cn. Dolabellae HS ad tricenis litem esse aestimatam. quae omnia, etiamsi voluntate Dolabellae fiebant, per istum tamen omnia gerebantur. ... te haec coegisse, te aestimasse, tibi pecuniam numeratam esse dico, eademque vi et iniuria, cum pecunias maximas cogeres, per omnis partis provinciae te tamquam aliquam calamitosam tempestatem pestemque pervasisse demonstro.*

70 Plutarch uses the word in connection with the activities of Roman politicians in 10 places besides this one. In 5 of those it appears in the plural and means either “bribes” (*Pomp.* 51.2, *Cat. Min.* 43.7, 44.1) or a widespread “habit of taking bribes” (*Cat. Min.* 35.5, 47.1), in 2 it refers to the bribe-taking of *iudices* (*Cor.* 14.3, *Pomp.* 55.3), in 2 it refers to bribes taken from foreign kings (*Gracch.* 39.2, *Cat. Min.* 15.3). At *Oth.* 6.4, however, it appears in a context rather like that of Antonius: Φάβιον δὲ Οὐάλεντα τὸν ἕτερον στρατηγὸν οὐτε ἀρπαγαὶ πολεμίων οὐτε κλοπαὶ καὶ δωροδοκίαι παρὰ συμμάχων ἐνεπίπασαν χρηματιζόμενον.

Sulla's triumph and so should have been available for prosecution before 76 (Asc. *Tog.* 88.21–29, quoted on p. 47 above). Perhaps the Greeks' advocate, C. Julius Caesar, was the driving force behind the accusation. Just before, in 77 or perhaps even in 76, he had tried to make a name for himself through his (unsuccessful) prosecution of Cn. Cornelius Dolabella for *repetundae* as governor of Macedon.<sup>71</sup> This prosecution was apparently a *cause célèbre* and has left a much larger trace in the record than the case involving Antonius. Plutarch states that Caesar took on the latter case to pay back the Greeks for their zeal on his behalf.<sup>72</sup> This is likely a garbled reference to some statement by Caesar to the effect that his prosecution of Antonius was motivated by his sense of *fides* towards the Greeks who exhibited proper *studia erga se* (which does not preclude his being the moving force in the case).<sup>73</sup> Caesar's later career shows him to have been masterful at manipulating Roman political institutions to his advantage. Caesar may simply have decided to try the gambit of a civil prosecution of Antonius after learning the details of the case from the Greeks during his prosecution of Dolabella.<sup>74</sup> However, it may also be the case that Lucullus' being praetor influenced his decision. As we have seen, this praetor showed himself both open to new procedures and actively opposed to lawlessness. Furthermore, Caesar may have been brought to Lucullus' attention by Lucullus' brother, who had been a commander at the siege of Mytilene where Caesar

71 Dolabella was succeeded in Macedon by Ap. Claudius Pulcher *cos.* 79. The latter should thus have gone out to replace Dolabella in 78. However, he fell ill on the way (Sall. *Hist.* 1.127M) and is attested in Rome as interrex at the start of 77 (Sall. *Hist.* 1.77.22M). Hence the earliest date for the prosecution is 77 and there is no particular reason why it could not have fallen in 76. Suetonius suggests that Caesar waited until the recent civil unrest was quelled before instigating the prosecution (*Caes.* 4.1).

72 ἀμειβόμενος τὴν Ἑλλάδα τῆς προθυμίας (*Caes.* 4.2). It is only Plutarch who indicates the relative chronology of the case of Antonius and that of Dolabella. Suetonius seems to imply that the case of Dolabella came second by stating that Caesar left Rome for Rhodes after his acquittal to avoid the *invidia* and to attend rhetorical lectures: *absolutoque Rhodum secedere statuit, et ad declinandam invidiam et ut per otium et requiem Apollonio Moloni clarissimo tunc dicendi magistro operam daret* (*Caes.* 4.1). However, such imputations of motives are inherently suspicious and are likely to be mere guess-work. That being so, Suetonius is likely simply to have ignored the less significant case of Antonius and to have erroneously connected the acquittal and the departure.

73 One might compare a similar sentiment in a fragment of his speech *pro Bithynis* (vel *pro hospitio regis Nicomedis* vel *pro horum necessitate quorum res agitur, refugere hoc munus, M. Iunice, non potui, nam neque hominum morte memoria deleri debet quin a proximis retineatur neque clientes sine summa infamia deserere possunt, quibus etiam a propinquis nostris opem ferre instituimus* [ORF<sup>3</sup> fr. 44]) and compare the defence Cicero feels obligated to make of his own prosecution of Verres in *in Caec.* 2–5.

74 At this time the governor of Macedon was responsible for the jurisdiction of Greece (see above n. 13), so Greeks from Greece proper could well have participated in Dolabella's case.

received the *corona civica*.<sup>75</sup> Lucullus' motives are not obvious. One might think that the case was an indirect criticism of Sulla's behavior as commander, but what we know about Lucullus shows him to be a staunch optimiate and defender of the Sullan constitution. Hence he is unlikely to have been acting in any sense that could be construed as anti-Sullan. One suspects, however, that there was no love lost between the upright Lucullus and the rather despicable Antonius. Certainly, the very act of accepting the case is indicative of hostility.<sup>76</sup> Who knows, maybe Lucullus was actually interested in seeing justice done and looked favorably upon the idea of supplementing loopholes in the *lex de repetundis* through civil action. Although the tribunes were convinced of the inequity of Lucullus' new procedure, the censors implicitly recognized the justice and equity of it by citing Antonius' shunning of the case as grounds for expelling him from the senate.<sup>77</sup>

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75 Suetonius tells us that Caesar received the *corona* while serving in the *contubernium* of M. Thermus, who was apparently the governor of Asia (*Caes.* 2). Plutarch, however, speaks of Lucullus as commander of the attack (*Luc.* 4.3) and Caesar was probably actually under his command even though Thermus granted him the *corona*; see D. Magie, *Roman Rule in Asia Minor* (Princeton 1950) 2.1124 n. 41.

76 One might contrast L. Metellus' obstruction of the case against Apronius in Verres' behalf (*Verr.* 2.3.152–53).

77 On the censorial *nota* as a penalty for abuses that the judicial system proper failed to punish, cf. Cic. *in Caec.* 8: *iudiciorum desiderio tribunicia potestas efflagitata est, iudiciorum levitate ordo quoque alius ad res iudicandas postulatur, iudicum culpa atque dedecore etiam censorium nomen, quod asperius antea populo videri solebat, id nunc poscitur, id iam populare et plausibile factum est.* (Pliny attests to the survival of this notion under the principate at *Ep.* 9.13.16.)