

THE *LEX SCANTINIA* AND THE PROSECUTION
OF CENSORS AND AEDILES

Caelius apud Cicero *Epistulae ad Familiares* 8.12.3:

quibus¹ cum parum procederet ut ulla lege mihi ponerent accusatorem, compellari ea lege me voluerunt qua*** dicere non poterant: insolentissimi homines summis Circensibus ludis meis postulandum me lege Scantinia curant. vix hoc erat Pola elocutus cum ego Appium censorem eadem lege postulavi. quod melius caderet nihil vidi. nam sic est a populo et non infimo quoque approbatum ut maiorem Appio dolorem fama quam postulatio attulerit.

Though the criminal prosecution of magistrates-designate is attested frequently enough,² Roman magistrates were seldom prosecuted during their term of office.³ For this reason a letter from M. Caelius Rufus to Cicero in 50 B.C. is of great interest. Caelius held a curule aedileship in that year and Ap. Claudius Pulcher was serving as censor, but prosecutions were initiated against both men. The passage of Caelius quoted above allows us to test a view that has recently become more common: that magistrates were not uniformly exempt from criminal prosecution during their term of office.

Did the *lex Scantinia* provide for civil procedure or criminal procedure? If we had the text of the Scantinian law,⁴ we would not have to ask whether this passage constitutes evidence for the criminal liability of incumbent censors⁵ and aediles. Previous discussions have ignored the standing of Caelius and Appius as incumbent magistrates.⁶ Mommsen suggested that the suits were private and heard in the court

1. Ap. Claudius Pulcher, L. Domitius Ahenobarbus (cos. 54), and Pola Servius (on whom, cf. Cic. *QFr.* 2.12.2).

2. Most of the trials were held in the *quaestio de ambitu*. Cf. D. R. Shackleton Bailey, "The Prosecution of Roman Magistrates-Elect," *Phoenix* 24 (1970): 162–65; E. J. Weinrib, "The Prosecution of Magistrates-Designate," *Phoenix* 25 (1971): 145–50.

3. Magistrates with *imperium* enjoyed immunity from liability in all private suits: D. 2.4.2; cf. D. 3.3.54, 46.7.12, 47.10.32, 48.2.8, and see E. J. Weinrib, "The Prosecution of Roman Magistrates," *Phoenix* 22 (1968): 32–56, esp. 33–34. Magistrates who lacked both the power to arrest someone in person (*prensio*) and the power to send a *viator* to issue a summons (*vocatio*) could be prosecuted in a civil suit even by a private citizen, but by Varro's day only the quaestors fit into this category (Varro ap. Gell. 13.13.4–6). The magistrates immune from prosecution in the criminal courts were enumerated in the laws establishing the various *quaestiones*. The one extant list, from the extortion law on the Tabula Bembina, is incomplete; immunity is there granted to the dictator, consul, praetor, and magister equitum (*FIRA* 1² 7.8).

4. The Scantinian law punished pederasty: Juv. 2.44, Auson. *Epigr.* 92, Prudent. *Perist.* 10.204. The law is mentioned in passing by Caelius twice (ap. Cic. *Fam.* 8.14.4, 12.3), by Suetonius (*Dom.* 8.3), and by Tertullian (*De Monog.* 12); the law may or may not be under discussion in a fragmentary summary of Livy (*Oxy. Per.* 50). A fine of 10,000 sesterces for *stuprum* (criminal fornication) with *ingenui* (free-born boys) is mentioned at Quint. *Inst.* 4.2.69; the fine is mentioned again at 7.4.42. W. Kunkel, *Untersuchungen zur Entwicklung des römischen Kriminalverfahrens in vorsullanischer Zeit* (Munich, 1962), p. 73, n. 275, pointed out that Quintilian does not mention the *lex Scantinia*, and deemed the fine an invention. The fine recorded by Quintilian has usually been considered a provision of the *lex Scantinia*: T. Mommsen, *Römisches Strafrecht* (Leipzig, 1899), p. 703; I. Pfaff, "Stuprum," *RE* 4.A1 (1931): 423–24; A. Berger, *Encyclopedic Dictionary of Roman Law* (Philadelphia, 1953), s.v. *lex Scantinia* (*Scantinia*).

5. We could rule out a civil suit if we could be certain that a trial was held and that censors had *imperium*; it has been argued that censors held *imperium* (F. Cancelli, *Studi sui censori e sull'arbitratus della lex contractus* [Milan, 1960], pp. 1–57), but Livy 26.10.9, perhaps the best evidence for the thesis (cf. H. S. Versnel, *Triumphus: An Inquiry into the Origin, Development and Meaning of the Roman Triumph* [Leiden, 1970], p. 338), is not decisive.

6. Except for D. R. Shackleton Bailey, ed., *Cicero: "Epistulae ad Familiares,"* vol. 1 (Cambridge, 1977), p. 435, who notes that neither man was protected by his office, but does not choose between criminal and

of the urban praetor, and was followed by Strachan-Davidson.⁷ In an earlier letter of Caelius we are told that a certain Drusus was presiding over a trial on the basis of the Scantinian law: *legis Scantin(ia)e iudicium apud Drusum fieri* (Cael. ap. Cic. *Fam.* 8.14.4).⁸ Mommsen had suggested that Drusus was the urban praetor, but Kunkel pointed out that C. Titius Rufus was praetor urbanus in 50 B.C., and also found the wording of Caelius suggestive of criminal procedure.⁹ Bauman similarly judged the text of Caelius to show that criminal procedure was involved.¹⁰

The arguments of Kunkel and Bauman are not decisive. We know that Drusus was not urban praetor, but we do not know that he was a praetor or quaesitor at the head of a *quaestio perpetua*. In fact, the words *iudicium apud Drusum fieri* could not refer to the urban praetor, for the praetor did not try cases in Roman civil procedure.¹¹ Drusus might have been a *iudex* appointed by the urban praetor; "*iudicium* in genuine classical texts always means precisely 'procedure *apud iudicem*.'" ¹² Nor does the word *postulatio* necessarily indicate criminal procedure. The first stage of the proceedings before the praetor was known as the *postulatio actionis*,¹³ since the plaintiff made a request to the praetor for a *iudex*;¹⁴ the verb *postulare* can be found in Cicero in civil contexts¹⁵ as well as criminal ones.

civil procedure. He considered the case of C. Scantinius Capitolinus in 226 to be "probably an almost exact precedent" for the case of Caelius; this is certainly wrong, as Scantinius was prosecuted by an aedile before the tribal *comitia* (Val. Max. 6.1.7, Plut. *Marc.* 2.2-4).

7. Mommsen, *Strafrecht*, pp. 703-4; J. L. Strachan-Davidson, *Problems of the Roman Criminal Law*, vol. 2 (Oxford, 1912), p. 21.

8. M. Livius Drusus Claudianus; cf. *MRR* 2.248. The anonymous referee of the journal has drawn my attention to the fact that the context suggests that Appius was responsible for this *iudicium*, which took place some six weeks before the prosecution of Caelius.

9. Kunkel, *Untersuchungen*, pp. 72-73 and n. 275. Kunkel cited the words (using his text) *insolentissime homines . . . postulandum me lege Scantinia curant* (8.12.3) and *legis Scantinae iudicium apud Drusum fieri* (8.14.4).

10. R. Bauman, "The Resumé of Legislation in Suetonius," *ZRG* 99 (1982): 81-127, esp. 122 and n. 197. Whereas Kunkel believed that the Scantinian law established *ein Quästionenverfahren* apart from the *quaestiones perpetuae*, Bauman assumed that Scantinian cases were tried by a *quaestio perpetua*, and cited D. 48.6.3.4 as proof that "in Cicero's day it will have been the *quaestio de vi*." But Marcianus there is commenting on the *lex Iulia de vi publica*, Augustan legislation that itself did not replace the *lex Scantinia*, as the numerous late references to the law show. In Augustus' day the *quaestio de vi* was probably limited to trying "qui puerum vel feminam vel quemquam per vim stupraverit" (D. 48.6.3.4). The new *quaestio de adulteriis* seems to have been responsible for certain cases of *stuprum* with boys: cases involving a *masculus liber invitus* (Paulus *Sent.* 2.26.12) or a *puer* (D. 48.5.35[34].1), and the case of a man who allowed the commission of *stuprum cum masculo* in his house (D. 48.5.9[8].pr.). Room can be found for the *lex Scantinia* if we deem Quint. *Inst.* 4.2.69 evidence for the law; prosecution under the *lex Scantinia* would then be possible only in cases of *stuprum* with *ingenui*. Alternatively, one can argue on the basis of D. 48.5.6.1 that references to *pueri* in discussions of the adultery statute are interpolated; cf. G. Rizzelli, "*Stuprum e adulterium*," *BIDR* 90 (1987): 355-88, esp. 383, nn. 97-98.

11. Most private suits were heard by a single judge; cf. M. Kaser, *Das römische Zivilprozessrecht* (Munich, 1966), pp. 41-44, 138-42.

12. F. Schulz, *Classical Roman Law* (Oxford, 1951), p. 22. The distinction between preliminary proceedings before the praetor (proceedings *in iure*) and proceedings before the judge (proceedings *in iudicio* or *apud iudicem*) can be found in any general work on Roman law.

13. E.g., Cic. *Quinct.* 56, 71; cf. A. H. J. Greenidge, *The Legal Procedure of Cicero's Time* (Oxford, 1901), pp. 146-49; Kaser, *Zivilprozessrecht*, pp. 171-72, 175.

14. *Postulare* could also mean "to contradict the demand of another," and so was used even of defendants in civil suits. D. 3.1.1.2: "Postulare autem est desiderium suum vel amici sui in iure apud eum, qui iurisdictioni praestet, exponere vel alterius desiderio contradicere."

15. Cic. *Quinct.* 25, 29, 30, 36, 37, 45, 48, 60, 61, 63, 64, 79, 81, 82, 83, 86, 88, 96; *QRosc.* 10, 50; *Tull.* 38, 39; *Caec.* 19, 27, 36, 67, 88; cf. Gai. *Inst.* 2.167. It must be admitted that one does not find a

The text of Caelius is ambiguous, but perhaps we can choose between civil and criminal procedure on the ground that both men were magistrates. Weinrib believed that magistrates were not uniformly exempt from criminal prosecution, but he could cite just one example,¹⁶ and it is both late and subject to doubt.¹⁷ Though information on the position of censors is lacking, we know that aediles were exempt from prosecution in the *quaestio de vi* in 57 B.C. (Dio 39.7.3, 18.1).¹⁸ This suggests, but does not prove, that aediles were exempt from prosecution in other *quaestiones*. Nothing stands in the way of the received view that magistrates in office were exempt from criminal prosecution,¹⁹ and at first it seems necessary to conclude that the Scantinian procedure was civil. But it remains a fact that the use of *postulare* with a personal object is a standard phrase in criminal contexts. And, according to Varro, neither censors nor aediles could be prosecuted in a civil suit in his own day.²⁰ A civil trial of either man therefore appears as impossible as a criminal one.

Two solutions present themselves. The suits against Caelius and Claudius were perhaps criminal proceedings that did not go on to trial. If Caelius was narrowly technical in his use of the term *postulare*,²¹ his letter proves only that it was possible to initiate criminal proceedings against censors and aediles. An analogy in the criminal sphere of law is provided by the *lex Memmia*, which did not prevent a citizen from submitting a *postulatio* against a magistrate absent on state business, but did prevent the president of the court from making a *nominis receptio*, the formal admission of the charge.²² If the suits did go on to trial, civil procedure was probably employed. The civil trial of an aedile can be explained by the assumption that the *lex Scantinia* was passed before aediles had become immune to civil suit;²³ Varro remembered that a curule aedile had once been summoned before the praetor

phrase such as *postulandum me* in Cicero's four private orations, but this does not mean that Caelius could not use the phrase of a civil prosecution.

16. Weinrib, "Magistrates-Designate," pp. 149–50. At first Weinrib believed that an incumbent quaestor was tried in 58 B.C. ("Magistrates," pp. 44–45), but later was compelled to withdraw this statement ("Magistrates-Designate," p. 150, n. 10).

17. Dio 56.24.7 shows a quaestor being tried in the *quaestio de sicariis* during the reign of Augustus, but Dio never uses the Greek nouns for *quaestorius*, κοιμιστώριος and ταμειευτικός. Weinrib did not notice Cic. *De Or.* 2.274: "te [sc. M. Antonium] censorem a M. Duronio de ambitu postulatum." Shackleton Bailey believed that Antonius was tried during his censorship in 97 B.C. ("Magistrates-Elect," p. 163), but the examples he cites for the prosecution of censors in office are comitial trials that antedate the establishment of *quaestiones perpetuae*. It is usually assumed that Antonius was tried during the electoral campaign (E. S. Gruen, "Political Prosecutions in the Nineties," *Historia* 15 [1966]: 32–64, esp. 41, n. 58) or after leaving office (T. R. S. Broughton, *MRR* 2.6). Elsewhere I argue that Metellus Scipio voluntarily stood trial as suffect tribune in 60 B.C.: "The Quaestorship of Favonius and the Tribunate of Metellus Scipio," *Athenaeum* 73 (1995): forthcoming.

18. Interestingly enough, the very court in which Bauman would have Scantinian cases tried. It seems certain that Caelius was not tried in this court in 50 B.C.

19. Cf. Greenidge, *Legal Procedure*, p. 461.

20. Censors had messengers or *viatores* (cf. J. Suolahti, *The Roman Censors: A Study on Social Structure* [Helsinki, 1963], p. 330); Varro attributes the power of arrest (*prensio*) to magistrates who had *viatores* (ap. Gell. 13.12.6), and states that magistrates with *prensio* could not be prosecuted in private suits (ap. Gell. 13.13.4). In the last passage Varro explicitly mentions the immunity of aediles in private litigation, and connects this with the fact that aediles are *nunc stipati servis publicis*.

21. Not all of the terms in the passage are technical: *elocutus* is used of Pola.

22. Val. Max. 3.7.9 "legis Memmiae . . . quae eorum, qui rei publicae causa abessent, recipi nomina vetabat." Cf. Weinrib, "Magistrates," p. 38.

23. The law has been assigned to the years 225 and 149, but Caelius gives us our earliest reference to it; cf. G. Rotondi, *Leges publicae populi Romani* (Milan, 1912; reprint ed., Hildesheim, 1962), p. 293.

by a private citizen.²⁴ The immunity in private suits that Varro attributes to aediles can then be seen as a general principle, with exceptions to be found in legislation that antedated the development of the principle.²⁵ The Scantinian law might have left the censors similarly liable to prosecution.²⁶

On balance, a civil procedure is more probable. Other censors and aediles must have been prosecuted in the late Republic; we do not hear of these suits, and our sources are more likely to be silent about civil cases than criminal ones. Again, we know that aediles could be prosecuted under the *lex Aquilia de damno*, but we cannot point to a *quaestio perpetua* in which aediles could be tried (and we can point to one in which they were immune). Since sexual offences were generally left to the private sphere of law before the *lex Iulia de adulteriis coercendis* (18 or 17 B.C.),²⁷ the fact that the law punished pederasty militates against criminal procedure. Finally, we must ask why the enemies of Caelius were hard pressed to find *ulla lex* with which to accuse him, and why they settled for a law that left them with nothing to say (*qua dicere non poterant*). That Caelius should prosecute Appius in turn is not surprising, but simple revenge did not require him to accuse Appius under the very same law, especially when he seemed in no more danger of conviction under this law than Caelius himself (*maiores . . . dolorem fama quam postulatio attulerit*). The text of Caelius therefore strongly implies the magisterial immunity from criminal prosecution indicated by the silence of our other sources. In sum, though we cannot establish with certainty that the Scantinian law made pederasty a private crime, we may deny that the text of Caelius is proof of the criminal liability of censors and aediles. On the contrary, both interpretations offered above seem to have merit insofar as they explain the text of Caelius without causing us to abandon the principle that magistrates in office were uniformly immune from criminal prosecution—a principle nowhere attested, yet all but certain.

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24. Varro ap. Gell. 13.13.4. The curule aedile was M. Laevinus, perhaps the consul of 210 or the praetor of 182; cf. *MRR* 1.372.

25. We need not doubt that liability to summons in civil procedure could be regulated by a *lex*; D. 18.6.14(13) states that aediles were liable to trial for *damnum iniuria datum* under the *lex Aquilia*.

26. Caelius was prosecuted by a private citizen, but Appius seems to have been accused by Caelius, so we do not strictly know that censors could be summoned before the praetor by a private citizen. Yet we cannot be certain that *postulavi* excludes the use of an *accusator* by Caelius, as my anonymous referee points out; we do not know that it was common for incumbent magistrates to initiate private lawsuits or criminal prosecutions (other than those in a *iudicium populi*).

27. Cf. T. A. J. McGinn, "Concubinage and the *lex Iulia* on Adultery," *TAPA* 121 (1991): 335–75, esp. 340 and n. 22.

A CURIOUSLY PERSISTENT ERROR: *SATYRICON* 43.4

At Petronius *Satyricon* 43.4, Phileros has picked up the story of the late Chrysanthus. He tells how after an initial setback Chrysanthus' first harvest saved him. Then comes the sentence under discussion: *vendidit vinum, quantum ipse voluit*. This is the reading of the only manuscript containing the *Cena* (H) and all modern editions. The meaning of the Latin could not be clearer: "He sold as much wine as