

MISTREATMENT OF FOREIGN LEGATES AND THE FETIAL PRIESTS: THREE ROMAN CASES

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IT IS WELL KNOWN THAT THE COMMUNITIES of ancient Greece and Italy considered envoys (*legati*, πρεσβευταί, κήρυκες), both their own when sent to foreign communities and those of foreign communities to themselves, to be sacred and inviolate (*sancti*, ἱεροὶ καὶ ἄσυλοι), and mistreatment of them to be sacrilegious and a source of pollution. The Romans held that their status was a part of the *ius gentium*, and were likely to exact a severe penalty for mistreatment of their envoys.¹ This paper, however, is concerned with the few and relatively unnoticed cases during the Roman Republic of mistreatment of foreign envoys by Romans in Rome, with consideration of the part that the Fetials played in carrying out the punishment of offenders (extradition) and the part that they may have played in judging their guilt. I wish also to consider in this connection a somewhat neglected suggestion regarding the judicial functions of the Fetials made in one case by Theodor Mommsen a century ago. As will appear below, there is some mention in almost all periods of the role of the Fetials in declaring war, and still more of their part in concluding treaties.² Special attention, too, was drawn to their part, for example, at Numantia in 137 B.C. when the refusal of the Senate to

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¹Note, for example, Nepos *Pelop.* 5.1, on the seizure of Pelopidas and Ismenias of Thebes by Alexander, the tyrant of Pherae: *Cum . . . legationis iure satis tectum se arbitraretur, quod apud omnes gentes sanctum esse consuesset*. In fact, Athens and Sparta did mistreat Persian envoys in 491, but Herodotus (7.134–137), while uncertain which of the disasters that befell Athens was the result, finds Sparta under the curse of Talthybius, and, with fine irony, when the Spartans, Sperchias and Bulis, went to Xerxes to make atonement, has them splendidly received by the King, who then said that he was not like the Lacedaemonians, for they had made havoc of all human law by having slain heralds (συγχέαι τὰ πάντων ἀνθρώπων νόμιμα ἀποκτείναντας κήρυκας) and would not free them from their guilt. See L. M. Wéry, “La meurtre des hérauts de Darius en 491 et l’inviolabilité du héraut,” *AC* 35 (1966) 468–486. For the Roman view, note the following quotation from the *Digesta* (50.7.18[17]), from the Commentary of Pomponius on Quintus Mucius (Scaevola): *si quis legatos hostium pulsasset, contra ius gentium id commissum esse existimatur, quia sancti habentur legati*. Mucius also held that even if war was declared on the community of the envoys it was part of the *ius gentium* that they should go free (see A. Watson, *The Law of Persons in the Later Roman Republic* [Oxford 1967] 165). For the religious horror an attack on *legati* might arouse, see Tac. *Ann.* 1.39.5: . . . *ni aquilifer Calpurnius vim extremam arcuisset, rarum etiam inter hostes, legatos populi Romani in castris Romanis sanguine suo altaria deum commaculavisset*. For the punishment of communities that mistreated Roman envoys, one may cite the destruction of Corinth in 146 (Livy *Per.* 52; Cic. *Leg. Man.* 11). Note also the mistreatment by the Tarentines of Postumius Megellus and his associates in 282 (*MRR* 1.189–190; P. Willeumier, *Tarente* [Paris 1939, reprinted Paris 1968] 138–140).

²On the Fetials in general, see below, note 26 and lemma.

accept the sworn agreement of the consul, Hostilius Mancinus, with the Numantines involved the Fetials in carrying out his extradition to them. But I have found references to only three cases of mistreatment of foreign envoys by Romans in Rome, and in none of them is there a detailed account or fully satisfactory evidence.

In the first one the chief evidence is a laconic notice in Livy *Per.* 15: *Cum legatos Apolloniaticum ad senatum missos quidam iuvenes pulsassent, dediti sunt Apolloniaticibus.* This notice is supplemented by Valerius Maximus (6.6.5), who probably drew his material from Livy and put it into a chapter entitled *De publica fide*, with much laudation of the good faith of the Senate. The text runs as follows:

Repraesentamus etiam illud senatus nullo modo praetermittendum opus. Legatos ab urbe Apollonia Romam missos Q. Fabius Cn. Apronius aedilicii orta contentione pulsaverunt. Quod ubi comperit continuo eos per fetiales legatis dedit quaestoremque cum his Brundisium ire iussit, ne quam in itinere a cognatis deditorum iniuriam acciperent.

Thus we are given the names and rank of the offenders, a statement of the punishment, the role of the Fetials in carrying it out, and the administrative measure intended to prevent the relatives of the guilty parties from doing harm or committing a further impiety. There is no statement regarding how guilt was determined, but the Senate is given credit for ordering and providing for the punishment. The incident is mentioned in Cassius Dio (fr. 42, from Book 10), and in Zonaras (8.7). These authors supply an approximate date (by or shortly before 266 B.C.), but name only Q. Fabius and describe him as a senator (βουλευτής). They use the verb ὑβρίζειν to describe the offence, and add that the Apolloniatas returned the offenders unharmed.³

The second case involves Romans and Carthaginians, is dated to 188, and is considered to be an authentically historical event, even cited by S. Gsell, in his *Histoire ancienne de l'Afrique du Nord* 3 (Paris 1920) 300, as evidence

³The incident was taken by B. Niese (*Grundriss der römischen Geschichte*⁵ [Munich 1923] 88, n. 2) as merely an historical *exemplum*, and by M. Holleaux (*Rome, la Grèce et les monarchies hellénistiques* [Paris 1921] 1–4) as exaggerated and unimportant, but is accepted as historical by G. De Sanctis (*Storia dei Romani* [Turin 1907, reissue Florence 1960] 2.407) and H. Bengtson (*Grundriss der römischen Geschichte* [Munich 1962] 84, n. 2), probably rightly, since, after the Roman organization of Adriatic Italy and the victory over Pyrrhus, some contact with a city not far from the coast opposite the heel of Italy is not unlikely. Münzer ("Fabius, no. 30," *RE* 6 [1909] 1748–49; cf. no. 16, 1744) expresses doubt of the story but accepts Fabius as an historical person, possibly the Cunctator's father, whose birth early in the third century and whose failure to reach the highest magistracy are consistent with the record of this Fabius. But interesting as it would be if he really was the Cunctator's father, deprived of a distinguished career by this foolish and impious act, it should be noted that he is not given the inherited cognomen Maximus, and an early death would explain equally well the absence of the Cunctator's father from the record. On Apollonia, see N. G. L. Hammond, *Epirus* (Oxford 1967) 588 ff.; "The Kingdoms of Illyria circa 400–167 B.C.," *BSA* 61 (1966) 239–253.

of the correctness of diplomatic relations between Rome and Carthage in the first part of the second century B.C. The notice in Livy (38.42.7) is brief, almost archival in style: *Eo anno L. Minucius Myrtilus et L. Manlius, quod legatos Carthaginienses pulsasse dicebantur, iussu M. Claudii praetoris urbani⁴ per fetiales traditi sunt legatis et Carthaginem aucti*. Valerius Maximus (6.6.3) uses this incident too to praise the good faith of the Senate:

Adversos eosdem hostes (the Poeni) parem fidem in iure legationis tuendo patres conscripti exhibuere: M. Aemilio Lepido L. Flaminio consulibus (sic) L. Minucium et L. Manlium Karthaginiensium legatis, quia manus his attulerunt, per fetiales a M. Claudio praetore dedendos curaverunt. Se tunc senatus, non eos, quibus hos praestabatur, aspexit.

Where Livy uses the verb *pulsare*, Valerius describes a physical attack upon the legates.⁵ Since in other cases in which Roman citizens were stripped of their rights and status as citizens and surrendered to a foreign community there is recorded a decree of the Senate or a vote of the People or both, Weissenborn holds that the *praetor urbanus* acted with such authority in this case too.⁶ He was, in fact, the leading magistrate in Rome with *imperium* when both consuls were absent on campaign, as they were in 188 (*MRR* 1.365). Credit is again given to the Senate, and the Fetials had charge of extraditing the offenders. In Cassius Dio (fr. 61, from Book 19) these are described as "some young fellows" (νεανίσκοι τινές), the offence is *hybris* (ὕβρις), and they were returned unharmed. As before, there are recorded the offenders' names, the actions of magistrate and Senate, the penalty, and its execution by the Fetials, and nowhere is it stated how the guilt of the offenders was established.

Before turning to the third case, in which the offender was acquitted, it seems desirable to return to the rest of the quotation in the *Digesta* (50.7.18[17]) from Pomponius on Q. Mucius Scaevola because of the close relationship between cases in which the penalty was loss of citizen status and

⁴Although there is some uncertainty which of the two Marci Claudii Marcelli (Münzer, "Claudius, nos. 223 and 224," *RE* 3 [1899] 2757–58), who are known to have been active in Rome in this period (one was praetor urbanus in 188 and the other was praetor in 185), held the consulship in 183 (*MRR* 1.365, 372, 373, n. 1), it remains certain that there was a Marcus Claudius Marcellus in office as praetor urbanus in 188. The error in Valerius Maximus, who names the consuls of 187, seems due, as Münzer suggests, to hasty reading of the passage in Livy (38.42.7), which follows immediately after his report of the elections and assignments of provinces for 187. On the passage, see W. Weissenborn, *Ab urbe condita* (Berlin 1873) *comm. ad loc.*

⁵Cf. Livy *Per.* 15, above, and 1.14.1 (also Dionysius 2.51–53), a legendary case of an attack upon envoys of the Laurentes in the period of Romulus and Tatius, before Fetials were supposed to have been instituted. Note that the Laurentes are said to have made their claim *iure gentium*.

⁶W. Weissenborn (above, n. 4) *ad* 38.42.7, with references to Cic. *De or.* 1.181, and *Digesta* 50.7.18(17).

those in which it was extradition, and because the religious basis for this penalty was throughout the same. The text runs as follows:

Itaque eum qui legatum pulsasset, Quintus Mucius dedi hostibus, quorum erant legati, solitus est respondere. Quem hostes si non receperissent, quaesitum est, an civis Romanus maneret: quibusdam existimantibus manere, aliis contra, quia quem semel populus iussisset dedi, ex civitate expulsisse videretur, sicut faceret, cum aqua et igni interdiceret. In qua sententia videtur Publius Mucius fuisse.⁷ Id autem maxime quaesitum est in Hostilio Mancino, quem Numantini sibi deditum non acceperunt: de quo tamen lex postea lata est, ut esset civis Romanus, et praeturam quoque gessisse dicitur.

Cicero took the opposing view,⁸ that one who was extradited and not accepted kept his citizenship upon his return, and Livy also implies that in 321 the ex-consuls Postumius and Veturius and their associates, who were surrendered to the Samnites, and would have become Samnites if accepted by them, were rejected and returned to the Roman camp without loss of citizen status.⁹ Cicero also emphasizes the religious basis of the penalty of extradition: it is to free the state from a religious taint (*ut religione civitas solvatur, civis deditur*). The religious issue raised by mistreatment of envoys is made particularly explicit in the remarks attributed to Cato the Younger in 55. Report had come to the Senate of Caesar's victory over the Usipetes and Tencteri in Gaul and his near-annihilation of them during a truce while detaining many of them who had come to him. In his account Caesar pictures them as acting in bad faith, while playing for time to mobilize their forces against him, and even making an attack (Caesar *BG* 4.4–15), but in Rome in the Senate Cato urged the people to surrender him to those whom

⁷See note 1. Pomponius quotes opinions of both P. Mucius Scaevola, praetor in 136, at the time of the dispute about the citizenship of Mancinus, and consul in 133, and Q. Mucius Scaevola, praetor in 98 and consul in 95. On these see W. Kunkel, *Herkunft und Sozialstellung der römischen Juristen*² (Graz and Cologne 1967) 12 and 18, nos. 17 and 28, respectively; F. Schulz, *History of Roman Legal Science* (Oxford 1946) 47. On P. Mucius, see also E. S. Gruen, "The political allegiance of P. Mucius Scaevola," *Athenaeum* 43 (1965) 321–332.

⁸*Pro Caecina* 98: *Quem pater patratus deditit aut suus pater populusve vendidit, quo is iure amittit civitatem? Ut religione civitas solvatur civis Romanus deditur; qui cum est acceptus, est eorum quibus est deditus; si non accipiunt, ut Mancinum Numantini, retinet integram causam et ius civitatis; cf. De or. 1.181; Topica 37. See MRR 1.486 and 487; and A. Watson (above, n. 1) 244–247, who points out that the need of a law to restore Mancinus' citizenship shows that the opinion of P. Mucius (and the tribune Rutilius) formally prevailed.*

⁹Note the following passages from Livy's account of the extradition of Sp. Postumius Albinus to the Samnites in 321 by the Fetial, A. Cornelius Arvina, twice consul, who was probably *pater patratus*: *haec dicenti fetiali Postumius genu femur quanta maxime poterat vi perculit et clara voce ait se Samnitum civem esse, illum legatum fetialem a se contra ius gentium violatum eo iustius bellum gesturos* (9.10.10); and after the rejection and release of Postumius and his associates: *et illi quidem, forsitan et publica, sua certe liberata fide ab Caudio in castra Romana inviolati redierunt* (9.11.13). Claudius Clineas, a subordinate officer sent in advance to Corsica by the consul Varus in 236, extradited to the Corsicans after making a base peace and rejected by them, was either banished or put to death on his return (*MRR* 1.223).

he had wronged and not to turn upon themselves, or allow to fall upon the city, the pollution of his crime.¹⁰

In the third case, as the offender was acquitted, discussion centers on the circumstances of the offence and the effort to secure condemnation. The single surviving piece of ancient evidence is a fragment of the History of Diodorus Siculus (36.15), preserved in the collection *De legationibus* made by Constantine Porphyrogenitus. The incident described is accepted as historical.¹¹ The translation of the passage by F. R. Walton in the Loeb Classical Library runs as follows:¹²

Envoys of King Mithridates arrived in Rome, bringing with them a large sum of money with which to bribe the Senate. Saturninus, thinking that this gave him a point of attack on the Senate, behaved with great insolence towards the embassy. At the instigation of the senators, who promised to lend their support, the outraged envoys preferred charges against Saturninus for his insulting treatment. The trial, held in public,¹³ was of great import because of the inviolability attaching to ambassadors and the Romans' habitual detestation of any wrongdoing where embassies are concerned; it was therefore a capital charge of which Saturninus stood accused, and

¹⁰Plut. *Cato Minor* 51.1: ὁ δὲ Κάτων ἐκέλευεν ἐκδιδόναι τὸν Καίσαρα τοῖς παρανομηθεῖσι καὶ μὴ τρέπειν εἰς αὐτοὺς μηδὲ ἀναδέχεσθαι τὸ ἄγος εἰς τὴν πόλιν (cf. Plut. *Caesar* 22.3 [quoting Tanusius]); and on the removal of pollution, Cic. *Caec.* 98 (see above, n. 8). The legendary case of the Laurentian envoys (see above, n. 5) involved questions of pollution and expiation.

¹¹See H. Last, *CAH* 9.167–168, on the relation of this incident to the career of Saturninus and the party strife of the time. On the embassy, see Th. Reinach, *Mithridates Eupator*, tr. A. Goetz (Leipzig 1895) 88; D. Magie, *Roman Rule in Asia Minor* (Princeton 1950) 197 and 1093, n. 57; E. Olshausen, "Mithridates VI und Rome," *ANRW* 1.1 (1972) 810–811; A. N. Sherwin-White, "Roman Involvement in Anatolia, 167–88 B.C.," *JRS* 67 (1977) 71, n. 61, and *Roman Foreign Policy in the East, 168 B.C. to A.D. 1* (Norman, Okla. 1983) 104–105 and n. 38.

¹²Diodorus Siculus 36.15 (Loeb ed. 12.178–181): "Ὅτι εἰς τὴν Ῥώμην ἦκον πρεσβευταὶ Μιθριδάτου τοῦ βασιλέως κομίζοντες μεθ' αὐτῶν χρημάτων πλῆθος πρὸς τὴν τῆς συγκλήτου δωροδοκίαν. ὁ δὲ Σατορνίνος δόξας ἀφορμὴν ἔχειν κατὰ τῆς συγκλήτου μεγάλῃν ὕβριν τῇ πρεσβεΐᾳ ἐνεδειξάτο. καὶ τῶν συγκλητικῶν παροξυνάντων τοὺς πρεσβευτὰς καὶ συνεργήσειν ἐπαγγελλομένων, οἱ καθυβρισθέντες ἐπήνεγκαν κρίσιν τῷ Σατορνίνῳ περὶ τῆς εἰς αὐτοὺς ὕβρεως, τοῦ δὲ ἀγῶνος ὄντος δημοσίου καὶ μεγάλου διὰ τὴν τῶν πρεσβευτῶν ἀστυλίαν καὶ τὴν συνήθη παρὰ τοῖς Ῥωμαίοις ὑπὲρ τῶν πρεσβειῶν μισοπονηρίαν. ὁ δὲ Σατορνίνος θανάτου κατηγορούμενος ὑπὸ τῶν συγκλητικῶν, ὡς ἂν ἐκείνων δικάζοντων τὰς τοιαύτας κρίσεις, εἰς τοὺς μεγίστους ἐνέπεσε φόβους τε καὶ κινδύνους."

¹³Mommsen took these words to mean a capital *iudicium publicum*, but with a senatorial tribunal (*Staatsrecht* 2³.112, n. 3). On his definition of this term, which included the *quaestiones*, and the distinction between it and *iudicium populi*, see *Staatsrecht* 2³.182, n. 3; 2³.233; 3.351, n. 2, 353; *Strafrecht* 180–182. Diodorus' use of the term δημόσιος favors the meaning "public" or "of the state," and there was in general public access to trials, but in this passage the use of the rather general word ἀγών and the phrasing with the participle ὄντος and the addition of καὶ μεγάλου suggest the translation given above.

since his prosecutors were of senatorial rank, and it was the Senate that judged such cases,¹⁴ he was thrown into great fear and great danger.

The rest of the passage may be summarized as follows: Saturninus put on mourning and aroused the pity of the people, exciting them by claiming that he was being made a victim of the Senate's partizanship contrary to all justice, and that his enemies were both his accusers and his judges. So they gathered in their thousands at the place of trial (κρητήριον), and he was unexpectedly acquitted. With the support of the people he was again proclaimed tribune.

The passage describes an incident in the career of the ambitious and turbulent popular leader, L. Appuleius Saturninus,¹⁵ and, since he was not in office at the time, must be dated between his first tribunate, most probably in 103, and his fatal second tribunate in 100. The years 102 or 101 are the most suitable for the arrival of an embassy from Mithridates.¹⁶ Rome had not followed up her previous demand that Mithridates of Pontus and Nicomedes of Bithynia withdraw from Paphlagonia, and the situation in Cappadocia was still uncertain. Rome, occupied until late in 105 with the Jugurthine War, continued to face danger from the Cimbri and the Teutoni, not removed until 101. She was also involved in operations against the pirates and in the Second Slave War in Sicily. Mithridates may well have thought it a suitable time to try for a favorable settlement by negotiation or bribery (a Sallustian touch)¹⁷ with the riches of his new Euxine empire. Saturninus went too far when he violated the sanctity of Mithridates' envoys, and gave his opponents an opening they were quick to exploit. He was understandably quite perturbed when conviction seemed certain, by the not

¹⁴The translation at this point seems to me mistaken. The Senate did not judge cases as a body or function as a court of law before the Principate, however much it may have given direction or support to the actions of magistrates, and although some anticipation of this development is seen in the *hostis* declarations and in Gracchan and Catilinarian procedures (see F. de M. Avonzo, *La funzione giurisdizionale del Senato Romano* [Milan 1957]; W. Kunkel, *Über die Entstehung des Senatsgericht*, *SBWien*, Phil-Hist. Kl. [1969] 2, esp. 1–25; R. A. Bauman, "The 'Leges Iudiciorum Publicorum' and their Interpretation in the Republic, Principate and Later Empire," *ANRW* 2.13 [1980] 103–253, esp. 145–153, and works mentioned there). In this passage of Diodorus the plural ἐκείνων should refer, not to the Senate, but to the senators. If the phrase τὰς τοιαύτας κρίσεις refers to capital cases in general Diodorus must be mistaken since the jurors in such cases were not restricted to senators. Could it mean special cases of this kind?

¹⁵On the career of Saturninus, see Klebs, "Apuleius, no. 29," *RE* 2 (1896) 261–269; *MRR* 1.560, 563, 565, and Supplement, Vol. 3.20–23.

¹⁶See Reinach 88 ff.; Magie 197, and 193, n. 57; Olshausen 810–811; Sherwin-White, *JRS* 67 (1977) 70–71, and *Roman Foreign Policy* . . . 102–108, esp. 104–105, and n. 38 (full references above, n. 11).

¹⁷See G. M. Paul, *Commentary on Sallust's Bellum Jugurthinum* (Liverpool 1984) Appendix 1, on bribery.

so cheerful prospect of being deprived of his rights and status as a citizen and of being surrendered to the tender mercies of Mithridates.

In the two previous cases, as remarked above, the role of the Fetials in carrying out the penalty is clearly stated, and credit for decision to act is given to the senate and the magistrates, and rightly so, for the actions taken deprived citizens of their status. But there is no evidence regarding the mode of arrival at the decision that an impiety has been committed and by what persons. In the case of Saturninus the terms used by Diodorus point to a formal trial of some sort. Upon complaint by the envoys a charge of *hybris* was laid, and the penalty for guilt was capital. The prosecutors are described as senators, and the judges are also described as senators, who, if the interpretation of the text of Diodorus given above is correct, were regularly the judges in trials of this kind. The defendant pointed this out effectively to his large and sympathetic crowd of followers.

Who were these senatorial judges? They cannot be the Senate itself, which did not develop the functions of a court of law until the Principate (above, note 14). There was no standing court with a mandate to deal with the rare cases of this kind. E. S. Gruen tentatively suggested that perhaps "an attempt was made to set up a *quaestio extraordinaria* staffed entirely by senators."¹⁸ There is no evidence of an attempt to legislate one, and the apparent popular mood may well have made a proposal to create such a *quaestio* for Saturninus quite ineffective. It was the religious nature of the offence and evidence that the Fetials were thought to have possessed from early times certain judicial functions in foreign affairs, and particularly in matters affecting envoys, that led Mommsen to suggest that the senatorial judges in the trial of Saturninus were probably Fetials, and to suppose, as priests did not possess *imperium*, that they were acting as a *consilium* of the magistrate in charge.¹⁹

This evidence comes from three texts, one each from Varro, Dionysius, and Cicero. The first is quoted in Nonius Marcellus (850L), s. v. *Faetiales*, from Book 3 of Varro's *De vita populi Romani*: *si cuius legati violati essent qui id fecissent, quamvis nobiles essent, uti dederetur civitati statuerunt; faetialesque viginti, qui de his rebus cognoscerent, iudicaret et statuerent et constituerent*.²⁰ The second is found in Dionysius (2.72) in a passage, clearly

¹⁸E. S. Gruen, *Roman Politics and the Criminal Courts, 149–78 B.C.* (Cambridge, Mass. 1968) 168–169, and n. 59.

¹⁹See Mommsen, *Staatsrecht* 2³.112, n. 3, in a passage which has been overlooked, perhaps because it is not listed in the Index under "Fetiales." It occurs in a section on procedure in cases of violation of the *ius gentium* (*Staatsrecht* 2³.110–118; cf. *Strafrecht* 55, n. 1). Mommsen admits consular cognition in such cases without right of appeal (*provocatio*).

²⁰In this passage Mommsen deleted the *et* after *statuerent* and emended *constituerent* to *constituerunt*. The passage in Nonius mentions the role of the Fetials *apud veteres Romanos* in declarations of war and making of treaties, with a quotation from Book 2 of Varro's work on the care they took to ensure that every war was *pium*.

elaborated and systematized in fairly recent times, describing the status and the "multitude of duties," according to the "Institutes of Numa," of the Fetials: "They are also to take cognizance of crimes against ambassadors."²¹ The third is from Cicero (*De legibus* 2.21), who apparently felt that the judgments of the Fetials were essential to his ideal state: *Foederum pacis belli indotiarum oratorum fetiales iudices nontii sunt; bella disceptanto*.²² But in another passage, on the question how independently the priests, Fetials, Pontifices, and others functioned, and on their legal as opposed to their moral and religious authority, Mommsen adds the following comment: "Die Mitwirkung der Priestercollegien, der Fetialen wie der Pontifices, wird in diesen Angelegenheiten häufig den Ausschlag gegeben, formel aber doch sich auf Ratschlag und Gutachtung beschränkt haben."²³ Hence his suggestion, probably because as priests they lacked the initiative and compelling power of the *imperium*, that in the case of Saturninus the board of senatorial judges serving as the *consilium* of the magistrate in charge was composed of Fetials because the sanctity of the envoys according to the *ius gentium* was for them a special field of competence and concern.

Another suggestion, which I owe to one of the referees, offers a reason-

²¹The passage in Greek is as follows: τὰ τε περὶ τοὺς πρεσβευτὰς ἀδικήματα δικάζειν. For the term describing the Fetials as εἰρηνοδίκαι, see Dionysius 2.72.6; 15.7.6, and 9.13; App. *Samn.* 4.5. Plutarch (*RQ* 62, 279b), calls them εἰρηνοποιοὶ and σπονδοφόροι. See below, note 38, on the term θεμιστῆρες.

²²The text given above is that of Vahlen, which was accepted by Mommsen, and by Keyes in the Loeb Classical Library. The readings in manuscripts ABH are *iudices non sunt*, and *bella disceptatis*. Van den Bruwaene ("Contribution à l'étude des sources du 'De Legibus'," *Atti del I congresso internazionale di studi Ciceroniani* [Rome 1961] 2.463–470) accepts *non sunt*, and holds that Cicero is definitely prohibiting the Fetials from exercising the judicial functions once attributed to them. Against this it may be urged that in the rather archaic language Cicero uses in these chapters about the priesthoods his negative in the few examples that occur is not *non* but *ne*, and that he is primarily engaged in a positive assignment of their duties and functions. On Cicero's attitude, see E. Rawson, "Scipio, Laelius, Furius and the Ancestral Religion," *JRS* 63 (1973) 161–174, at 168; and on the Fetials, see *ANRW* 1.4 (1973) 346–347.

²³Mommsen, *Staatsrecht* 2³.113; cf. *History of Rome*, tr. W. P. Dickson (New York 1895) 220, where he asserts even more forcefully the subordination of all the priestly colleges, no matter how distinguished they were or how important their function, from earliest times to the holders of command: they were not commanders but advisors, decisive in fact as advice from them on religious matters might be. G. Fusinato in his thorough treatise, "Dei feziali e del diritto feziale" (*MemAccLinc* Ser. 3.13.3 [1883–1884] 451–590, esp. 572–581), gives no credence to the texts cited above (nn. 19–22), and denies that the Fetials ever had judicial functions beyond those required for the correct ritual performance of their assigned duties. He grants the importance of the religious factors, particularly in regard to the sanctity and inviolability of envoys, but emphasizes in all cases of extradition the legal factor of compensation for harm done. In the case of Saturninus, he denies the competence of Fetials to be judges in this kind of case and holds that it is at best a chance occurrence if the Fetials were all or mainly senators (581). Incidentally, he notes (581) that in the first edition of the *Staatsrecht* (1871) Mommsen said that the judges were "evidently Fetials," but changed "evidently" to "probably" in the second. (Only the third edition has been available to me.)

able and attractive solution. It is that the judicial functions of the college of Fetials may have been similar to those of the college of Pontifices in two well-known cases. In 61 their decision that the rites of the Bona Dea had been violated²⁴ cleared the way for the Senate and the people to create an extraordinary *quaestio* to try the offender; and in 57 the decision of the college of Pontifices that there had not been a valid consecration of Cicero's property²⁵ enabled the Senate to pass decrees in favor of return and compensation. Similarly, a decision by the college of Fetials that some Roman citizen had violated the sanctity of foreign envoys and thus become liable to extradition could result in official action by Senate and magistrates. But as Diodorus appears to be describing a formal judicial proceeding with a panel of judges whose decision meant certain conviction, Mommsen's suggestion may be preferable.

Both suggestions raise the questions how probable it is that the Fetials, given that they had in some measure in primitive times the religious and judicial functions ascribed to them, would continue to keep and exercise them in later times; and how far Roman religious conservatism, especially strong in matters of form and ritual and in matters affecting relations with the gods, would succeed in preserving them in the original or an adapted form. These questions demand some review of the evidence that documents their activities as a functioning body during the Roman Republic.

The college of Fetials,²⁶ a primitive institution of the Latin communities,²⁷ was along with the patrician Salii, a distinguished body of priests, drawn from the noblest families (Dionysius 2.72.1) and ranking next to pontiffs and augurs. Mommsen ascribed to them the same standing in regard to the sacred laws of foreign relations as the pontiffs and the augurs had in regard to the sacred laws of internal relations.²⁸ Livy first mentions their activity in

²⁴Cic. *Att.* 1.13.3; cf. 1.14.1 and 5.

²⁵Cic. *Att.* 4.1.7; 4.2.3–5. Note M. Lucullus' response that the pontiffs were *religionis iudices* but the Senate is judge of the law (*legis [es]se senatum*).

²⁶For general discussions of the Fetials, see Samter, "Fetiales," *RE* 6 (1909) 2259–2265; C. Daremberg and E. Saglio 6.2.1095–1101 (A. Weiss); E. De Ruggiero, *Dizionario epigrafico* 3.66–71; G. Wissowa, *Religion und Cultus der Römer*² (Munich 1912) 550–554; Mommsen, *Staatsrecht* 1³.250–257; 2³.110–113, 675–679; 3.339, 1157, and on their decline, 1167; *Strafrecht* 55; G. Fusinato (above, n. 23); Tenney Frank, *Roman Imperialism* (New York 1914) 7–10, 12, and more fully, "The Import of the Fetal Institution," *CPh* 7 (1912) 335–342; K. Latte, *Römische Religionsgeschichte* (Munich 1960) 121–124; A. H. McDonald and F. W. Walbank, "The Origins of the Second Macedonian War," *JRS* 27 (1937) 180–207, at 192; R. M. Ogilvie, *A Commentary on Livy, Books 1–5* (Oxford 1965) 110–112, 127–136; E. Rawson, *JRS* 63 (above, n. 22), and "Religion and Politics in the Late Second Century B.C. in Rome," *Phoenix* 28 (1974) 193–212.

²⁷According to Cn. Gellius, Ardea provided the model (fr. 16, *HRR* 1.170, from Dion. Hal. 2.72). They were attributed also to Aequicola (Dion. Hal., *ibid.*; A. Degraffi, *Elogia* no. 66, *Inscr. Ital.* 13.3 [1937] 42 f.).

²⁸*Staatsrecht* 3.1157–58; *Strafrecht* 55.

Rome under Tullus Hostilius,²⁹ and Dionysius (*ibid.*) credits Numa with their institution. Both describe their part in declaring war, in making peace, and in striking treaties, Dionysius in elaborate detail, and with special mention of their duties when envoys were mistreated (2.72.5, above, note 21). Varro in the *De vita populi Romani* confirms both (Nonius Marcellus 850L, above, note 20). Dionysius and Varro alike insist on the special function of the Fetials in early times in this kind of case. Would it have survived when cases were so few, still applicable, in the time of Saturninus?

As R. M. Ogilvie (above, note 26, 110–112, 127–136) and others have pointed out, the college of Fetials lost much of its early importance in declaring war or making peace and alliances as Roman power extended over a wider area, and the old rituals, however much they may have been modified,³⁰ became too slow and antiquated for use under new conditions. Moreover, influence and control must have lessened as senatorial influence increased, and it seemed more convenient to send senatorial legates out on missions. But it would be mistaken to say the Fetials became obsolete.³¹ As will appear below, a series of notices documents their continued existence as a functioning institution, available whenever circumstances were suitable. They were available also, as Ogilvie agrees, to attract interest and regain importance in the period of antiquarian revival and religious tension in the latter part of the second century, and notably in the extradition of Mancinus to the Numantines in 137.³²

A prominent senator, A. Cornelius (Cossus) Arvina, consul in 343 and 332, is named in Livy's largely invented account as the Fetial, probably also *pater patratus*, who had charge of the surrender to the Samnites of Sp. Postumius, consul in 321, and his associates, whose humiliating agreement of peace at the Caudine Forks had been rejected by the Senate.³³ The Fetials

²⁹Livy 1.24; cf. 4.58; Cic. *Rep.* 2.31. See D. W. Packard, *A Concordance to Livy* (Cambridge, Mass. 1968), s. v. Fetiales.

³⁰See especially F. W. Walbank, "Roman Declarations of War in the Third and Second Centuries," *CP* 44 (1949) 15–19; J. W. Rich, *Declaring War in the Roman Republic in the Period of Transmarine Expansion* (Brussels 1976) Ch. 3, 56 ff.

³¹R. M. Ogilvie (above, n. 26) [128] terms the *ius fetiale* obsolete so far as declarations of war were concerned by the beginning of the second century B.C. but grants (110) that they long maintained their role in the concluding of treaties. The passage of Polybius (13.3.7: βραχὺ δὲ τὸ . . . ἔχονος), which he cites to show that only a slight trace of the original procedure remained, refers, as Walbank has shown (*CP* 44 [1949] 17 f.), not to details of the fetial procedure but to older Greek as well as Roman practices in beginning a war.

³²On religious attitudes in the political life of the latter part of the second century, see E. Rawson, *Phoenix* 28 (above, n. 26). Though sceptical of the accuracy of the traditions, she shows how seriously leading Romans of that time regarded them and their rituals. On the sincerity with which many of the Roman nobility continued to regard traditional Roman religious ritual, see H. D. Jocelyn, "The Roman Nobility and the Religion of the Republican State," *JRelH* 4 (1966–1967) 89–104.

³³Livy 9.10–11; see *MRR* 1.150–153. It is generally agreed that much of the story of this

are mentioned in a late source as the ones who made the declaration of war against Pyrrhus in 280, in an adapted ritual, by casting the blood-stained spear at a piece of land in Rome near the temple of Bellona which had been conveyed to the enemy and thus made enemy territory.³⁴ In 201 Fetials were sent to Africa to conclude the treaty of peace with the Carthaginians, and were provided by decree of the Senate with the *lapides silices* and the *verbenae* from the *Arx* needed for proper performance of the ritual.³⁵ The Fetials were consulted, and issued decrees, regarding the proper forms for declaring war on Philip V of Macedon in 200, and on Antiochus the Great and the Aetolian League of 191.³⁶ As the cases discussed above attest, the Fetials were available about 266 and again in 188 to do their part in extraditing to the injured communities (perhaps also in judging) offenders who had violated the sanctity of their envoys. When in 137 the Senate and the people had refused to confirm the humbling agreement for peace which Hostilius Mancinus had made with the Numantines, there was a *pater patratus* and Fetials with him to extradite Mancinus and to bring fresh prominence to the college of Fetials.³⁷ Cicero's sarcastic remark on the

event was invented and many details elaborated in imitation of the story of the extradition of Hostilius Mancinus to the Numantines in 137. Even the refusal of the Senate and People to accept the *sponsio* and the extradition of Postumius may be inventions. See H. Nissen, "Der caudinische Friede," *RhM* 25 (1870) 1–65; and E. T. Salmon, *Samnium and the Samnites* (Cambridge 1967) 224–230, who has shown that acceptance of the peace and cessation of hostilities for five years is much more consistent with the evidence and with the realities of the Second Samnite War. The names of the consuls seem genuine, and it is probable that Arvina, already twice consul, was a prominent Fetal to whom the story could be attached. See also M. H. Crawford, "Foedus and Sponsio," *PBSR* 41 (1973) 1–7; Ö. Wikander, "Gaius Hostilius Mancinus and the Foedus Numantium," *OpusRom* 11 (1976) 84–104, esp. 87–100.

³⁴Serv. Auct. *ad Aen.* 9.52; cf. Ovid *Fasti* 6.206–208; Festus 30L, 470L. For an expression of doubt about the tradition, see E. Rawson, *JRS* 63 (above, n. 26) 167; and for uncertainty about the original date, K. Latte, *Römische Religionsgeschichte* (Munich 1960) 122, n. 3. It seems unlikely that in so momentous a matter as the declaration of war on Cleopatra Octavian would not have taken great care to be acting in accord with a firm tradition. See Dio Cassius 50.4.4–5, and below, n. 47 and lemma.

³⁵Livy 30.43.9. The notice is doubted by E. Rawson, *ibid.* It may have been included because of Livy's own love of antique forms (cf. 5.21.9; 43.13.2). It is an annalistic notice, but such notices cannot be discarded entirely (see J. P. V. D. Balsdon, "Some Questions About Historical Writing in the Second Century B.C.," *CQ* ns 3 [1953] 158–164; "Rome and Macedon, 205–200 B.C.," *JRS* 44 [1954] 30–40). The importance of the treaty and Scipio's attitude toward religious ritual make recourse to the Fetials more probable, even though it was unusual for them to travel to distant lands. Note that Scipio was a *Salus*, and the *Salii* took their rituals seriously (Livy 37.33.7). See H. H. Scullard, *Scipio Africanus, Soldier and Statesman* (Ithaca, N.Y. 1970) 18–23, 25–27, 233–237; J. Briscoe, *A Commentary on Livy, Books XXXIV–XXXVII* (Oxford 1981) 337–338.

³⁶Livy 31.8.3–4; 36.3.7–12. See above, note 30, Walbank and Rich; also Briscoe, *ibid.* 223–224.

³⁷Cic. *De or.* 1.181; 2.137; *Caec.* 98; *Rep.* 3.28; *Vell.* 2.1.5–2.1. Oros. 5.4.21; *Obseq.* 24; and on the *ius fetiale*, Cic. *Off.* 1.36; 3.108.

disregard by Verres, *hominem in fetialium manibus educatum*, of the terms of the Roman treaties with Messana and Tauromenium, that if Verres had been acting correctly all the previous praetors of Sicily should be surrendered to the Mamertines (Verr. 2.5.49–50), depends for its effectiveness on the awareness of his readers in 70 of the role of the Fetials in concluding treaties and guarding against infringement of their terms. If the suggestion of J. M. Reynolds that in the *Senatus Consultum de Aphrodisiensibus* of 39, with the renewal of the treaty between Rome and Aphrodisias, the term θεμιστῆρες means Fetials is correct, we have further evidence of their continuing role in concluding treaties,³⁸ a role which Varro described as contemporary (LL 5.86: *et per hos etiam nunc fit foedus*). It is noted above (note 23 and lemma) that Cicero maintained the importance of the role of the Fetials in regard to treaties, war, peace, truces, and embassies. They gained further prominence when Octavian, himself a Fetial, declared war on Cleopatra in 32 at the temple of Bellona “with all the rites preliminary to war in the customary fashion” (Dio Cassius 50.4.4–5).

In dignity, however, they had always been considered inferior to the major priestly colleges, and in the Augustan revival they remained so, as well as to the *sodalitates*. But they kept an honorable position. The emperors held this priesthood too, and so did many of the imperial family.³⁹ Nor would there otherwise have been a proposal in 22 B.C. to have them join the major colleges and the *sodalitates* in presiding over the games in honor of Livia’s recovery from illness, nor would Tiberius have felt it necessary to review the various *iura sacerdotiorum* and the precedents before deciding that they were inferior in *maiestas* (Tac. Ann. 3.64). Claudius concluded treaties with foreign princes in the Forum, reciting the ancient formula of

³⁸J. M. Reynolds, *Aphrodisias and Rome* (London 1982, JRS Monograph 1), Document 8, line 85, and see pp. 39, 63, 89–90, a reference for which I thank my colleague, Professor Jerzy Linderski. Dr Reynolds comments on them as follows: “On one view the religious archaism commonly associated with Octavian/Augustus would be attested some years earlier than was hitherto believed, and on another the reference would be an indication that, as Varro said, the rituals of the Fetials persisted throughout (LL 5.86: *et per hos etiam nunc fit foedus*).” The context of the series of references given above provides some support for the latter interpretation. Although no titles are given, and there seems to be no room for them on the fragmentary stone, the Cn. (?) Domitius Calvinus and the Cn. Pompeius (or Pomponius?) Rufus who took oath on behalf of the Roman People in the treaty of 45 B.C. between Rome and Cnidus (E. Täubler, *Imperium Romanum* [Berlin 1913] 450–454; and for a translation, A. C. Johnson, P. R. Coleman-Norton, and F. C. Bourne, *Ancient Roman Statutes* [Austin, Texas 1961] 92, no. 110) may possibly have been Fetials, as E. Rawson has suggested (JRS 63 [above, n. 26] 168, n. 70). On the date, see C. Cichorius, “Ein Bündnisvertrag zwischen Rom und Knidos,” *RhM* 76 (1927) 327–329. The little-known author, Anniius Fetalis, may have lived in the late Republic and have been a Fetial priest (Pliny HN 34.29, the lists of authorities [in Book 1] for Books 16, 33, 36; P. V. Rohden, “Annius,” no. 43, *RE* 2, 2265; E. Rawson *ibid*).

³⁹On the Fetials in the Julio-Claudian period, see M. H. Lewis, *The Official Priests of Rome under the Julio-Claudians* (Rome 1955) 114–115, 138–140, 155–159.

the Fetials (Suet. *Claud.* 25.5), and Marcus Aurelius in the tense situation in 178 declared war on northern invaders by the old rites at the temple of Bellona.⁴⁰

Thus the college of Fetials maintained itself throughout the Roman Republic through periods of obscurity and revival. Roman territorial expansion and the growth in the importance of the Senate caused adaptations to, or made obsolete, some of their activities, particularly their role in declarations of war, but much was done to preserve their functions and the efficacy of their ritual in making and in maintaining the terms of treaties. There was nothing to diminish their religious significance in issues that arose in Rome, and, as our sources agree, they were especially concerned, as part of the *ius gentium*, with the sanctity of envoys, and in carrying out the penalties for its violation. In the few cases reported in our sources, discussed above, we are unable to go beyond suggestions and probabilities. It is true that in none of them are the Fetials mentioned as judges, yet in these, in a field of their special competence, it is reasonable to believe, as Mommsen thought, that they were called upon to give advice and offer their judgment. This would be comparable to that of the college of pontifices in sacred internal law and to that of the augurs as judges of the auspices. Given that a citizen could be deprived of his rights only by action of magistrates with *imperium* with the support of the Senate, the Fetials could participate in two ways, either through a separate session of the college to decide if the offenders had violated the *ius gentium*, an impiety likely to provoke divine wrath, in which case the decision would clear the way for official action; or, as Mommsen thought in the case of Saturninus, and as seems more consistent with the text of Diodorus, by creating at a trial a magistrates' *consilium* of senators from the college of Fetials, whose opinion in their special field and on a religious issue could hardly fail to be decisive.

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⁴⁰Dio Cassius 72.33.3, Loeb ed. 9.56–59.