

# THE OATH *PER IOVEM LAPIDEM* AND THE COMMUNITY IN ARCHAIC ROME

## I

One of the few documents from early Rome the authenticity of which no one now seriously doubts is the first treaty with Carthage. Polybius says that the treaty, and two others which were struck subsequently with the Carthaginians, were recorded on bronze tablets and were preserved in the treasury of the aediles. There are some difficulties, but there is no reason to doubt what Polybius claims.<sup>1</sup>

Polybius offers a precise date for the treaty. He says that it was struck when L. Iunius Brutus and M. Horatius were consuls, a date which he then converts into something more accessible to his Greek audience: the treaty was struck twenty-eight years before Xerxes crossed to Greece.<sup>2</sup> Although some have accepted it, Polybius' precise date is worthless. Brutus is simply unhistorical.<sup>3</sup> Nor was he, according to the later tradition of events, ever a colleague of Horatius. In the later version, Horatius was only a suffect consul who came to office after Brutus' death.<sup>4</sup> Polybius is here simp-

1) Polyb. 3,26,4; on the ‘treasury of the aediles’, see F.W. Walbank, A Historical Commentary on Polybius I, Oxford 1957, 353–354; more recently, J. Serrati, Neptune’s Altars: The Treaties between Rome and Carthage (509–226 B.C.), CQ 56, 2006, 122–123.

2) Polyb. 3,22,1–2; Walbank (above, n. 1) 339–340.

3) See, e.g., K.-W. Welwei, Lucius Iunius Brutus – ein fiktiver Revolutionsheld, in: K.-J. Hölkenskamp and E. Stein-Hölkenskamp (eds.), Von Romulus zu Augustus. Große Gestalten der römischen Republik, Munich 2000, 48–57; T.P. Wiseman, The Legend of Lucius Brutus, in: M. Citroni (ed.), Memoria e identità: la cultura romana costruisce la sua immagine, Florence 2003, 21–38 (= T.P. Wiseman, Unwritten Rome, Exeter 2008, 293–305).

4) References in T.R.S. Broughton, The Magistrates of the Roman Republic I, New York 1951, 1–3. Cf. T.P. Wiseman, Roman Republic, Year One, G&R 45, 1998, 19–26 (expanded version in Wiseman, Unwritten Rome [above, n. 3] 306–319); J.H. Richardson, Rome’s Treaties with Carthage: Jigsaw or Variant Trad-

ly setting forth a variant tradition concerning the identity of the consuls of the first year of the Republican period.<sup>5</sup> This entails no serious difficulty, however, for the names of the two consuls do not appear to have come, and obviously cannot have come, from the text of the treaty.<sup>6</sup> Polybius may record a second variant tradition here as well, if it is not just a simple slip. He says that Brutus and Horatius dedicated the temple of Jupiter Capitolinus. Later tradition gave that honour to Horatius alone, although there was clearly some uncertainty about when he did this, and in what capacity.<sup>7</sup>

Polybius next provides his readers with translations of all three of the treaties with Carthage, or perhaps more accurately with translations of parts of all three, and he also provides commentaries on the first two.<sup>8</sup> He carefully notes however, before relating the terms of the first treaty, that, while his translation is as accurate as he can make it, the Latin language has changed so much since the treaty was drafted that not all of the text can now be easily understood, even by the most intelligent Romans. This comment has often, and without doubt rightly, been taken as confirmation of the document's authenticity, and of its early date, but it has also allowed for some rather loaded speculation about the identity of the learned Romans to whom Polybius refers.<sup>9</sup> The com-

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itions?, in: C. Deroux (ed.), *Studies in Latin Literature and Roman History XIV*, Brussels 2008, 93–94.

5) The tradition concerning Tarquinius (Brutus' colleague in the more prevalent version; see Broughton [above, n. 4] 2 for references) may have developed in the fourth century, see Wiseman (above, n. 3) 30–32 (= *Unwritten Rome* [above, n. 3] 299–301). If it did, then Polybius must be presenting a variant tradition, rather than merely an early one.

6) Cf., e.g., Walbank (above, n. 1) 399; G. De Sanctis, *Storia dei Romani* II, Turin 1960, 239–240; S. P. Oakley, *A Commentary on Livy. Books VI–X, Volume II: Books VII and VIII*, Oxford 1998, 256; Serrati (above, n. 1) 116: “[Polybius] gives the date [of the treaty] as the consulship of Brutus and Horatius, 509. This is possibly an error that, if not featured on the treaty, would probably derive from either Fabius Pictor or Cato ...”. But the error could scarcely have appeared on the treaty, unless it had been added at a much later date, when no one knew (despite what they may have believed) who had really been in office at the time when the treaty was made.

7) Polyb. 3,22,1. See Broughton (above, n. 4) 3–4 and n. 3, 6 and n. 1; Walbank (above, n. 1) 340.

8) Polyb. 3,22,4–3,25,5.

9) Polyb. 3,22,3. Note, in particular, M. Cary, *A Forgotten Treaty Between Rome and Carthage*, JRS 9, 1919, 69–70, who suggests that Polybius may have got his information about the treaties from Cato, “the last person in the world to give

ment naturally also has wider implications for the Romans' ability to comprehend early texts,<sup>10</sup> although, since Polybius' account of the clauses of the treaty seems coherent, plausible and most importantly, appropriate to the general era to which the treaty is now usually assigned,<sup>11</sup> it is perhaps reasonable to suppose that the treaty was simply difficult to read, and especially so in some places, but was not wholly unreadable.<sup>12</sup> Had it been unintelligible, Polybius can be trusted to have said so.

After he has set out his translations of all three treaties, Polybius turns to the oaths which were sworn for each.<sup>13</sup> Although he deals with all the oaths together in a single paragraph which he appends to his discussion of the treaties, there is no reason to suppose that the information he supplies about the oaths does not come from the treaties themselves. Firstly, in his seventh book Polybius provides what appears to be the full text of the treaty which Hannibal made with Philip V. The treaty evidently included details of the oaths which were sworn on that occasion.<sup>14</sup> And secondly, what Polybius records, for the first treaty with Carthage anyway,

an impartial account of the relations between Rome and Carthage"; cf. also n. 6 above.

10) Cf., e.g., C. Ampolo, *La storiografia su Roma arcaica e i documenti*, in: E. Gabba (ed.), *Tria corda: Scritti in onore di Arnaldo Momigliano*, Como 1983, 19–26; Wiseman, *Unwritten Rome* (above, n. 3) 8–15.

11) Cf., e.g., J. Heurgon, *The Rise of Rome to 264 B.C.*, London 1973, 253–256; T.J. Cornell, *The Beginnings of Rome*, London 1995, 211–212; Oakley (above, n. 6) 256; Serrati (above, n. 1) 116. The chronology of the early treaties between Rome and Carthage is notoriously difficult; the first treaty has, in the past, been given a significantly different date; see, e.g., Th. Mommsen, *Die römische Chronologie bis auf Caesar*, Berlin 1859, 320–325; De Sanctis (above, n. 6) 239–240; A. Alföldi, *Early Rome and the Latins*, Ann Arbor 1965, 350–355; but on the methods used to date the treaties, see Richardson (above, n. 4). The first treaty with Carthage was almost certainly struck sometime in the late sixth century, or possibly in the early fifth.

12) Serrati (above, n. 1) 115–116.

13) Polyb. 3,25,6–9. The reading of A. Calore, "Per Iovem lapidem" alle origini del giuramento. Sulla presenza del 'sacro' nell'esperienza giuridica romana, Milan 2000, 86 seems forced; if Polybius was referring here only to the oaths that were sworn when the second and third treaties with Carthage were struck, he would have needed to make this clear. And why should he have remained silent about the oath that was sworn when the first treaty was made? Cf. n. 20 below.

14) Polyb. 7,9,2–3, on which see F.W. Walbank, *A Historical Commentary on Polybius II*, Oxford 1967, 42–51; of the works cited by Walbank, see in particular E.J. Bickerman, *An Oath of Hannibal*, *TAPhA* 75, 1944, 87–102.

is perfectly plausible but perhaps also a little unexpected;<sup>15</sup> had Polybius only been relating what his learned Romans imagined the oath to have involved, it is fair to say that he would probably have recorded something quite different.

For the first treaty, Polybius says, the Romans swore, according to an old custom, by Jupiter lapis; for the second and third treaties, they swore by Mars and Quirinus. Polybius then offers an explanation of the oath by Jupiter lapis: the person who swears to the treaty takes a stone in his hand, swears in the name of his state, and declares that, should he not abide by his oath, he alone should be cast out, as the stone is cast; having said this, he throws away the stone.<sup>16</sup> Obviously this explanation is most unlikely to have come from the text of the treaty. Polybius may here have been drawing upon the knowledge of his learned Romans. Naturally this means that the precise wording of the oath may be nothing more than what Polybius' informants supposed it to have been, or it may simply be

15) See, for instance, J. E. Vaahtera, Roman Religion and the Polybian *politeia*, in: C. Bruun (ed.), *The Roman Middle Republic: Politics, Religion, and Historiography c. 400–133 B.C.*, Rome 2000, 257: "... an oath taken on behalf of the state in such form as described by Polybius appears quite implausible, since the formula explicitly imposes the obligation, and the possible future punishment, only on the person who pronounces the oath, not on the state"; after discussing Livy's account of the oath that was sworn upon the striking of a treaty (on which, see below), Vaahtera concludes: "... it is clear that Polybius is in error. He has confused two distinct rituals: the oath *per Iovem lapidem*, and the Fetial oath completed by slaying a pig with a *lapis silex*"; see also R. M. Ogilvie, *A Commentary on Livy. Books 1–5*, Oxford 1965, 110: "... [Polybius] had only a confused understanding of the detailed institution because he was misled into identifying the fetial sacrifice of the pig by a flint (*silex*) with an entirely separate oath *Iovem lapidem*". On the contrary, Polybius provides good, early evidence. If that evidence does not fit with modern expectations or preconceptions, then those expectations and preconceptions should be thoroughly questioned before the evidence is dismissed.

16) Polyb. 3,25,7–9: ἔστι δὲ τὸ Δίο λίθον τοιοῦτον· λαβὼν εἰς τὴν χεῖρα λίθον ὁ ποιούμενος τὰ ὄρκια περὶ τῶν συνθηκῶν, ἐπειδὴν ὅμοσῃ δημοσίᾳ πίστει, λέγει τάδε εὐόρκοντι μὲν μοι εἰη τάγαθός· εἰ δ' ἄλλως διανοῦθειν τι ἡ πρόξαιπι, πάντων τῶν ἄλλων σωζομένων ἐν ταῖς ιδίαις πατρίσιν, ἐν τοῖς ιδίοις νόμοις, ἐπὶ τῶν ιδίων βίων, ιερῶν, τάφων, ἐγὼ μόνος ἐκπέσοιμι οὕτως ὡς ὅδε λίθος νῦν. καὶ ταῦτ' εἰπὼν ρίπτει τὸν λίθον ἐκ τῆς χειρός. The concept of the scapegoat may come to mind here, but it is wholly inapplicable: if the person who swore the oath was, potentially, to function as a scapegoat, this would mean that possible violation of the treaty had been envisaged, and that measures designed to mitigate the consequences of that violation had been built into the oath itself; but clearly this would subvert the value of the oath.

the wording that was employed in Polybius' day.<sup>17</sup> But other evidence for the oath sworn by Jupiter lapis, although it comes from later sources, certainly confirms one thing: the oath sworn *per Iovem lapidem* appears to have been binding only on the individual who swore it.<sup>18</sup>

Discussion of Polybius' account of the oaths has tended to focus on the problems in it. There are various difficulties with the phrase 'Δία λίθον',<sup>19</sup> although the explanation of the rite which Polybius provides may help to dispel some of these, at least as far as present purposes require. Even though the explanation probably comes from elsewhere, it is obviously an explanation of the type of oath which was recorded on the treaty. There are also difficulties with the idea of oaths sworn by Mars and Quirinus (in turn, for each of the two subsequent treaties perhaps, or maybe as a pair for both).<sup>20</sup> Something certainly does seem to be amiss with the later oaths, but that is unimportant as far as the oath for the first treaty is concerned. Polybius clearly implies that he had received help (in person, or by what he had read in some unknown work) to make sense of the first treaty. There is no reason whatsoever to suppose that that help was restricted only to translating the terms

17) Note that Polybius mentions the state, the father-land and the laws (see n. 16 above), but compare this with Festus' version of the oath (n. 18 below), in which only physical locations are mentioned.

18) Fest. 102L: *lapidem silicem tenebant iuraturi per Iovem, haec verba dicentes: si sciens fallo, tum me Dispiiter salva urbe arceque bonis eiciat, ut ego hunc lapidem*; Cic. Fam. 7,12,2: ... quo modo autem tibi placebit Iovem lapidem iurare cum scias Iovem iratum esse nemimi posse?; Gell. NA 1,21,4: 'Iovem lapidem', inquit, 'quod sanctissimum iuriurandum habitum est, paratus ego iurare sum Vergiliūm hoc numquam scripsisse ...'; Apul. de deo Soc. 5: *iurabo per Iovem lapidem Romano vetustissimo ritu?* atque si *Platonis vera sententia est, numquam se deum cum homine communicare, facilius me audierit lapis quam Iuppiter*; Plut. Sulla 10,7: ὃ δέ ἀναβάς εἰς τὸ Κατιτώλιον ἔχων ἐν τῇ χειρὶ λίθον ὅμνυνεν, εἴτα ἐπαρασκέψας ἔαντό μη φυλάττοντι τὴν πρὸς ἐκεῖνον εὑνοιαν ἐκπεσεῖν τῆς πόλεως, ὥσπερ ὁ λίθος διὰ τῆς χειρός, κατέβαλε χαμᾶζε τὸν λίθον οὐκ ὀλίγων παρόντων. See the various works cited in n. 19 below.

19) Cf. J. L. Strachan-Davidson, Selections from Polybius, Oxford 1888, 73–80; J. S. Reid, Human Sacrifice at Rome and Other Notes on Roman Religion, JRS 2, 1912, 50–52; G. Wissowa, Lapis (2), RE XII (1924) 779–782; Walbank (above, n. 1) 351–353; M. Dubuisson, Le latin de Polybe. Les implications historiques d'un cas de bilinguisme, Paris 1985, 189–194; Vaahtera (above, n. 15) 256–257; A. Watson's handling of Polybius' evidence (International Law in Archaic Rome, Baltimore 1993, 44–45) is extraordinarily superficial.

20) Cf., e.g., Walbank (above, n. 1) 353; Vaahtera (above, n. 15) 256.

of the treaty; indeed, the explanation that Polybius provides of the form of the oath may well be evidence that he had received assistance in reading the whole of the treaty. If Polybius' account of the terms of the first treaty is reliable, and it is generally supposed that it is,<sup>21</sup> then his account of the oath should be treated as reliable too. Of course, it may be worth considering the opposite, namely that the difficulties discernable in Polybius' description of the oaths may suggest that there could be difficulties in his account of the terms. But the main difficulty is connected with the oaths for the second and third treaties, and the solution to that difficulty is actually very simple;<sup>22</sup> the oath sworn when the first treaty was struck, although unexpected, is certainly coherent; and, most importantly, there is good, independent evidence for precisely this form of oath.<sup>23</sup>

Before any consideration is given to what the employment of the oath *per Iovem lapidem* may imply, it will be useful to note first and briefly Livy's famous and much discussed account of the ritual which was, according to Livy, performed when a treaty was made. Livy provides his description of the ritual in his first book, in his narrative of the reign of King Tullus Hostilius. The ritual, he claims, was conducted as follows. One of the fetial priests began by asking the king if he, that is the king, ordered that the treaty be made; the king ordered that it be so.<sup>24</sup> Next, the fetial asked the king for the *sagmina*, herbs taken from the *arx* of the Capitol; the king presumably provided them.<sup>25</sup> The fetial then asked the king

21) See, e. g., the references in n.11 above, where this is implicit.

22) Presumably the triad of Jupiter, Mars and Quirinus is meant, and mention of Jupiter has simply been omitted; cf. Wissowa (above, n.19) 780–781; Walbank (above, n.1) 353; Vaahtera (above, n.15) 256. Calore (above, n.13) 85–87 offers a different solution, but one which is based upon a difficult reading of Polybius' text (see n.13 above); nor does Calore provide any real evidence to support his theory that quite different types of oath were sworn, when a treaty was first struck (the oath which Livy describes, for which see below), when that same treaty was later confirmed or renewed (the stone-throwing oath), and when new clauses were subsequently added to it (an oath sworn by Mars and Quirinus).

23) Cf. n.18 above for the evidence. Cornell (above, n.11) 211 and Oakley (above, n.6) 253, 255 appear to accept that Polybius' account of the oath is genuine: both treat the oath (and rightly so) as evidence of the first treaty's early date.

24) Livy 1,24,4: *fetialis regem Tullum ita rogavit: 'iubesne me, rex, cum patre patrato populi Albani foedus ferire?' iubente rege ...*

25) Livy 1,24,4–5: ... 'sagmina' inquit 'te, rex, posco'. rex ait: 'puram tollito'. *fetialis ex arce graminis herbam puram attulit.* Cf. Livy 30,43,9: *fetiales ... privos*

for permission to speak for the Roman people of the Quirites. Once permission had been granted,<sup>26</sup> another of the fetials was appointed as the *pater patratus*, so that he might complete the oath,<sup>27</sup> the central element of which was a request made of Jupiter. The request was that, should the Roman people be the first to breach the terms of the treaty, then may Jupiter strike the Roman people as the fetial strikes a piglet. After he had made this request, the fetial then struck a piglet with a *silex*.<sup>28</sup>

It has been argued that all this is in fact an antiquarian reconstruction, an argument which may find support in Polybius' account of the oath that was sworn when the first treaty with Carthage was made.<sup>29</sup> Yet there is good evidence, literary and numismatic, which

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*lapides silices privasque verbenas secum ferrent ut, ubi praetor Romanus imperaret ut foedus ferirent, illi praetorem sagmina poscerent. herbae id genus ex arce sump-tum fetialibus dari solet.* On the *sagmina*, cf. also Serv. Aen. 12,120; Plin. HN 22,5; Fest. 424–426L; Paul. Fest. 425L; Dig. 1,8,8,1.

26) Livy 1,24,5: *postea regem ita rogavit: ‘rex, fac sine me tu regium nuntium populi Romani Quiritium, vasa comitesque meos?’ rex respondit: ‘quod sine fraude mea populi Romani Quiritium fiat, facio’.*

27) Livy 1,24,6: *fetialis erat M. Valerius; is patrem patratum Sp. Fusium fecit, verbera caput capillosque tangens, pater patratus ad ius iurandum patrandum, id est, sanciendum fit foedus.*

28) Livy 1,24,8–9: *si prior defexit publico consilio dolo malo, tum illo die, Iuppiter, populum Romanum sic ferito ut ego hunc porcum hic hodie feriam; tantoque magis ferito quanto magis potes pollesque’.* *id ubi dixit porcum saxo silice percussit.* See also Livy 9,5,3: *... preicatione res transigitur, per quem populum fiat quo minus legibus dictis stetur, ut eum ita Iuppiter feriat quemadmodum a fetialibus porcus feriatur.* On the piglet, see also n. 30 below.

29) Ogilvie (above, n. 15) 110–112. Pace Calore (above, n. 13) who accepts as good both Livy's evidence (43–45) and Polybius', and who further supposes that Livy and Polybius both refer to the oath *per Iovem lapidem* (cf., e.g., 39, 53, 55, 57, 60 n. 70, 87). Such an hypothesis requires an explanation for the differences between Livy's oath and Polybius', but it is not enough simply to distinguish between a public oath (Livy's) and a private one (Polybius'), or between an oath sworn when a treaty was made, and one sworn when a treaty was later confirmed, or when a *sponsio* was made (e.g., 83–87, 105, 107; see n. 22 above). Not only does Polybius say that the oath *per Iovem lapidem* was used for a treaty, he also says that it was used for the first treaty between Rome and Carthage (so the context can hardly be deemed anything other than public). The only parallel between Livy's rite and Polybius' is the use of a stone, but the use to which that stone is put in each is very different, as is its symbolic value. If the *silex*, as Calore ibid. 57 argues, “non era un oggetto qualsiasi ma uno strumento consacrato ad una divinità precipitolina, quale Giove Feretrio, e gelosamente custodito dall'antico Collegio sacerdotali dei feziali nel tempio del dio”, then it is extremely difficult to imagine (and this is a point which has been made in the past) that anyone would throw it away; nor is it prob-

shows that a piglet was indeed killed when a treaty was made.<sup>30</sup> The date at which the practice of killing a piglet was introduced is not known. The earliest evidence for it, which is numismatic, comes from the late third century BC. But the absence of the piglet may in fact make much better sense in an archaic context.<sup>31</sup>

If the piglet was to represent the Roman people, as Livy implies it was, and if the fetial priest was to speak for the Roman people, as Livy claims he was, then that presupposes the existence of a number of important concepts. Most obviously, the concept of the Roman people must have existed – as it may well have done, and certainly did by the time Rome's first treaty with Carthage was struck, as the terms of the treaty show. But the existence of this concept cannot always be taken for granted, especially in a community that had its origins in several, in a community that was remarkably open to others, seemingly irrespective of their origins, language or ethnicity, and in a community where ideas of citizenship may have taken some time to develop and take root.<sup>32</sup> Along with the concept of the Roman people, there also had to exist a sense of a state, and indeed of a state which could be considered as the Roman people's (so a *res publica* rather than a *res privata*). Furthermore, the ability to conceive of these ideas in a sufficiently abstract way to allow for them to be imparted into the piglet must have also been a prerequisite of the ritual which Livy describes.<sup>33</sup> None of these things, in contrast, had to exist for the oath which Polybius records.<sup>34</sup> The oath *per Iovem lapidem* was binding only

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able that such an object could represent symbolically a person who had broken the terms of an agreement, and yet that is the precise symbolic value of the stone in the ritual which Polybius describes.

30) Cic. *Inv. rhet.* 2,91; Virg. *Aen.* 8,641; Serv. *Aen.* 1,62; 8,641; Varro, *Rust.* 2,4,9; Fest. 266L; Paul. Fest. 267L; Suet. *Claud.* 25. For the numismatic evidence, see M. H. Crawford, *Roman Republican Coinage*, Cambridge 1974, 144–145, nos. 28/1–2, 29/1–2, and 266–267, no. 234/1.

31) Compare Hom. *Il.* 3,298–301, esp. 3,300: ὁδε σφ' ἐγκέφαλος χαμάδις πέοτ ὡς ὁδε οἶνος, an oath which is unquestionably early.

32) See, e.g., Cornell (above, n. 11) 92–103, 157–159; A. Momigliano, *The Origins of Rome*, CAH VII.2 (1989) 66–68, 75–76, 81, 91, 99–100; C. Ampolo, *La nascita della città*, in: A. Momigliano and A. Schiavone (eds.), *Storia di Roma I: Roma in Italia*, Turin 1988, 153–180; see also nn. 40, 41 and 42 below. On the development of the concept of citizenship, see below.

33) But cf., for instance, J. H. Richardson, *Ancient Political Thought and the Development of the Consulship*, *Latomus* 67, 2008, 630 and n. 11.

34) See n. 17 above, although the wording in both instances may well be late.

on the person who swore it, and it is for this very reason that this form of oath may have been far more suitable for an archaic context as it presupposes little more than the existence of a single leader or chief of some description.<sup>35</sup>

Although the first treaty with Carthage was struck at a time in Rome's history when concepts such as the state and citizenship undoubtedly did exist (even if they may not have done so in a fully developed form, and even if they may not have been ideas to which everyone yet or fully subscribed<sup>36</sup>), there nonetheless remain several possible contexts in which the oath *per Iovem lapidem* would have made perfect sense.

First and most obviously, there is regal Rome. It is not necessary, and it is in fact extremely dangerous, to think of regal Rome in the way in which it appears in the literary tradition, that is, as a fully developed state, with all the appropriate appendages of a state. The Senate for instance, as T.J. Cornell has plausibly argued, may not have originally been the comparatively fixed and independent public body that it is presented as being in the literary tradition. It may, until the passing of the *lex Ovinia* in the fourth century, have been something much more akin to an individual's *consilium*.<sup>37</sup> And the *comitia centuriata*, or what became the *comitia centuriata*, may have once consisted of nothing more

35) Cf. Strachan-Davidson (above, n. 19) 80: "It is to be noticed that the oath 'Jovem lapidem' was taken only in the case of the First Treaty. The other instances of this ceremony relate to oaths made by private persons. It may be conjectured that originally the Fetials employed this as the most solemn form of oath known to them; but that, as there might be a question whether the vengeance was to fall on the swearer personally, or on the State as represented by him, it was afterwards discarded in public business in favour of the pig-smiting ceremony, where the two are kept distinct, and the curse is expressly imprecated on the Roman People". But the change may rather have been the result of the development of the idea of the state. Nor was there, it would seem, any room for the fetials in the oath sworn *per Iovem lapidem* (unless their role in proceedings was significantly different); cf. Wissowa (above, n. 19) 780, 782. The fetial college was said to have been invented during the regal period, but that is likely no more than an unhistorical assumption; if Polybius' evidence is good and early, as it appears to be, then it is reasonable to conclude that the ritual performed and the oath sworn when a treaty was made must have changed.

36) On these comments, see below.

37) T.J. Cornell, The *Lex Ovinia* and the Emancipation of the Senate, in: C. Bruun (ed.), The Roman Middle Republic: Politics, Religion, and Historiography c. 400–133 B.C., Rome 2000, 69–89. For the *lex Ovinia*, see Fest. 290L.

than the (or, possibly better, an) army gathered together as a largely undifferentiated body.<sup>38</sup> There is some useful archaeological evidence too.

In 1977 archaeologists from the Dutch Archaeological Institute in Rome discovered at the temple of Mater Matuta near Satricum an inscription. The stone on which the inscription was written had been reused in the construction of the temple, and that reuse provides a terminus ante quem of about 500 BC. The inscription commemorates a dedication made to Mamers by the companions (*suodales*) of an individual called Poplios Valesios. The inscription therefore provides good evidence for a group of individuals who defined themselves not as citizens of some city, but rather as the companions of one particular individual.<sup>39</sup> As it happens, the literary tradition of early Rome is filled with stories which seem to present a similar situation. The historical value of many of these stories is questionable, but the evidence does have a certain cumulative force. So, for instance, there is Attus Clausus, the Sabine who migrated to Rome, and who took with him all his clients.<sup>40</sup> Similarly, Tarquinius Priscus left Etruria and moved to Rome with all his attendants and his considerable wealth.<sup>41</sup> Then there are the Vibenna brothers, Aulus and Caeles, and their army, and there is also Caeles' faithful companion Mastarna; he too was

38) Cf. Cornell (above, n. 11) 183–197. “[T]he progressive articulation of the Roman citizen body into the five census classes” was likely a development of the fourth century; cf., e.g., M. H. Crawford, *The Roman Republic*, London 21992, 39 (whence the quote); Momigliano (above, n. 32) 92–93, also 103–104; cf. too in this context, E. Gabba, *Maximus comitiatuſ*, *Athenaeum* 75, 1987, 203–205 (= E. Gabba, *Roma arcaica*, Rome 2000, 245–248); on the literary tradition, see, most recently, J. H. Richardson, *Ancient Historical Thought and the Development of the Consulship*, *Latomus* 67, 2008, 330–333.

39) H. S. Versnel, *Historical implications*, in: C. M. Stibbe et al., *Lapis Satricanus. Archaeological, epigraphical, linguistic and historical aspects of the new inscription from Satricum*, The Hague 1980, 108–121; J. Bremmer, *The suodales of Poplios Valesios*, *ZPE* 47, 1982, 133–147; G. Forsythe, *A Critical History of Early Rome*, Berkeley 2005, 198–200; Cornell (above, n. 11) 143–150; Momigliano (above, n. 32) 96–99, 104; see also the various works cited in nn. 40–44 below.

40) Perhaps not unexpectedly, Cornell (above, n. 11) 144, 157, 174–175 treats the story as though it were historical. See T. P. Wiseman, *Clio's Cosmetics: Three Studies in Greco-Roman Literature*, Leicester 1979, 59–65 on the evidence.

41) The story may well be historical, cf. F. Zevi, *Demarato e i re «corinzi» di Roma*, in: A. Storchi Marino (ed.), *L'incidenza dell'antico. Studi in memoria di Ettore Lepore I*, Naples 1995, 291–314.

said to have moved to Rome.<sup>42</sup> It has been suggested that the career of Cn. Marcius Coriolanus should be viewed in this context as well.<sup>43</sup> And, although it is a calque of the story of the 300 Spartans at Thermopylae, it is worth mentioning the expedition of the 300 Fabii against Veii.<sup>44</sup> All these episodes clearly envisage a single leader and a band of adherents, men who owed their allegiance only or primarily to their leader, and, with the exception of the 300 Fabii (the tradition of whose expedition has obviously been reinterpreted), not to any city. That must be why these men were prepared to follow their respective leaders and move elsewhere. They were presumably not citizens, or at least they did not think of themselves as citizens, and so had no strong or binding allegiance to any state; and, if the concept of citizenship was not fully developed, then that is perhaps also why it was so easy for them to settle in another city.

All this is, then, good evidence of a time when concepts such as the state and citizenship were in their infancy, and when allegiances could still be owed to individual leaders before anything else. It is surely against this background that the early stages of the conflict of the orders should be viewed. Law codes and the practice of creating and keeping documents – and note that it was the *plebs* which was said to have kept records from an early age – are the things of a state.<sup>45</sup> The plebeian movement was perhaps then at

42) See, e.g., Alföldi (above, n. 11) 212–231; Cornell (above, n. 11) 133–141, 144–145; M. Pallottino, Il fregio dei Vibenna e le sue implicazioni storiche, in: F. Buranelli (ed.), *La tomba François di Vulci*, Rome 1987, 225–233.

43) Cornell (above, n. 11) 144; T.J. Cornell, Coriolanus: Myth, History and Performance, in: D. Braund and C. Gill (eds.), *Myth, History and Culture in Republican Rome. Studies in Honour of T. P. Wiseman*, Exeter 2003, 86–91.

44) See, e.g., Cornell (above, n. 11) 144, 290–291, 311; Heurgon (above, n. 11) 181–182; J.-C. Richard, Les Fabii à la Crémère: Grandeur et décadence de l’organisation gentilice, in: *Crise et transformation des sociétés archaïques de l’Italie antique au Ve siècle av. J.-C.*, Rome 1990, 245–262; C. J. Smith, The Roman Clan: the *gens* from ancient ideology to modern anthropology, Cambridge 2006, 290–295. On the parallels with Thermopylae, see E. Pais, *Ancient Legends of Roman History*, London 1906, 168–184.

45) Cf., e.g., A. Momigliano, The Rise of the *plebs* in the Archaic Age of Rome, in: K. A. Raflaub (ed.), *Social Struggles in Archaic Rome*, Malden 2005, 178–179; T. P. Wiseman, The Myths of Rome, Exeter 2004, 66–68; note as well in this context the idea that the role of inscriptions was primarily symbolic, see C. Williamson, Monuments of Bronze: Roman Legal Documents on Bronze Tablets, *CA* 6, 1987, 160–183; Wiseman, *Unwritten Rome* (above, n. 3) 2–4. This is why

first an attempt to force these individual warlords – for such they undoubtedly were, at least in origin – to adhere to the idea of a state. In this context of warlords and emerging ideas of a state, or at least ideas of a state to which not everyone subscribed, the oath sworn *per Iovem lapidem*, an oath which was binding on only one individual and which did not presuppose the existence of a state, would have fitted extremely well.

Naturally a reconstruction such as this implies a rather different context from that found in the literary tradition for, most obviously, the XII tables (another early document the authenticity of which no one seriously doubts). But the degree to which the literary tradition is based upon serious misconceptions about the nature of early Rome is, in this instance, easily illustrated. The Romans noticed that there were Greek elements in the XII tables. They devised two stories to explain the presence of these elements. According to one, before they drafted their law code, the Romans dispatched embassies to various Greek cities to collect the best of their laws, and to Athens to collect Solon's.<sup>46</sup> According to the other, Hermodorus of Ephesus, wandering in exile, by chance happened to arrive at Rome just in time for the decemvirs to be able to take advantage of his advice.<sup>47</sup> Although it seems that there are some who still wish to claim that these stories are to a certain degree historical, it is quite obvious that they are both aetiological.<sup>48</sup>

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the *leges regiae* are almost certainly unhistorical. The argument that the *leges regiae* contain seemingly archaic language and so therefore must be authentic (e.g., J. E. Gaughan, *Killing and the king: Numa's murder law and the nature of monarchical authority*, CCh 18, 2003, 331–332, developing the comments of J. D. Cloud, *Parricidium: from the lex Numae to the lex Pompeia de parricidiis*, ZSS 88, 1971, 3) is facile and needs no refutation (cf. Oakley [above, n. 6] 485–486 on Livy's account of the prayer used for a *devotio*); the argument that they were preserved in the pontifical records (e.g., A. Watson, *Roman Private Law and the Leges Regiae*, JRS 62, 1972, 103–104) supposes that those records must have been kept in the regal period, but that is highly unlikely. Livy, in any case, did not think that the *leges regiae* were preserved in the pontifical records; he clearly distinguishes the pontifical records, which he says were lost in the Gallic fires (Livy 6,1,2), from the *leges regiae*, certain of which were, he implies, recovered after the Gauls' departure (Livy 6,1,10). See also the comments above (along with nn. 37 and 38).

46) Livy 3,31,8; Dion. Hal. Ant. Rom. 10,51,5–10,52,4; Zon. 7,18; Lyd. de mag. 1,34; Jerome Chr. on 452 BC, 112H.

47) Plin. HN 34,21; Strabo 14,1,25; Dig. 1,2,2,4.

48) E.g. Cornell (above, n. 11) 275 who draws attention to the appearance of the loan-word *poena* in the XII tables; but the word's appearance need be evidence

They are both also simply unnecessary. There is a good body of archaeological evidence which shows that, from the very outset, the Romans were exposed to, and heavily influenced, by Greek culture.<sup>49</sup> A Greek influence on the XII tables is not therefore at all unexpected. It was for those Romans who lived at a much later date, but that was only because they believed – wrongly – that the arrival of Greek culture at Rome was the result of Rome's expansion in the Greek east. They were simply unaware of the early influence that Greek culture had had on their city, and so naturally they found it necessary to invent stories to explain the presence of the various Greek elements that were discernable in the XII tables.<sup>50</sup> So here, as elsewhere, a distinction must be made between what the few pieces of contemporary evidence imply about the nature of archaic Rome, and what Rome's historians, inevitably writing at a much later date, imagined about their distant past.

## II

The wealth which Tarquinius Priscus brought with him when he migrated to Rome may have played an important role in developing his new place of residence into a major city.<sup>51</sup> That physical development need not have been accompanied by widespread development of, or subscription to, ideas concerning the Roman

of nothing more than the use of Greek loan-words; it is certainly not evidence of an embassy to any Greek city. Both stories are late inventions; so, e.g., Ogilvie (above, n. 15) 449–450; E. Ruschenbusch, *Die Zwölftafeln und die römische Gesandtschaft nach Athen*, *Historia* 12, 1963, 250–252; P. Siewert, *Die angebliche Übernahme solonischer Gesetze in die Zwölftafeln: Ursprung und Ausgestaltung einer Legende*, *Chiron* 8, 1978, 331–344.

49) See, e.g., T. P. Wiseman, *Historiography and Imagination*, Exeter 1994, 26–29; T. P. Wiseman, *Remus: A Roman Myth*, Cambridge 1995, 35–42; Cornell (above, n. 11) 86–92, 147–148, 162–163; archaeological evidence in M. Cristofani (ed.), *La grande Roma dei Tarquinii: catalogo della mostra*, Rome 1990.

50) See, most famously, Hor. Ep. 2,1,156–163. Not surprisingly, straightforward acceptance of the literary tradition concerning the XII tables can lead to some rather awkward results; see, e.g., A. Watson, *The State, Law and Religion: Pagan Rome, Athens, Georgia* 1992, who argues that the plebeian movement in this instance resulted in a patrician victory.

51) Cf. Zevi (above, n. 41) 298; and *passim* (but esp. 295–303) on the wealth of the Tarquinii; note too 307 on the building projects of the Tarquinii; Wiseman (above, n. 45) 38, 40.

state. And naturally it cannot be assumed that the concept of a *res publica* to which, perhaps by definition, all Romans belonged sprang into existence the very moment Tarquinius Superbus was expelled from the city. Exactly how Superbus' rule was brought to an end is unclear, but the possible involvement of Lars Porsenna in the coup may raise doubts about the extent to which Rome became a *res publica* at that time.<sup>52</sup> And even if the expulsion of Tarquinius Superbus is believed to have secured the liberty of Rome and the Roman people,<sup>53</sup> naturally that need not imply the establishment of a republican regime (the removal of the tyrant alone may have been enough to liberate the city), or of a new system of government along the lines of what the sources imagine.<sup>54</sup>

Polybius claims that the first treaty with Carthage was made in the first year of the republican period, when Brutus and Horatius were consuls. That claim is extremely difficult, and not just because of the problems with Brutus and Horatius. No less problematic is the idea that Brutus and Horatius were consuls. Livy was well aware that Rome, after the kings had been expelled, had not always been led by two consuls. The chief magistrates (or maybe just magistrate) of the state had once been praetors, and Livy also found good evidence for a magistrate called the *praetor maximus*.<sup>55</sup> Livy seems to have supposed that what was involved

52) See Tac. Ann. 3,72; Plin. HN 34,139; and, e.g., Alföldi (above, n. 11) 72–77; Heurgon (above, n. 11) 156–165; Cornell (above, n. 11) 217–218; Momigliano (above, n. 32) 93–94; Forsythe (above, n. 39) 148–149.

53) Cf. Richardson (above, n. 33) 627–633; also T. P. Wiseman, *Liber: Myth, Drama and Ideology in Republican Rome*, in: C. Bruun (ed.), *The Roman Middle Republic: Politics, Religion, and Historiography c. 400–133 B.C.*, Rome 2000, 297–299 (= *Unwritten Rome* [above, n. 3] 136–139) on *Liber* and the *Liberalia*.

54) On what the sources imagine, cf. for instance n. 37 above on the Senate, or n. 38 on the development of the army and the classes; on the unhistorical approach of ancient historians see, e.g., Wiseman (above, n. 40) 41–53; E. Gabba, *Dionysius and the History of Archaic Rome*, Berkeley 1991, 159–166; Richardson (above, n. 38).

55) Livy 3,55,12; see also Fest. 249L; Zon. 7,19; *praetor maximus*: Livy 7,3,5. A very great deal indeed has been written about the *praetor maximus*; cf., e.g., variously, and with discussion of earlier work, E. S. Staveley, *The Constitution of the Roman Republic* 1940–1954, Historia 5, 1956, 94–98; A. Momigliano, *Praetor maximus et questiones affini*, in: *Studi in onore di G. Grossi I*, Turin 1968, 161–175 (= A. Momigliano, *Roma arcaica*, Florence 1989, 171–181); A. Giovannini, *Il passeggiando dalle istituzioni monarchiche alle istituzioni repubblicane*, in: *Bilancio critico su Roma arcaica fra monarchia e repubblica*, Rome 1993, 89–93; Cornell (above, n. 11) 227–229; Oakley (above, n. 6) 77–80. There is little to be gained by offering

was merely a change in name (the consuls had once been called praetors); but, since he was unable to exploit this information in any way whatsoever, Livy instead simply claimed that Brutus and his colleague (Tarquinius in Livy's version), and their numerous successors had been elected to the consulship. Some modern scholars have followed Livy in this reaction: the change from the praetorship to the consulship is generally treated as a change in name only, and the evidence for the early praetorship is by and large simply set aside in favour of the literary tradition.<sup>56</sup> But magistracies often derive their names from their duties. Praetors presumably went in front (*praeire*), that is to say, they led, while consuls presumably consulted (*consulere*).<sup>57</sup> 'Consulting' implies that there is someone to consult, or someone whose interests should be consulted. Ancient tradition claims that it was the people whom the consuls were to consult, although the Senate is often mentioned as well, or that the consuls were to consult the interests of the state.<sup>58</sup> On the other hand, since collegiality was a fundamental feature of the dual consulship, it is not impossible that the person with whom, it was imagined, the consul would consult (even if only ideologically speaking) was his colleague.<sup>59</sup> After all, it is not neces-

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yet another hypothesis about the precise nature of the constitution of early Rome; modern reconstructions are inevitably highly fragile as the evidence is just too sparse and difficult. It is sufficient simply to say that this evidence is enough to suggest that Rome was, after the expulsion of the kings, not originally led by dual consuls.

56) E. g. Ogilvie (above, n. 15) 231; H. H. Scullard, *A History of the Roman World 753 to 146 BC*, London 1980, 78, 118, 465 n. 1; Cornell (above, n. 11) 226; A. Lintott, *The Constitution of the Roman Republic*, Oxford 1999, 104; Forsythe (above, n. 39) 151–153; see also various works cited in n. 55 above.

57) See Varro, *Ling.* 5,80; 5,87; Varro, *de vita pop.* Rom. fr. 68R (= Non. 35L); Cic. *De leg.* 3,8; *De or.* 2,165; Piso 23; August. *De civ.* D. 5,12; Livy 22,1,14; Flor. 1,9,2; Quint. *Inst.* 1,6,32; Dig. 1,2,2,16; Isid. *Orig.* 9,3,6; Dion. Hal. *Ant. Rom.* 4,76,2; Plut. *Rom.* 14,3.

58) See various references in n. 57 above. If the Senate was long akin to a magistrate's *consilium* (see n. 37 above), then it would naturally have been consulted by the executive magistrate(s) of the community; that is, the consultation of the Senate is not something to be connected specifically with the consulship. The idea that consuls in particular were to consult the Senate is doubtless due to the etymology of the word 'consul', and the role of the Senate.

59) This idea does not appear in the tradition, but that may only be because the tradition connects the duality of the consulship with the desire to preclude monarchy (cf., most explicitly, Eutrop. 1,9,1); but that ideology may be anachronistic, see Richardson (above, n. 33).

sary to have a dual magistracy to consult the Senate or the citizens, or the interests of the state; but it is necessary to have at least two equal magistrates if those magistrates are to consult one another.

The title ‘leader’, in contrast, does not require or presuppose the existence of a colleague, but it may presuppose a quite different relationship with the people; and a magistrate known as the *praetor maximus* clearly must have been superlative in some sense (and the very use of the superlative stands in stark contrast with the ideology of the two consuls, whose power was shared, balanced and equal). If the model of independent warlords has been overstated, is simply flawed, or should only be adopted for an earlier era,<sup>60</sup> then here is another possible context in which the oath sworn *per Iovem lapidem* would have made good sense. If the community was led by perhaps a single leader, or by a leader who could be described as the ‘greatest’ of however many leaders there may have been, then that leader may have been responsible (or just more responsible) for the community. He may also have been responsible for ensuring that the terms of any treaty were adhered to; that, certainly, is what the use of the oath *per Iovem lapidem* when the first treaty with Carthage was struck appears to suggest. The employment of that particular form of oath implies that only one individual took the oath, that only that one individual was to be held accountable, should the terms be violated, and presumably therefore that it was up to that one individual to ensure that the clauses of the treaty were honoured.

There is one further piece of evidence which should be considered in this context, and that is the *foedus Cassianum*. This treaty was said to have been struck in the consulship of Sp. Cassius and Postumus Cominius (493 BC). The text of the treaty was evidently inscribed on a bronze column which was set up in the Forum, near the Rostra, and it may be that the text included the name – if it included any names at all – of only one individual, Sp. Cassius.<sup>61</sup> Certainly the treaty was associated with Sp. Cassius

60) Although note, for instance, W. V. Harris, Roman Warfare in the Economic and Social Context of the Fourth Century B.C., in: W. Eder (ed.), *Staat und Staatlichkeit in der frühen römischen Republik*, Stuttgart 1990, 500–501 (on naval activity), also 505 and 508.

61) For the sources, see Broughton (above, n. 4) 15. There were, it would appear, no names on the treaty with Carthage; Ogilvie (above, n. 15) 318 seems certain that Cassius’ name “stood in the treaty”, although he goes on to say: “but perhaps

alone (hence, obviously, its name), and this was clearly something which Livy at least felt required some explanation.<sup>62</sup> Caution is needed here, however; much of the tradition regarding the *foedus Cassianum* is highly questionable, and the possibility that this treaty may have actually been struck at a considerably later date, a date in the fourth century, or even in the third, has been entertained.

The *foedus Cassianum* has, in the past, been used by some as evidence that Rome was, in the early fifth century, ruled not by two consuls, but rather by a single magistrate.<sup>63</sup> That is an idea which fits extremely well in the present context. The sources for the *foedus Cassianum* say nothing specific about the form of oath which was employed by Sp. Cassius,<sup>64</sup> but the mere fact that the Cassian treaty was associated with only one individual suggests that it could very well constitute further evidence of precisely the same circumstances as those which the use of the oath *per Iovem lapidem* for the first treaty with Carthage implies. That is, that the city of Rome was at that time led by one individual, or that one individual held a position in the city which meant that he could represent the entire community, or at least the dominant part of it. Needless to say, whether or not the *foedus Cassianum* does in fact constitute evidence of circumstances such as these naturally depends to a very large degree on whether or not the evidence for the *foedus* itself is of any value.

Obviously the suggestions made here about what the employment of the oath *per Iovem lapidem* seems to imply about the

in his capacity as *fetial* rather than *consul*". The idea that Cassius made the treaty as a *fetial* rather than as a *consul* is contradicted by the ancient tradition; the idea is presumably Ogilvie's own solution to the problem that only one name was associated with the treaty, but see Livy 9,5,4: Livy imagined that the names of two *fetials* would be preserved when a treaty was made.

62) Livy 2,33,4, note also 2,33,9; so too perhaps Dion. Hal. Ant. Rom. 6,91,1.

63) Cf., e.g., K. Hanell, Das altrömisches eponyme Amt, Lund 1946, 172–175 (with arguments in favour of the traditional date); Alföldi (above, n. 11) 114–115 (although Alföldi doubts the authenticity of most of the tradition). Much is made too out of the tradition concerning M. Horatius (cf., e.g., Hanell ibid. 170–172; n. 7 above); since the argument hinges on his dedication of the temple of Jupiter Capitolinus, rather than on any oath, the matter is beyond the scope of this paper.

64) Only Dion. Hal. Ant. Rom. 6,95,3 says anything about the oath, but his comment is far too vague to be of any use, and is probably Dionysius' own contribution.

nature of the early Roman constitution do not fit at all well with what the much later literary tradition has to say about the nature and constitution of the early Republic, and they do not fit with modern reconstructions which are closely based upon that later tradition. But good, contemporary evidence should never be discarded, especially in favour of a literary tradition composed centuries later by historians who clearly did not fully understand the early history of their city, who had only a limited awareness of processes of change and development, and whose aims and purposes often differed quite radically from those of the modern historian. Instead, the later literary tradition, and those reconstructions which are heavily dependent upon it, must give way before the good, contemporary evidence. Although suspicions have been raised about the value of the evidence for the *foedus Cassianum*, there is no good reason at all to doubt what Polybius has to say about the oath sworn by the Romans when they made their first treaty with Carthage. And, of course, to doubt Polybius' evidence because of what it implies about archaic Rome is to treat the evidence in precisely the same manner as Procrustes treated his guests.

Lampeter

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