Poetry, Prosecution, and the Author Function

Nora Goldschmidt*

In 1969, partly in response to Roland Barthes' declaration of the death of the author, Michel Foucault addressed the issue of how we talk and think about authors.[2] Attempts to abolish the author, Foucault observed, will inevitably have limited success, because the concept has such a powerful cultural function — and one that seems all pervasive. '[W]hen we reconstruct the history of a concept, literary genre, or school of philosophy', Foucault noted, 'the author and the work', in contrast to almost all other interpretive filters, take on an inordinately powerful role in how we interpret texts (141). To understand why this is the case, Foucault set about addressing not the construction of the 'individual author' but what he called the 'author function', that is, in Foucault's words, 'the relationship between text and author and … the manner in which the text points to this "figure" that, at least in appearance, is outside it and antecedes it' (141).

From this apparent promise of an analysis of the dynamics of literary texts, Foucault moved outwards to what reads, and has been read, much more like a socio-historical aetiology of the construction of authorship. How and why did texts come to be associated with authors, and what were the social, cultural and legal contexts that made the author function possible? These are all fundamental questions, and — whether in agreement or dissent — Foucault's essay, and its socio-historical dimension in particular, has long featured prominently as 'an obligatory reference' in discussions of modern authorship.[3] The idea of the author function has come to play a part in the law and literature movement, too, where issues of authorship and copyright constitute an important intersection of the two fields.[4] Yet the concept rarely features either in work on Greek and Roman authorship or on Roman law.[5] Foucault's author function and its later evolutions, however, are worth interrogating, not least because the concept has important implications both for how we think about ancient authorship and for how we might consequently think differently about the narrative of the emergence of authorship that we tell more broadly across disciplines. At the heart of the issue are the interactions between literature and the law. The juridical construction of the author is central to Foucault's argument and — in one way or another — central, too, to the cultural emergence of poetic authorship in Rome.

This chapter revisits Foucault's author function and the relationships that it exposes between law and literature in the context of the emergence of poetic authorship in Republican Rome. Where Foucault located the author function in the late eighteenth century and the

[2] Foucault (1969). The English text is from Joseph Harari's translation (= Foucault (1979)), to which all page numbers cited in this chapter refer.

[3] Chartier (1992) 29.

[4] Woodmansee and Jaszi (1994); Ward (1995) 28-42; Wharton (2017). On Foucault and law more broadly, see Goulder (2013).

[5] Martelli (2013) esp. 146, and 231-2, and Peirano (2013) 252 mention Foucault's essay in the context of issues of the author's voice and authorial signatures in Roman poetry, though neither deal with issues of law and literature. See also the brief mention in Lowrie (2009) 283 with Goldschmidt (2019) 83-4; 180.

beginning of the nineteenth, and where several others have since projected it back in time, primarily to the early modern period, this chapter shifts the discussion much further back to the Roman context and specifically to the creation of a written literature in Latin in the third century BCE. Latin literature appeared surprisingly late, long after other cultural institutions — including the institution of the law — had been established in Rome.[6] The particular conditions surrounding the beginnings of literature in Rome, therefore, offer a powerful type-case for the author function and its relationship to juridical culture. While revisions of the author function generally follow Foucault's original essay by dealing with the hypothetical 'emergence' of the author in periods when literature was already well established, the Roman example enables us to put the Foucauldian author function to work in circumstances where the emergence of the author is a much more palpable cultural fact, disclosing with particular clarity the relationships between law and the creation of literary authorship.

This chapter takes Foucault's insights to the Roman context by looking at how Roman poetic authorship emerged from, and was imagined through, juridical culture. Beginning in Section 1 by interrogating Foucault's paradigm and its later developments, I move on to consider the implications of the author function and its juridical conditions specifically for Roman Republican contexts. Section 2 ('Fescennine Licence and Literary *furta*') looks at the dynamic interactions between poetry and the law in the pre-literary and so-called 'archaic' periods of Roman literature and the ways in which they were imagined by later readers. Penal responsibility (an essential precondition for Foucault's author function) was written into the literary history of Rome, while a concept of literary property, couched in the quasi-legal language of theft imported from Alexandria and adapted to Roman juridical language, was central to the creation of the early canon of Roman poets. The final section focuses on one of Rome's earliest poets, Gnaeus Naevius, as a case study in how poetic authorship can emerge in dialogue with the law.

1. Locating the Author

For Foucault, the author function comes about through a confluence of two principal socio-cultural conditions, both of them broadly juridical in nature. The first involves the establishment of a system governing the ownership of texts, which he links with the modern system of copyright law and its related networks:

> Once a system of ownership for texts came into being, once strict rules concerning author's rights, author-publisher relations, rights of reproduction, and related matters were enacted ... the possibility of transgression attached to the act of writing took on, more and more, the form of an imperative peculiar to literature (148).

For Foucault, 'the imperative peculiar to literature' which created the author concept as we understand it, is tied in decisively with modern copyright law, 'the moment when a system of strict copyright rules were established': that is, towards the end of the eighteenth century and the beginning of the nineteenth, when 'the social order of propriety which governs our culture' was codified.

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[6] On the complex cultural processes underlying the emergence of literature in Rome, see Rüpke (2000); Gildenhard (2003); Goldberg (2005); Feeney (2016); Biggs (2020).

The second condition necessary for the author function is what, Foucault says, 'one might call penal appropriation':

> Texts, books, and discourses really began to have authors (other than mythical, 'sacralized' and 'sacralizing' figures) to the extent that authors became subject to punishment, that is, to the extent that discourses could be transgressive (148).

'Penal appropriation' can precede ownership of texts. But it is when the two conditions pertain together that, for Foucault, the 'author function' proper arises:

> It is as if the author, beginning with the moment at which he was placed in the system of property that characterizes our society, compensated for the status that he thus acquired by rediscovering the old bipolar field of discourse, systematically practicing transgression and thereby restoring danger to a writing which was now guaranteed the benefits of ownership (148-9).

Foucault thus tries to tie together the 'transgressive' potential of texts with modern ideas about private property, and, in doing so, locates the emergence of the author function at the point when law and literature were closely bound together: that is, when penal appropriation and copyright law created a combination of juridical and social pressures that enabled particular discourses to be classified as literature and associated with a named author.

Foucault located this moment in the late eighteenth century and at the beginning of the nineteenth century, and a whole raft of scholars have since nudged his aetiology of the author function back in time.[7] Notably, in Britain, where the Copyright Act was passed in 1710 (about eighty years before similar laws were passed in France), the dynamics of censorship, literary property and print culture have been systematically shown to have allowed for the emergence of an author function at least a hundred years earlier than Foucault's.[8] Rome has had a walk-on part in the story. As Brian Vickers importantly argued, the relationship between poetry and the law voiced in the canonical texts of Augustan poetry — particularly those of Horace and Ovid which interrogate or instantiate relationships between law, poetry, patronage and power — offered parallels through which early modern writers, deeply steeped in the Augustan classical canon, negotiated discourses of authorship.[9] Yet while Augustan and imperial figurations of the poet's role may have set important later paradigms for the emergence of the author function in the modern world, the productive relationship between law and literature was established long before that.

In what follows, I contend that a version of the author function can be located much earlier than Foucault and others have located it, in the interactions between law and the emergence of literature — and especially of poetry — in third-century-BCE Rome. I am not aiming primarily to expose historical weaknesses in Foucault's argument, though, as others have pointed out,

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[7] Woodmansee (1984); Rose (1988); Rose (1993); Chartier (1992); Greene (2005). In *Before the Law* (originally composed in 1982) Derrida similarly located the cultural moment when 'law regulates the problems of the ownership of creative works' which he saw as beginning '[i]n broad terms … between the end of the seventeenth century and the beginning of the nineteenth century in Europe' (Derrida (2018) 69). Cf. Wharton (2017) for modern copyright law and broader definitions of creative production.
[8] Sinfield (1996) 10-12; Loewenstein (2002); Greene (2005) esp. 10-15.
[9] Vickers (2002) 511-18. See also Goldschmidt (2019) esp. 83-4 on the staging of Augustan poets in Ben Jonson's *Poetaster* and issues of the Foucauldian author.

they do exist.[10] Instead, I want to utilise Foucault's theoretical insights to explore the relationship between law and literature at a moment when professional poetic authorship in Latin became a cultural fact in Rome. Foucault himself expressed unhappiness with the ways in which he tended to rely on clichés when talking about antiquity.[11] It is hardly surprising, and probably would not have surprised Foucault much either, that the ancient evidence is significantly more vital than he acknowledged. While Homer receives a mention in the essay (along with Hippocrates and Hermes Trismegistus, said to be the author of the Hermetic corpus) as part of the demonstration of the idea that you do not need a flesh-and-blood figure to have an author function, Foucault essentially elides Rome in his account of the prehistory of authorship.[12] This is a crucial omission. Arguably, it changes the whole story, because Roman culture provided a microclimate in which the rise and codification of authorship in just the kinds of social and juridical contexts that Foucault influentially identified as germane to 'our culture' (159) was closely approximated much earlier than his aetiology of authorship and its later developments have allowed.

Literature in Rome began notoriously late. As Denis Feeney has observed, there was in some ways no need for it.[13] One of the consequences of that late arrival is that when Roman literature did emerge, there was already a long-established legal culture and legal vocabulary within which it unfolded and in dialogue with which it developed. It is striking that the XII Tables were already two centuries old when what we identify as 'archaic' Roman poetry began to be written and performed. Literature came to adopt the language and even part of the literary function of the law. Historical works like Ennius' *Annales* and Cato's *Origines* presented themselves as compendia of the *moribus antiquis* (*Annales* 156 Skutsch) on which the legal foundations of Rome were based.[14] We find linguistic echoes of the XII Tables in Ennius' *Annales*,[15] juridical language in Plautus,[16] legal dodges in the prologues of Terence,[17] and references to contemporary law in Roman *togata*.[18]

As I argue here, in important ways, poetic authorship itself also emerged in and through dialogue with the law. The issue is complicated by the fact that early Roman poetry, like early Roman law, is riddled with problems of fragmentary evidence. There are almost no hard facts for the preliterary period, and even for the period when literature was written down, what we have is unavoidably mediated by later sources.[19] Real juridical culpability is hard to prove, as are details of the biographies of authors (which are often projected from the texts themselves), or even in some cases the authenticity and interpretation of lines ascribed to them. Yet though it is hard to say many positivistic things about the early period of Latin literature, the material we have points to elements of a prehistory of the conditions for Foucauldian authorship and its dialogue with the law that are worth taking seriously. Moreover, if early Roman poetry is

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[10] Vickers (2002) 510 is particularly vituperative on this point ('his claim to be taken seriously as a historian seems increasingly slight').

[11] Elden (2016) 134; cf. Porter (2006), 159 ('Foucault's grasp of Greece and Rome is not direct or immediate by any stretch of the imagination'). On Foucault and antiquity more broadly, see Detel (1998), Porter (2006), and Alston and Bhatt (2017).

[12] Foucault makes an exception for Jerome, who comes up at 150-1 as part of the discussion of assigning authorial names to texts.

[13] Feeney (2016).

[14] Cf. Lowrie in this volume.

[15] Goldschmidt (2013) 44-5.

[16] Gaertner and Ziogas in this volume.

[17] 'Introduction' to this volume.

[18] Manuwald (2011) 165 (on Afranius' *Vopiscus*).

[19] For the distortions involved in the sources of early Latin poetry, see esp. Elliott (2013).

subject more than most evidence to the distortions of reception, what we can see with more certainty is that Roman readers retrospectively understood Latin literature as emerging in a socio-cultural — and indeed juridical — context that is very close to the modern author function. In doing so, they strikingly anticipated later ideas about the conditions conducive to poetic authorship and the creative interactions between penal appropriation and ownership of texts.

2. Fescennine Licence and Literary *furta*

In its earliest phase, the author function could only begin to emerge, for Foucault, when literature became 'subject to punishment, that is, to the extent that discourses could be transgressive' (148). The idea of a primitive phase of authorship rooted in transgressive discourse and its eventual punishment by law has a striking analogue in the ways in which Roman poets themselves imagined their own literary prehistory and the rise of literary authorship in Rome. Transgression — a key condition of the modern author function — was identified as a foundational moment in the emergence of Latin literature. Virgil imagined the early Italians singing unrefined verses imported from Troy in a Bacchic state of 'unchecked laughter' (*risu ... soluto*, *Geo.* 2.385-6). As his contemporary Horace recounted it, the primitive rural inhabitants of Italy had their own native traditions of pre-literary *carmina* (trans. Rudd (2005)):

> agricolae prisci, fortes paruoque beati,
> condita post frumenta leuantes tempore festo
> corpus et ipsum animum spe finis dura ferentem,
> cum sociis operum et pueris et coniuge fida,
> Tellurem porco, Siluanum lacte piabant,
> floribus et uino Genium memorem breuis aeui
> Fescennina per hunc inuenta licentia morem
> uersibus alternis opprobria rustica fudit,
> libertasque recurrentis accepta per annos
> lusit amabiliter, donec iam saeuus apertam
> in rabiem coepit uerti iocus et per honestas
> ire domos impune minax. doluere cruento
> dente lacessiti; fuit intactis quoque cura
> condicione super communi; quin etiam lex
> poenaque lata, malo quae nollet carmine quemquam
> describi: uertere modum, formidine fustis
> ad bene dicendum delectandumque redacti.
> (Horace, *Epistles* 2.1.139-55)

> Farmers of old — sturdy men, well off with a little —
> when the crops were in, at holiday time relaxed the body
> and the mind as well (which bears a lot when it has an end
> in sight) with the sons and loyal wives who had shared the work.
> They used to placate Silvanus with milk and Earth with a pig,
> and the Genius who knows the shortness of life with wine and flowers
> These occasions saw the beginning of wild Fescennines —
> verses in which they exchanged volleys of rustic abuse.
> Freedom was gladly given a place in the year's cycle,

and people enjoyed the fun, until the joking began
to get vicious and turned into sheer madness, becoming a menace
and running unchecked through decent houses; its tooth drew blood,
and the victims smarted; even those who escaped were worried
about the state of society. At last a law was enacted
involving penalties; no one, it said, should be traduced
in scurrilous verse. They changed their tune, and in fear of the cudgel
returned to decent language and the business of giving pleasure.

Like Virgil, Horace imagines native proto-literature emerging from a state of contained free speech associated with the carnival licence of religious festivities, when, historically, legal proceedings were suspended.[20] Horace links the carnivalesque freedom specifically with the *licentia* (145) of Fescennine verses, pre-literary abusive songs that were alternately sung (*uersibus alternis*, 146; cf. Livy 7.2.5). In time, the social licence granted to Fescennine songs grew out of hand, spilling over the boundaries of designated yearly religious festivals (148-51). The jokes became serious, broke the confined limits of the previously controlled holiday transgression and started to turn to frenzy (*in rabiem coepit uerti*, 149). Without the threat of punishment (*impune*) the impromptu compositions began to run wild, threatening the 'decent houses' (*honestas ... domos* 149-50) of the community. Worse still, pre-literary song morphed into a threat to the institution of the law itself. As Susanna Braund points out,[21] Horace's mutant Fescennines, verbally attacking Roman homes, look a lot like the *Volksjustiz* of *flagitatio*, the practice of hurling abuse at a thief in order to demand back property (like Catullus in poem 42),[22] or the associated practice of *occentatio*, both of which seem to have been associated with an attack on the offender's house door (*honestas ... domos* 149-50) and sometimes took the form of alternate chants (*uersibus alternis*, 146).[23] Over time, a move to curb this activity was made on the part of the community, including those untouched (*intactis*, 151) by the attacks who were worried for the state of society (*condicione super communi*, 152, or, as Brink renders it, the 'state of order of the body politic').[24] At last, formal legal measures were taken to check the transgression, when 'a law involving a punishment was brought in' (*lex/poenaque lata*, 152-3). Under the real and present threat of penal retribution (*formidine fustis*, 154), discourse (*dicendum*, 155) reverted to the bounds of juridically licensed decency, and the quasi-legal power inherent in the Fescennines — whose injurious speech had begun to take on the force of law itself — was reappropriated by the real juridical power of the state.

Horace's literary history in *Epistles* 2.1 is notoriously tendentious. Fescennine verse did not completely die out: along with the often subversive *uersus quadratus*, the genre continued to be practiced and circulated in certain contexts (Octavian is even said to have written *Fescennini uersus* against Pollio, Macrob. *Sat.* 2.4.21), and it clearly fed into Roman satire, much as Horace liked to locate the origins of his favourite genre in the aristocratic Lucilius.[25] The accuracy of Horace's version of early Roman literary history, probably modelled on Greek paradigms taken over from Varro, remains open to question, not least since the earliest forms of Latin verse are shrouded in mystery, and already were for Horace and his

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[20] Cf. 'Introduction' to this volume.
[21] Braund (2004) 416.
[22] Richlin (2017) 172.
[23] On the dynamics of *occentatio* and *flagitatio* with particular reference to Plautus, see Richlin (2017) 171-84; on *flagitatio* and *occentatio* as a challenge to the official law of the state, see Usener (1900), and on the history of the practices, see Lintott (1999) 9; 10. For *flagitatio* see also Kelly (1966) 22-3 and for *occentatio*, see Rives (2002) 283-4.
[24] Brink (1982) 195.
[25] For Fescennines and satire, see Braund (2004).

contemporaries.[26] Still, the penal appropriation of licentious song to which *Epistles* 2.1 gestures is grounded in a cultural and legal reality. In particular, the *lex* to which Horace refers has been linked directly by both legal historians and scholars of Latin literature to a law in the XII Tables (VIII.i):[27]

> *qui malum carmen incantassit ... <quiue> occentassit carmen<ue> cond<issit>...*

> Whoever cast a magic spell... <or whoever> sing in enmity <or> compose a song ...

Dating from the fifth century BCE, this was probably a single law, dealing with two types of *carmen*: magic spells (*qui malum carmen incantassit*) and the composition of libelous songs or poems (*<quiue> occentassit carmen<ue> cond<issit>*).[28] Like Horace's out-of-control *Fescennina licentia*, the language seems to echo the culture of *occentatio* and *flagitatio* (a longer section in Cicero's *De republica* qualifies the *carmen* as *quod infamiam faceret flagitiumue alteri*, *Rep.* IV.12 = Aug. *de Civ. Dei* 2.9), which the law might have been partly designed to quell.[29] Moreover, like Horace's prehistory of Latin literature, it suggests a Foucauldian alignment of the possibility of legal transgression with the dawn of authorship: while the law prohibits spells from being chanted (*incantare*), it outlaws not only the singing of songs (*cantare*) but their authored composition (*condere*).

Most commentators think it unlikely that anyone was ever put to death for composing or singing libelous verses, and the law probably fell into desuetude in the later Republic, when defamation was thought of as a kind of *iniuria.*[30] Physical *iniuria* was covered under the XII Tables (VIII iv) and modified by the praetorian *edictum de iniuriis aestumandis* (and eventually by the *actio iniuriarum*), and this came to cover non-physical forms of injury as well.[31] In two recorded cases, Roman poets themselves pursued litigation for *iniuria* on stage: Accius (170 - c.86 BCE) is said to have won a prosecution on those grounds against a *mimus* who attacked him by name, and Lucilius (180-103/2 BCE) pursued (and lost) a prosecution for literary *iniuria* against someone who defamed him on the stage (*Auct. ad Her.* 1.24; 2.19). The interpretation of the law to include verbal injury was probably relatively recent for Accius and Lucilius around the mid-second century BCE,[32] but even before that, the existence of a legal provision against transgressive composition in the XII Tables — *fons omnis publici priuatique iuris* (Livy 3.34.6) — provided a broad-brush cultural sanction for the possibility, at least, of associating the act of transgression with the act of composing *carmina*. Even if it was rarely or never implemented, its existence institutionalized literary composition as, in Foucault's terms, 'a gesture fraught with risks' (148), underwriting social constraints on the practice of writing and codifying the conditions of penal appropriation necessary for the author function to emerge.[33]

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[26] Roman prehistories of poetry and especially of drama, probably go back to a passage in Varro's *De poetis*, itself based on Alexandrian narratives about Greece: Rudd (1989) 28-32.

[27] Crawford (1996) Vol. II, 677-80; Brink (1982) 196 on *lex*: 'the present reference can only be to the Twelve Tables'; Rudd (1989) 100 on 152-4. The reconstructed text and translation are taken from Crawford (1996) 677.

[28] Crawford (1996) Vol. II, 679; Rives (2002) 282 (two clauses in the same law).

[29] Richlin (2017) 179 reads the passage in Cicero specifically as a reference to *flagitatio* and *occentatio*.

[30] Crawford (1996), vol. II, 679; Momigliano (1942) 122-3; Frier (1989), 177-200.

[31] Zimmermann (1996) 1050-9.

[32] Frank (1927) 109, following Huvelin (1903), puts the incident in the post-Gracchan period, arguing that the inclusion of verbal abuse under the scope of *iniuria* was then relatively recent: cf. also Smith (1951) 171.

[33] On social constraints (rather than official laws) curbing the potential transgressions of dramatic poetry in the Republican period, see Manuwald (2011) 293-4.

All this suggests some kind of productive dynamics (in various degrees of actual danger to the author) between literature, libel and prosecution not all that different from the entanglements that have been seen to lead to the modern author function. On its own, however, penal appropriation is not necessarily an indication that Rome had a workable version of the modern author function, which could only pertain with the introduction of a system of ownership of texts that would bind a named 'author' to the work. Roman law granted no statutory rights to authors about the circulation and use of their work. There was no official copyright law in the Roman legal system.[34] The only clear law dealing with textual ownership related to the text as material and moveable object, not to its content.[35] But there were other ways in which ownership could be established and contested. Even if they faced no legal redress for their misuse, Roman poets, far from producing the kinds of authorless 'sacralizing' texts Foucault envisaged, mirrored Greek practices of writing and reading to inscribe authorial ownership into their works through autobiographical references and other forms of signature right from the beginning.[36]

More broadly, a quasi-legal discourse of ownership of texts was embedded in the ways in which literature was interpreted and received. As Scott McGill has shown, plagiarism, the presentation of another's work under the new author's name — and the consequent discourse of literary ownership it brought with it — was clearly 'a legible item in the cultural vocabulary' of Rome, even if it was not strictly codified in legal terms.[37] When a written literature in Latin arrived on the scene and its audiences began to discuss and disseminate it, literary plagiarism became couched in the existing Roman vocabulary of legal transgression. In Greek literary criticism, reuse of material from another author was commonly called a 'theft' (κλοπή) and its practitioners 'thieves' (κλέπται) in the context of a broader literary critical vocabulary that encompassed property violations as well as more neutral language of assumption and transference.[38] At some point in the second century BCE Greek exegetical practices were exported to Rome, effectively, in Sander Goldberg's formulation, constructing literature in Republican Rome, and the concept of literary theft and the violation of literary ownership that it implied became naturalised on Roman soil.[39] Modelling their methods on Greek practices, a growing cohort of professional *critici* adapted Alexandrian modes of exegesis and applied them to the emerging body of literary writing in Latin. Like their Greek colleagues, Roman literary critics adopted the practice of making comprehensive lists of literary 'thefts', and the identification of purloined lines, characters or scenes became a key part of the dynamics of literary discourse.[40] Terence self-consciously dramatized accusations of theft against him by theatrical rivals (*Eun.* 19b-26), and even before that, Caecilius (c.230/20-168/7 BCE), who was purportedly Ennius' housemate (Jer. *Ab Abr.* 1838, 179 BCE), was making charges of literary

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[34] McGill (2012) 10.

[35] Gaius 2.77; McGill (2012) 10 n.34.

[36] Suerbaum (1968); Goldschmidt (2019) 11-13; Biggs (2020) 54-8 on 'Naevius' as a historical character in the *Bellum Punicum*.

[37] McGill (2012) 30. While McGill mentions Foucault in a footnote (30 n. 102), he makes no connection between his own findings and the light they might shed on the author function.

[38] McGill (2012) 6; Stemplinger (1912); Ziegler (1950).

[39] The moment is commonly dated (following Suetonius *Gram.* 2.1) to the extended visit of Pergamene scholar Crates of Mallos to Rome: Goldberg (2005), 27. It may be, as McGill (2012) 7 argues, that comic poets like Terence were partly responsible for the importation of the practice, but it was embedded much more widely through the broader culture of literary professionalism at Rome, not least because many of the new literary critics were also teachers.

[40] Goldberg (2005) 49. The *critici* were aware of their own author function, too: M. Pomponius Andronicus wrote an *elenchi Annalium Enni* (probably a list of 'thefts', though this may also have included other forms of criticism) which Orbilius, finding out of circulation, took care to publish specifically 'under the author's name' (*uulgandos curasse nomine auctoris*): Suet. *Gram.* 8.1; Kaster (1995) 124.

purloinment, probably because he, too, had faced them himself from professional *critici* and rival playwrights.[41]

The language which the new *critici* used to approximate Greek terms naturally overlapped with the already developed professional discourses of Roman law. There was no official term for plagiarism or what we would understand as copyright infringement; the term *plagiarius,* 'kidnapper', was later used by Martial (1.52.9) to describe literary filching, from which the English word derives. But transgression was clearly apparent in the quasi-legal valency of the terminology. The literary critical language of authorial ownership could encompass a whole spectrum of possibilities from the relatively neutral to the technically legal: Macrobius, who was probably working from an older list of *furta Virgilii* himself,[42] used the term *alieni usurpatio* (*Sat.* 6.1.2) — a legal term denoting the act of taking hold of property without a legal right — to describe what audiences, accustomed to the practice of listing literary parallels, might think of the list of Virgil's literary transgressions he offered.[43] Generally, the most common noun Roman authors employed to describe the use of another author's intellectual property was *furtum* ('theft') and the verb usually *surripere* 'to steal' or 'to filch'.[44] *Furtum*, like the English 'theft' overlapped with the technical term for a wrong punishable by law.[45] In early law, the delict of *furtum*, legislated in the XII Tables, may have encompassed specifically the asportation of someone else's movable property (the word was etymologically derived from *ferre*, 'to carry' in antiquity), though this point is debated by modern legal scholars.[46] When the *Lex Aquilia* codified *damnum iniuria datum* around 286 BCE, *furtum* came increasingly to encompass several kinds of 'theft' or unlicensed borrowing, including some types of fraud, and became an elastic catch-all *crimen omnium generalissimum*,[47] which made it particularly prone to adaptation.

Though textual *furtum* had no real-world legal valency, then, its juridical connotations helped to create a literary-critical system in which the author function could flourish. As the available juridically inflected language of theft was absorbed into literary critical terminology, a strong concept of ownership of texts became essential to the discourses surrounding the creation of a canon of early Latin literature in the first century BCE. This might not be modern copyright law, but it does imply 'a system of ownership of texts' that mirrors Roman poets' own proprietorial claims to authorship which they had inscribed into their works. Combined with 'the possibility of transgression', early Roman poetic production could, more and more, take on 'the form of an imperative peculiar to literature'.[48] That imperative — and the role of textual ownership and penal appropriation in its formation — play a central role in the case of one of the earliest Roman poets, Gnaeus Naevius, whose career is marked by the perceived infringement of copyright and a notorious brush with the law.

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[41] Porph. ap. Euseb. *Praep. evang.* 465d: Goldberg (2005) 49; Manuwald (2011) 237.

[42] Skutsch (1985) 31.

[43] McGill (2012) 182-3. McGill discusses a whole range of vocabulary used by Roman authors, much of it legally inflected, to equate literary borrowing with criminal wrongdoing.

[44] Derrida's 1977 essay 'Limited Inc a b c' points up a fundamental paranoia about theft underlying modern copyright claims: cf. Greene (2005), 12-15, and for an application of Derrida ideas to 'copyright' understood as 'the kinds of authenticating expectation that we find attached (with varying degrees of credibility) to the authorial name' in the *Res Gestae* and Ovid's exile poetry (24 n.8), see Martelli (2010).

[45] The use of *surripere* for stealing a commodity is common in Plautus (e.g. *Asin.* 929; *Aul.* 39; *Curc.* 581) and appears three times in Cato *Agr.* The participle *subruptum* seems to have appeared in the XII Tables or the Lex Atinia of 197 BCE: Crawford (1996) 620. Cf. Zimmermann (1996) 929 n. 58 on the 'older terms', *subripere*, *tollere*, and *amouere*.

[46] XII Tables, 1.17-22 Crawford. For *furtum* in early law, see Zimmerman (1996) 927-8.

[47] Zimmermann (1996) 922.

[48] Foucault (1979) 148.

3. Naevius and the Metelli

Naevius, whose first stage production is dated to 235 BCE, is known for several works, none of which survives intact: a series of *fabulae praetextae* (plays on Roman themes), comedies, tragedies, and an epic on the First Punic War written in Saturnians, known as the *Bellum Punicum*. Along with Livius Andronicus (his precursor) and Ennius (his successor), Naevius is seen as a key player in the emergence of Roman literary authorship. Together, they helped to create a poetic canon which was still substantially in place in Horace's lifetime, and whose emergence need not have been taken for granted. It involved an effort of socio-political self-positioning as well as poetic self-fashioning — and the dynamics of that process anticipate Foucault's author function in important ways.

When Cicero — who was crucial to forming the canon of early Roman poetry retrospectively — looked back at the history of Roman epic, he identified the *Bellum Punicum* as an object of quasi-copyright infringement in the hands of Naevius' epic successor Ennius through the discourse of petty theft:

> sit Ennius sane, ut est certe, perfectior; qui si illum, ut simulat, contemneret, non omnia bella persequens primum illud Punicum acerrimum bellum reliquisset. "scripsere," inquit, "alii rem uorsibus" – et luculente quidem scripserunt, etiam si minus quam tu polite. nec uero tibi aliter uideri debet, qui a Naeuio uel sumpsisti multa, si fateris, uel, si negas, surripuisti.
>
> (*Brutus* 75-6)

> Let Ennius be more polished, as he surely is. But if he really disdained Naevius, as he pretends, he would not, in undertaking to go through all our wars, have passed over the sharply contested first Punic War. "Others have treated the subject in verses," he says. And indeed, they have written excellently, even if they did so in a less refined way than you. Nor should it seem any different to you, since you have borrowed (*sumpsisti*) much from Naevius, if you admit it (*si fateris*), or have stolen (*surripuisti*) much from him, if you deny it (*si negas*).

The boundaries between theft and imitation were already blurred in the language of Roman literary criticism, and Cicero, a lawyer himself, couches his accusations as a forensic drama. *Brutus* is set up as a dialogue between Cicero and M. Iunius Brutus, and Cicero opens by giving a third-person account of the beginnings of Roman literature and the development of judicial and political speech in Rome (an elision that itself reflects the wider co-dependence of literature and law in Latin culture). In this passage, he suddenly switches to the second person, calling on Ennius as if he were a living courtroom witness to admit (*fateri*) or deny (*negare*) the allegations he levels against him.

As Scott McGill points out, for Cicero, the crucial issue in question is not *imitatio*, 'intending not to steal but to borrow openly, so that it would be noticed' (*non subripiendi causa, sed palam mutuandi, hoc animo ut uellet agnosci*, Sen. *Suas.* 3.7), but an intentional assumption by one author of the intellectual property of another. Cicero accuses Ennius of what McGill calls 'the intent to deceive readers' to the effect that substantial material (*multa*) belonging to

Naevius, and known under the author's name, in fact belongs to Ennius.[49] Despite Cicero's assertion that Ennius 'passed over' the First Punic War, there are a number of fragments that suggest he covered at least parts of it.[50] As Ennius himself was probably aware when he dismissed his rival as a preliterary *uates* before entering his quasi-copyrighted territory (*scripsere alii rem/uorsibus quos olim Faunei uatesque canebant*, 'others have written on the topic in verses which once the Fauns and seers used to sing', *Ann.* 206-7), this is not just a question of poetic imitation, but a contest about literary property and the ownership of texts.[51]

Foucault's second condition, penal appropriation, also contextualises Naevius' career. Several fragments suggest that Naevius' work was, in one way or another, concerned with the limits of authorial rights and literary and political transgression. Like Horace's *Fescennina licentia* or Virgil's prehistory of drama in the *Georgics* discussed above, one of Naevius' most well-known dramatic fragments links the carnival licence of the theatre with the festival of Liber, the Roman equivalent of Bacchus: *libera lingua loquemur ludis Liberalibus*, 'with a free tongue (*libera lingua*) we will speak at the games held in honour of *Liber*' (113 Ribbeck). Another fragment, from the *Tarentilla* (72-4 Ribbeck), probably part of a metatheatrical comment spoken by a slave, seems to pit the freedom of a *rex* against the superior *libertas* of the stage.[52] Just how 'outspoken' Naevius actually was is debatable, but the *frisson* between the possibility of transgression (however abstract) and the authorial act seems to lie behind parts of his output. Gellius (7.8.5) refers to a moment 'in the historical record' (*ex historia*) that 'may or may not be true' (*uerone an falso incertum*) in which Naevius criticised the future Scipio Africanus on stage. According to Gellius, Naevius subversively reminded the audience that while Scipio may have been a man 'who often performed glorious deeds by his hand …[and] whose reputation stands supreme among the people' (*qui res magnas manu saepe gessit gloriose … qui apud gentes solus praestat*, 108-9 Ribbeck), he was dragged away in shame from his lover's arms by his father, bundled up in the Greek *pallium* which he wore as an affectation (*eum pater cum pallio unod ab amica abduxit*, 110 Ribbeck; cf. Livy 29.19.13).[53] The episode could be read as a stock scene in a comic plot, but as H. D. Jocelyn points out, it would also have had a particular resonance in the political landscape of Rome: '[a] Roman audience aware of the political camp of the magistrate who had commissioned the play and of current gossip could not have failed to identify the person referred to as a contemporary statesman'.[54] There was no way of proving who was meant, but the dramatic fragment clearly tapped into political hearsay in a way that allowed its author to dance the line of transgression while managing to give 'no indisputable legal cause for police action' against him.[55]

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[49] McGill (2012) 2-3.

[50] *Ann.* 216-19 Skutsch with Goldberg and Manuwald (2018) 221-3.

[51] Ennius stops short of explicitly naming Naevius, though the anonymous plural *alii*, common in polemical texts, can only be a reference to him: Skutsch (1985) 371.

[52] For discussion of the fragment (quoted by the grammarian Charisius, *GLK* I.216.10) and its presumed speaker, see Leo (1913) 77; Jocelyn (1969) and Goldberg (2005) 169. On the *Tarentilla*, see esp. M. Barchiesi (1978) 2-66.

[53] Gellius' ultimate source was probably the Augustan critic Julius Hygius whom he mentions elsewhere: Jocelyn (1969) 39-40. The lover referred to in the fragment may have been male: Cornell (2013) II. 570 adopts the variant reading *amico* ('boyfriend') for *amica*.

[54] Jocelyn (1969) 40. For stock comic themes in the fragment, see Goldberg (1995) 37.

[55] Jocelyn (1969) 40. The fragment and the story have also been linked with Cicero's report (which may ultimately be based on Cato) at *De or.* 2.249 of a pun on the name Naevius made *seuere* by Scipio (*Quid hoc Naeuio ingnauius*, 'Is there anyone lazier (*ignauius*) than Naevius': Jocelyn (1969) 38-9. Cf. Marmorale (1950) 91-104. For speculations about the transgressive role of other Naevian fragments, see Marmorale (1950) and Beta (2014).

The crucial event in Naevius' career (at least as it was constructed retrospectively in reception) concerns an encounter with the Caecilii Metelli which led to a much mythologised brush with the law. At some point, whether in a literary work or independently, Naevius wrote the riddling line:[56]

Fato Metelli Romae fiunt consules

The words tend to be translated as 'by chance the Metelli are elected consuls at Rome'. But *fato* is difficult to pin down: it could be innocuous ('by divine will') or it could be a lot less innocuous: 'the Metelli become consuls to the ruin of Rome'.[57] In response, the consul Metellus is said to have reacted by writing the following reply:[58]

Dabunt malum Metelli Naeuio poetae

The Metelli will make trouble for the poet Naevius

What exactly went on is inextricable from the constructions of later sources, but that construction is itself instructive in terms of how Roman readers understood the emergence of authorship in relation to the discourses of legal or quasi-legal constraints. Naevius' line was clearly well-known in first-century BCE Rome. Cicero alludes to it in *Ad Verrem* 1.10.29 at the expense of Verres' ally Q. Metellus Creticus, who was consul designate at the time of Verres' trial, and he does so before a senatorial jury in a way that expects them to know the un-named source: 'The story went that Verres used to say that you were elected consul not by fate (*fato*), as the rest of your family were, but through his influence'.[59] A fifth-century commentator on Cicero, who was probably drawing on Asconius Pedianus (first century CE), explains this as follows:[60]

> An old saying of Naevius was directed wittily and insultingly at the Metelli ... The consul Metellus became angry at this, and replied in a hypercatalectic iambic verse, which is called Saturnian: *Dabunt malum Metelli Naevio poetae.*

Caesius Bassus (first century CE, too) also knew about the exchange, and insists that the Metelli were 'wounded' by the verse (*Metelli ... ab eo lacessiti*, GLK 6.266).

If we accept the historical reality of the exchange, it is not clear what the import of Metellus' response would have been. According to Caesius Bassus, it was put up 'in a public place' like an edict or official promulgation, which suggests that it was intended as a threat that came dangerously close to mimicking the force of law.[61] At the same time — as both Naevius and Metellus would have been aware — the line could also be construed as an exercise in

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[56] Ps.-Asconius I.29, p. 215 Stangl. Boyle (2006) 52 tentatively assigns the line to the *Clastidium* (cf. Mattingly (1960) 415), but there is no particularly strong evidence for this: cf. Goldberg (1995) 35 for a note of caution, with Jocelyn (1969) 43-4.

[57] For the multiple meanings of *fato*, see Frank (1927) 105-106 and Gruen (1990) 98. Jocelyn (1968) 47 suggests 'with predictable disaster' among a spectrum of possible translations.

[58] Caesius Bassus *GLK* 6.266; Ps.-Asconius p. 215 Stangl.

[59] *Nam hoc Verrem dicere aiebant, te non fato, ut ceteros ex uestra familia, sed opera sua consulem factum.*

[60] Ps.-Asconius I.29, p. 215 Stangl: *dictum facete et contumeliose in Metellos antiquum Naeuii est "fato Metelli Romae fiunt consules", cui tunc Metellus consul iratus uersu responderat senario hypercatalecto, qui et Saturnius dicitur: "dabunt malum Metelli Naeuio poetae".*

[61] *proposuerunt*: Caesius Bassus *GLK* 6.266 with Fraenkel (1935) 624. For the inscriptional context 'blending official edict and personal lampoon', see Mattingly (1960) 420 with Boyle (2006) 54.

urbane literary banter. The Ciceronian commentator explicitly identified Metellus' line as *parodia* (Ps.-Asconius I.29, p. 215 Stangl): it is metrical, apparently in Saturnians, Naevius' favoured epic metre, and it is couched as a deliberate structural parallel to the poet's initial attack. As Robert Germany points out, *poetae* can be read not just with *Naeuio* but with *Metelli*, in a 'syntactical equivocation that would echo Naevius' case-play on *Romae*', suggesting implicitly that the Metelli were not only powerful politicians, but could play at being poets, too.[62] The phrase *malum dabo* is a common idiom of comedy, and the line would have evoked just the kind of set-up — a clever slave who is threatened for his impudence (but, as the audience knows, always gets away with it in the end) — that might have been found in one of Naevius' own plays.[63]

Whether Naevius was actually prosecuted through the implementation of the law against offensive *carmina* in Table VIII.i of the XII Tables is a more serious point of contention, and one which is deeply implicated in later sources. Modern scholars are divided about whether and to what extent to accept the historical reality of the story, though the pendulum has more recently swung in the direction of cautious acceptance.[64] The story of Naevius' prosecution is attractive: if true, the poet would have been prosecuted for his *carmen* around 206 BCE (the year of Caecilius Metellus' consulship), a time when poets in Rome had just started to attain a cultural foothold,[65] making penal appropriation a key ingredient in the rise of Roman poetic authorship. Virtually all the information is filtered by several layers of reception, however, and the problem is compounded by the fact that stories about the lives of ancient poets are essentially 'creative', regularly extracted from the works themselves and those of others writing in parallel genres.[66]

Whatever really happened to Naevius aside, it is instructive that the narrative of penal appropriation was so important for later readers looking back on the beginnings of Latin literature. So much so that a full-blown biofictional story of prosecution and exile takes centre stage in the biographical tradition about the poet. Gellius (3.3.15), probably drawing on Varro, tells the tale that Naevius was thrown into prison by the *triumuiri capitales* because of the 'constant abuse and insults he aimed at the leading men of the city' (*ob assiduam maledicentiam et probra in principes ciuitatis*), only to redeem himself by writing two further plays in his prison cell, thereby atoning for his transgressions.[67] The narrative is then completed by Jerome (again probably based ultimately on Varro),[68] who has Naevius die in exile, driven

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[62] Germany (2019) 71.
[63] Goldberg (1995) 35. Beta (2014) 205 reads another double entendre in Metellus' line (*malum* = apple).
[64] Notably Wiseman (1998) 39, Boyle (2006) 54-5; Beta (2014); Germany (2019); Gallia (2020). Crawford (1996) 40, citing Momigliano (1942), sees the story of Naevius' prosecution at the hands of the Metelli as 'still the best explanation' for the connection between the legal possibility enshrined in the XII Tables and the story of Naevius spending time 'in detention awaiting trial' and dying in exile, though, he argues, the death penalty would not have been implemented.
[65] Gallia (2020) 723.
[66] See esp. Graziosi (2002); Lefkowitz (2012); Fletcher and Hanink (2016); Goldschmidt (2019). On Naevius in particular, see Goldschmidt (2019) 11 and Biggs (2020) 56. As Jocelyn (1969) 34 puts it, the basic outline of the anecdotes (that Naevius criticised Scipio and the Metelli), at the very least, seems unlikely to have been completely invented by later sources, who tended to date the beginnings of serious dramatic poetry at Rome after the second Punic War.
[67] The detail of the poet composing some of his plays in prison in order to redeem himself may be based on Naevius' own plays: Jocelyn (1969) 38. The story also echoes the similarly constructed biography of Plautus (said to have ended his days chained to a mill, where he wrote three comedies), also told by Varro, an important source for Naevius' life: Goldberg (1995) 35-6. On the ancient Lives of Plautus and Terence as creative readings of their works, see Goldschmidt (2015a) and (2015b).
[68] Rostagni (1944) vi.

out of Rome by the *nobiles*, with the Metelli at the vanguard, and ending his days in Utica in North Africa in 201 BCE.[69]

With or without the writing of the plays in prison, it looks like some ancient audiences connected the story with a work of Plautus, and probably specifically a cryptic passage in *Miles Gloriosus* (209-12). The scene concerns the slave Palaestrio, who, observed by Periplectomenus, strikes a comic sequence of pantomime poses as he desperately tries to think up a plan. At last, Palaestrio adopts a thinking pose, with his chin propped on his arm like a column:

> ecce autem aedificat: columnam mento suffigit suo.
> apage, non placet profecto mihi illaec aedificatio;
> nam os columnatum poetae esse indaudiui barbaro,
> quoi bini custodes semper totis horis occubant.
> <div align="right">(Plautus Mil. 209-12)</div>

> Look, he's building! He's got a column propped under his chin.
> No thanks! I don't like that kind of building work at all:
> for I've heard there's a barbarian poet with a columned mouth
> and two guards each watching him all the time.

The image of an imprisoned poet evokes a clear moment of penal appropriation in which literature is subject to punishment: the *barbarus poeta* has paid for his transgressions with the ultimate sanction against an author: the 'columning' of his outspoken mouth.[70] As Erich Gruen puts it, the lines are 'obscure and nearly impenetrable',[71] though the obscurity is not surprising if they were meant to be understood by the original audience as a reference to an imprisoned contemporary *poeta* who had been prosecuted specifically for the act of writing.[72] Whether Naevius himself would have been read into the passage by Plautus' audience is a subject of contention, but, again, recent work has moved in the direction of cautious acceptance.[73] The identification goes back to antiquity, though the trail is pretty cold: Festus' epitome (known through Paulus' own epitome) of the first-century BCE scholar Verrius Flaccus, who himself may have been drawing on earlier lexicographers, tells us that Plautus called the poet Naevius a *barbarus* (i.e. Latin-speaking) *poeta*.[74] Verrius would probably have been aware of more than the twenty-one known plays of Plautus, so (if the reading does go back to him) it is not necessarily the passage in the *Miles* in particular he was thinking of, though the linguistic

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[69] As Jocelyn (1969) 42 points out, the exile story may be 'a post-Varronian guess based on the story of the exchange of verses'.

[70] The word *os* signals outspokenness in Plautus at *Mil.* 189: see also Ter. *Eun.* 597; 807; 838 with Jocelyn (1969) 36.

[71] Gruen (1990) 104.

[72] Plautus' *columna*, in particular, has been interpreted in several ways: a figurative description of Naevius' actual pose; a suggestion of sexual abuse (Lambinus (1576) 669); an architectural allusion referring to the vertical roof supports in the poet's cell (Jocelyn (1969) 36); the *columna Maenia* which stood near the *carcer Mamertinus* (Jocelyn (1969) 36), or even a (speculative) column crowned with a comic mask, hubristically erected by the poet himself (Gallia (2020)).

[73] Jocelyn (1969); Rochette (1998); Moore (1998) 62; Leigh (2004) 20 n.95; Germany (2019) 71, and Gallia (2020) all find the link credible. Gallia (2020) 722 n. 3 points out that much of the scepticism has been based on a rigidly schematic understanding of the differences between Old and New Comedy.

[74] Paulus *Exc. Fest.* 32. For Verrius' sources, see Jocelyn (1969) 35. On Festus' dictionary, see Cornell (2013) I. 67-8. For *barbarus* as Roman or 'Latin speaking', see Gallia (2020) 723 with Plaut. *Asin*. 11; *Trin*. 19; *Capt*. 884.

coincidences make it likely. It is still possible that Plautus was pointing to another poet, or to none at all.[75] But the interpretation of the imprisoned poet, bound in chains as a punishment for his *os*, may well have been possible for the play's immediate audience, and (whether as fact or as biofiction) it was certainly an interpretation available to readers in the first century BCE, who, like Cicero and his audience, knew the story of the famous exchange between the Metelli and Naevius, and who, like Verrius, could well have recognised Naevius in Plautus' *poeta*.

In the end, all we really have that dates securely to Naevius' lifetime is the text of the fragments themselves, and even that is subject to the filters and distortions of reception. Later readers writing in different political contexts may well have read more transgressive possibilities into Naevius' encounter with the Metelli than there may originally have been, mingling the life of the author with his work, and if the work was not available to them, reading his life from and into the works of others. Yet even if Naevius did not fall foul of the Metelli and was neither prosecuted nor punished by law, the *possibility* of transgression powerfully invested the act of writing with just the kind of *frisson* Foucault sees as an essential characteristic of the later stages of the development of the author function. Like the modern author identified by Foucault, Naevius — whether in earnest or in jest — was dicing with the discourse of the law. For later readers, implicated in a conceptual system which saw Roman poets as authors of their works and filchers of the intellectual property of others, Naevius provided an ideal paradigm for the Roman author function. It is just as he is penally accountable for his work that he became a fully-fledged, culturally central native version of a *poeta* — ready for his rivals to steal from him. In constructing the canon of Roman poetry *post hoc*, Roman readers tied penal appropriation with poetic ownership into the narratives which they told about the emergence of Latin literature, and, in doing so, they helped to create an author function that predates the phenomenon identified in modern author criticism by almost two millennia.

The Foucauldian author function is not the only way in which we can account for the emergence of authorship in Rome. There are several other methods by which Roman writers turned themselves and each other into authors, and other ways in which Roman culture facilitated the growth of its own literature. But the Foucauldian idea of an author function co-dependent on the law, 'linked to the juridical and institutional system that encompasses, determines, and articulates the universe of discourses' (153), helps to explain the ways in which the emergence of literature was constructed and understood by Roman writers themselves. The paradigm retrospectively set by Naevius would continue to be negotiated much more explicitly under Augustus and Nero: Ovid would claim he had been exiled for a transgressive *carmen*; Lucan (according to the *Lives* at any rate) would be banned by Nero from publishing in his lifetime;[76] Horace would position himself *vis-à-vis* the constraints of Roman libel law 'with Caesar as judge' (*iudice ... Caesare*, 2.1.84) in his conversation with the jurist Trebatius in *Satires* 2.1.[77] Those interactions between poetry, authorship,   and the possibilities of prosecution, however, were already powerfully implicated in the emergence of literature in Republican Rome.

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[75] Fontaine (2020) (Sotades).
[76] *interdictum est ei poetica*, *Vita Vaccae* 46: Rostagni (1944) 183; cf. Tacitus, *Ann.* 15.49; Dio 62.29: Goldschmidt (2019) 91.
[77] Lowrie (2009) 327-48.

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