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Deutsches Archäologisches Institut, Zentrale, Podbielskiallee 69–71, 14195 Berlin, Tel: +49 30 187711-0

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RAMSAY MACMULLEN

Judicial Savagery in the Roman Empire

From the entirety of the past, historical clichés and catch phrases isolate images that are specially vivid and striking, if only to the unreflecting mind. In English, for example, we speak of «barbarous cruelty» and «medieval torture». These are features of their times that we notice very much. Per contra, we do not associate them with Rome. Rome is essentially different. And in fact the catch phrases speak truly. Sights and sounds to make one shudder, not issuing from eccentric savagery but from communally approved action, could indeed be seen in A. D. 550 and later but not in 150, in the eastern regions of the Mediterranean as well as in the western. Can the change, thus highlighted, be traced and accounted for?

First, a peculiarity in penal action. Among Romans, everything depended on status. Several large distinctions received recognition in the courts: between those who were citizens, and aliens (most often called provincials, in the period of the empire), or between those who were free, and slaves. Additionally, judges recognized the status of senators, town councillors (decurions or *curiales*), their kin and descendants, and looser categories both social and moral. Of the social, we have many signs, perhaps the clearest being the first question directed by a judge to anyone, witness or accused, who appears before him: «What is your condition, your rank (*condicio, fortuna, tyche*)?» For this, we have a number of trial transcripts to rely on. As to the moral categories, the signs may be read in the opinion of a jurist of around the turn of the second century. He speaks of notorious bandits whose very notoriety earns special penalties. «Our ancestors in every sort of sentence dealt more harshly with slaves than with freeborn and with men of ill repute than with those of good repute.»¹

The standing of the accused having been determined, and the nature of his act,

¹ D. 48.19.28.16 (Callistratus), to which P. GARNSEY draws attention in his *Social Status and Legal Privilege* (Oxford 1970), 231, with brief comment. Moral character was an element in judging always, as one can sense in both Cicero's forensic oratory and in Apuleius', passim, across a span of more than two centuries, and, in the interval, less clearly in [Quint.], *Decl.* As to the question, *cuius condicionis es*, see passim in the *Gesta apud Zenophilum*, e. g. p. 185 line 9 of the edition of Optatus of Milevis by ZIWSA (CSEL XXVI, 1893); again in other trials of the period, the early fourth century (ibid. 203 line 21; *Martyrdom of Dasius 6*, in H. MUSURILLO, *Acts of the Christian Martyrs* [Oxford 1972], 276, and P. FRANCHI DE' CAVALIERI, *Note agiografiche* [Studi e Testi 65, 1935], 50, the *Passio SS. Dativi et al.* 5).

the two could be put together into a suitable penalty. It bore harder on a person low in the scale, lighter on persons higher up. Slaves at the bottom could not be very much worse treated in the later empire than in the later Republic since they were virtually without rights and since the governing classes took for granted their moral worthlessness.

Because a good part of the story has been carefully told by others,² I need only review it quickly and selectively. Most of it may be traced in the obvious sources, too: in the Digest, Codex Justinianus, Pauli Sententiae, and Codex Theodosianus, supplemented here and there by other texts like the Collatio of Mosaic and Roman laws. Their chronological coverage is of course uneven. They permit the fullest and easiest statements for the period around the turn of third to fourth century, with which other periods may be compared. I concentrate on severe penalties, above the level of hard labor for life in mines, quarries, and mills; for condemnation to such work-places, though it is more often talked about as the records of the Christian persecutions multiply, does not seem to have changed character across the whole history of the empire.³

Prior to A. D. 200, capital punishment visited persons found guilty of making slaves eunuchs (D. 48.8.4) or stealing livestock (*abigei*, sentenced to gladiatorial combat, Coll. 11.7.1). Both sentences were defined by Hadrian. In addition, in his day, parricide was a capital crime punished by tying the offender in a sack with snakes and other animals and drowning him (D. 48.9.9 praef.). Attacks on the emperor by magic or by physical means were naturally punishable by death; also arson, temple-robbing, or actual or attempted murder of their masters on the part of slaves, for which they could be crucified (Mart., Spect. 7.8–10). Most cattle-rustlers were executed (D. 47.14.1); likewise, brigands, some by crucifixion (Jos., B. J. 2.75, 241, and 253; Philostr., Vit. soph. 541; and Petron. 111.5). To these categories we must add Jews and Christians dying for their faith in both the first and

² T. MOMMSEN laid the groundwork in his *Römisches Strafrecht* (Leipzig 1899), though his approach obscured the historical dimensions (see esp. 943 f., less than a page on the subject of this paper). Subsequent scholars include U. BRASIELLO, *Il diritto penale* (Naples 1937); more recently, P. GARNSEY's valuable article, *Why penal laws became harsher: the Roman case*, *Natural Law Forum* 13 (1968); A. ROUSSELLE, *La persécution des chrétiens à Alexandrie*, *RHD* 52 (1974); M. HENGEL, *Crucifixion* (Philadelphia 1977); R. A. BAUMAN, *The «leges iudiciorum publicorum»*, *ANRW* II, 13 (Berlin 1980); J.-P. CALLU, *Le jardin des supplices au Bas-Empire*, *Du châtement dans la cité. Supplices corporels et peine de mort dans le monde antique*, ed. D. BAKER (Rome 1984); D. GRODZYSKI, *Tortures mortelles et catégories sociales*, *ibid.*; and T. SPAGNUOLO VIGORITA, *Exsecranda Pernicies* (Naples 1984).

³ The data are carefully assembled in F. MILLAR, *PBSR* 52 (1984) 124–147. He indicates condemnation *in pistrinum* in Ephesus of Cicero's time (p. 130); to the treadmill in Tiberius' time (p. 136) and to «the works» (i. e. factories? – p. 137) in A. D. 70; to public projects under Nero (p. 133); and *in metalla* and hard labor under Caligula and Trajan (pp. 136 f.) as well as earlier and later. Allowance being made for the uneven supply of evidence, distorted through survival of martyr-accounts, I see no increase in the use of these penalties except in moments of persecution – pace MILLAR (p. 145: «a radical innovation», etc.).

second centuries.⁴ And the slave who enlisted in the legions (Plin., Ep. 10.30) or pretended to be a citizen (Suet., Claud. 25.3 – presumably slaves not free persons) or the slave who proved traitor in time of war (Tac., Hist. 4.3.4), or who deliberately moved boundary markers (D. 47.21.3.1, Nerva), or the convict who broke out of jail (D. 47.18.1, Marcus Aurelius), was to be executed as well. Poisoning leads to condemnation to the beasts; at least it does so in a fictional account (Apul., Met. 10.28 and 34). But that is credible enough. The sixteen or so capital crimes in all these oddments and enactments indicate the height of severity, before the great age of the juriconsults.

There is more to be said, however, before we leave the first two centuries A. D.; and that more is to be found not in legal sources but in literary, often in anecdotes that lie in the realm between what is done by a law, and what is done by a lawfully appointed authority. In Lyons, for example, the governor identified one Christian in particular, Attalus, as a Roman citizen. He set him aside while he sought instruction about his fate from Marcus Aurelius; he received the command to behead the citizens and crucify the rest; but instead he sentenced the non-citizens and Attalus, too, «as an indulgence to the crowd», to death among the beasts of the amphitheater. In short, he did exactly as he pleased.⁵ So likewise did a mid-first century governor in Spain who sent a poisoner to the cross and, despite the criminal's asserting his citizenship, went right ahead with the crucifixion as decreed, illegally (Suet., Galba 9.1); similarly a governor of Asia under Augustus who, «when he had levelled with the executioner's axe three hundred in one day, went about among the corpses with an expression of pride, as if surveying some grand accomplishment». The affair is reported by Seneca in an Essay on Anger (2.5.5), as an instance of something almost irrational. And we have a general evaluation of a governor's conduct as «going beyond all bounds in punishing crime».⁶ Contemporaries could identify tolerable or praiseworthy exercise of authority and distin-

⁴ Jewish martyrs, Jos., B.J. 2.152 f., and in the second century Akiba and others, in W. H. C. FRIEND, *Martyrdom and Persecution in the Early Church* (Oxford 1965), 227; C. G. MONTEFIORE and H. LOEWE, *A Rabbinic Anthology* (Philadelphia 1963), 255, 264, and 269 f.; Christian martyr-accounts are conveniently in H. MUSURILLO, *op. cit.*

⁵ Euseb., H. E. 5.1.44, 47 (ἀποτυμπανισμός), and 50. For the definition of the Greek word, see ROUSSELLE 231 f. The arbitrariness and variety of tests and penalties prescribed by judges to Christians in the first two centuries has been many times discussed. The judge sometimes makes explicit his freedom of action, e.g. Passio S. Polycarpi 10 or Tert., *Ad Scap.* 4.1–4.

⁶ Suet., Galba 9.1, *acer et vehemens in coercendis delictis vel immodicus*, à propos esp. the crooked money-changer whose hands Galba ordered cut off and nailed to his change-table; 12.1, Galba's *fama saevitiae*; cf. Sen., *De ira* 1.18, the vivid tale of a Syrian governor – identification in R. SYME, Tacitus (Oxford 1958), 544 n. 8 – who flies into a passion of anger, *furens*, etc., and so has three innocent men, all legionaries, executed. Compare Philo, *In Flacc.* 78 f., the governor of Egypt disregards distinctions of status, a sign of his κακόνουα, in the assigning of corporal punishment, and departs from penal routine in other ways; and a governor of Syria burns and drowns assorted criminals and mutilates deserters, and crucifies undisciplined men, all victims of his *crudelitas potius quam severitas*, SHA Avidius Cassius 4.1–5.

guish it from the intolerable. The bounds were not fixed by law, at least not in the minds of ordinary observers; rather, by moral considerations. Governors had a right to freedom of action, they did a great deal more than mechanically apply some rule-book.⁷ Really, it was they who determined the level of judicial savagery quite as much as the central government.

It was they, but also that government. Naturally what emperors decided in their judicial as in their legislative capacity weighed heavily on the routines of provincial life, even granted the effective independence of their representatives. For every autocrat in Vienne, violating the rights of Roman citizens, no doubt there were as many or more Younger Plinys, scrupulously referring their uncertainties to their sovereign. The particular preferences of the occupant of the throne at any given moment would be known, as we may judge from the many anecdotes that have come down to us: Augustus and Hadrian kind even to slaves, Tiberius and Caligula inventively savage, Claudius and Domitian more conservatively so.⁸ Extremes of imperial vengeance were on display from time to time, for maximum publicity: best known, no doubt, the Christians in the wake of Rome's fire in A. D. 64, fixed to crosses and burned like torches in the evening, as Tacitus tells us (Ann. 15.44), while others were wrapped in the hides of beasts of the hunt, set before dogs, and so torn apart. Vespasian had one leader of the Jewish revolt led about the Forum while he was beaten, then to be despatched in the adjoining jail, and another such leader, or brigand, was first tortured and afterwards (necessarily in a public place) burnt alive.⁹ Under Domitian the character in a play, Laureolus, who is crucified on stage, was acted in the amphitheater by a convict actually despatched on the spot.¹⁰ Similar dressing-up of criminals who were to be executed, and the setting of them into some drama so as to present their death as a part of an entertainment, is recorded in Carthage and elsewhere.¹¹

Tolerance, even the demand, for severe punishments is often attested. Cruelty served the moral ends of society, so it was argued; and that explains and justifies publicity, too: for how else could convicted criminals serve an exemplary pur-

⁷ As CALLU 341 n. 117 points out, quoting Ulpian and Callistratus – though norms were certainly present to mind, and for most cases explicit.

⁸ For Augustus, see Dio 54.23.3, though cf. Suet., Aug. 67.2; Hadrian in D. 1.6.2; Suet., Tib. 62.2 f.; for Caligula, idem, Caligula 27.3 f., Dio 59.10.3, and P. GISS. 46 = H. A. MUSURILLO, *Acts of the Pagan Martyrs* (Oxford 1954), 14, col. iii line 25; Suet., Claud. 14, 15.2, and 34.2; Domitian 8.4 f., 10.2, and 11.2, and CALLU 328–331.

⁹ Jos., B. J. 7.154, all done «by Roman law»; ibid. 7.450, cf. similar parading of the victim before execution, in Jerusalem, by imperial order, ibid. 2.246 (Celer). Further on the almost ritual procedure, Dio 60.13.3 and 60(61).35.4. For executions at Claudius' orders *in campo Esquilino*, cf. Suet., Claud. 25.3.

¹⁰ Mart., Spect. 7, cf. A. NICOLL, *Masks Mimes and Miracles* (New York 1963) 111.

¹¹ Tert., Apol. 15.5, «Hercules» burnt alive and «Atys» castrated; Passio S. Perpetuae 18.4; Apul., Met. 10.28 and 34.

pose?¹² So authority makes an exhibit of them, even in a theater, amphitheater, or the Roman Circus Maximus. They were, moreover, people who deserved all they got: defeated enemies, foreign or domestic; dangerous, cunning, wicked folk for whom hanging was literally too good.¹³ Or the crowds simply didn't bother their heads over moral questions and shouted for more, more, without discriminating between the pleasures of violence and vengeance. With those shouts Christians were familiar in Vienne in 177, in Carthage according to Tertullian's and Perpetua's reports, and elsewhere, too.¹⁴ At least some large parts of the population of a great many cities, at some moments, more than merely accepted a high level of brutality in the name of their civilization. Particularly for suffering inflicted in the course of public shows, they obviously had a strong appetite. It is worth noting, however, that that appetite as expressed in gladiatorial combat began to diminish slowly around the time of these dates, i. e. the later second and early third century,¹⁵ while in judicial contexts its increase steadily continued.

Away from the crowds, at the opposite end of the spectrum of opinion, we find the moralist as his role was conceived of at the time: the philosopher clad in his cloak, or someone taught by such a person. One of them protests, «the executioner and noose are long out of date. Laws have been laid down to determine punishment without any harshness called for from the judges or scandal against the times».¹⁶ But another bids his listeners, «Think now of the jail, the cross, the rack, the hook, and the man pierced right through so that the stake comes out his mouth». He presents these images to arouse dread, not abhorrence.¹⁷ Of course scenes of that description *were* dreadful; yet, in a society where gladiatorial combat was a fixture, they were not likely to be judged literally intolerable. Indeed, they were destined to become more common in the empire's cities as time went on.

Just how common, it is very hard to determine for any period. If we keep our focus fixed on the empire of the first two centuries A. D., we can hardly say wheth-

¹² Hence, the criminal suffers in the same location where he performed his evil deeds: SHA Avidius Cassius 4.2 and 5.2 (soldiers); D. 48.19.28.15 (brigands); SHA Sev. Alex. 23.8 (extortionate imperial slaves); and [Quint.], Decl. 274 p. 124 RITTER, the crucified are displayed on the busiest road so as to arouse fear among the maximum of passers-by (2nd cent.?). The last ref. is brought forward by HENGEL (cit. above, n. 2) 50. There is a wealth of material in military settings, e. g. Polyb. 6.37 f., Frontin., Strat. 4.16, and D. 49.16.

¹³ The wicked alone receive cruelty, or deserve it: Mart., Spect. 7; Sen., Ad Lucil. 18.103.2, of those condemned to gladiatorial combat, *latrocinium fecit aliquis, ille meruit ut hoc patere-tur*; Lucian, Alex. 2; and Tert., Spect. 100 v.

¹⁴ Euseb., H. E. 5.1.38, 43, and 50; Tert., Spect. 103 v, *in nos quotidiani leones expostulantur*; Passio S. Perpetuae 6.1 and 18.9, in Carthage; at Smyrna in the 150s, Passio S. Polycarpi 3 and 12, pp. 4 and 10 in MUSURILLO, Christian Martyrs.

¹⁵ See my article (at notes 29 f.) in *Historia* 35 (1986).

¹⁶ Thræsea, in Tac., Ann. 14.48.

¹⁷ Sen., Ep. moral. 14.5; compare Lucian, Piscator 2, where the point of the humor lies in the philosophers recommending crucifixion, mutilation, etc., for their enemy.

er a criminal's corpse suspended on a gibbet was a sight quite beyond ordinary experience, or not (as in the Middle Ages). «Thoughts of crucifixion seem to have caused nightmares even for those who ran no risk of such punishment.»¹⁸ In the wake of some specially great disturbance, the bodies on crosses along the road must produce an overwhelming impression.¹⁹ What mention is made of them may reflect shock rather than their frequency. On the other hand, reinforcing our impression of prevalent and accepted judicial violence in that world, Epictetus warns us of the very real possibility that we may be tortured if we embark on litigation of any sort, and Cyprian points to court hearings as likely to involve brutal interrogation.²⁰ Common or not, depending on time and place, pictures of brutal routines of law in action were no doubt stored away in the memory of every citizen.

Pain, while a sentence in itself for slaves convicted of certain crimes, was also normally inflicted on them as a way of getting true testimony. Sometimes it was very effective. An example appears much later in a hearing before the governor of Africa in 315: just tying up the witness preparatory to further measures makes him change his story instantly and most damagingly.²¹ Freeborn persons, however, if they were also Roman citizens, were at first exempt from force used in interrogation. They were exempt whether as witnesses or accused; and that was St. Paul's point (Acts 16.37 and 22.25): «They have beaten us publicly, uncondemned, men that are Romans . . . Is it lawful for you to scourge a man that is a Roman, uncondemned?» By what stages this security was lost, does not appear clearly in the record.²² Augustus affirmed the exemptions but his successor already disregarded it in cases involving treason; and peasants possessing citizenship were beaten by a lo-

¹⁸ R. PACK, Artemidorus and his waking world, TAPA 86 (1955), 283 n.9, speaking of the later second century and referring to the Oneirocriticon 152.4; cf. Plut., Moral. 554 A, «every evildoer goes to his punishment bearing his cross on his back» (as if that were the only form of punishment) – quoted by HENGEL 77, along with several other mentions in second century authors.

¹⁹ Tac., Ann. 15.44, on the Great Fire in Rome; after Jewish defeats, in Jos., B. J. 2.75, 241, and 253; Vita 420.

²⁰ Epict., Diss. 2.2.1: «you who face litigation» may confront a judge (2.2.5) who «will do things to you that are thought to be frightful», at least by non-philosophers; and you must «endure to be beaten to death» (2.2.13); cf. Cypr., Ep. I ad Donat. 10 (CSEL 3, 1, p. 11), bidding the reader look at the forum, there to behold «the spear, the sword, the executioner handy, who tears at you with his hook; the stocks that stretch, the fire that burns, more torments for a single body than there are limbs». In Apul., Met. 10.10, when accused of homicide, the prisoner is racked, beaten, and burned; compare scenes in the persecutions, Tert., Apol. 12.4, *ungulis deraditis* etc.; Passio SS. Potam. et Basilid. 4 (boiling pitch dropped on the body); Passio S. Polycarpi 2.4, novel tortures of various sorts applied in Smyrna near the mid-second century; and Euseb., H. E. 3.32.6, similar scenes, but earlier (A. D. 106/7) in Palestine.

²¹ Acta purgationis Felicis (Opt. appendix II, ed. ZIWSA, p. 202 lines 5 f.). He was a *decurio* not a slave (p. 203 line 21).

²² For what follows, I depend on GARNSEY, Social Status 122, 127, 141–143, 241, and 265, and P. BRUNT, Evidence given under torture in the Principate, ZSS 97 (1980), 259–263.

cal imperial official in Commodus' reign, apparently just to coerce and terrify them. Granted, they were lowly folk living in a remote area. From the general indifference displayed toward the qualification of citizenship throughout the Digest, from the lack of interest in its universal gift displayed by everyone in and after A.D. 212, and from the clear interest that is by contrast displayed in social status as a determinant of penalties, we can judge where the weight of reality lay. It lay in one's local prominence, wealth, and office – in everything that peasants and the bulk of the population lacked. Indeed, by the date of their complaint to Commodus, the ruling had issued from so scrupulous an emperor as Marcus Aurelius that town councillors and higher ranks (*honestiores*) were not to be flogged either during interrogation or as a penalty; whereas, by implication, those exemptions did not belong by automatic right to persons of lower rank (*humiliores*), and were already coming under attack or question for *honestiores*. Hints of how that attack developed, more against defendants than witnesses and more often in the context of serious charges, can be found in various texts of Severan times.

The long period just surveyed is thus one of steady degradation in the legal right of the individual to decent treatment, only a little modified by touches of *humanitas*. That latter has received a great deal of study and emphasis. It constitutes an element in the history of Roman law that draws admiring comment. The vast majority of citizens, however, were they to be asked what era they would wish to live in, Cicero's or Marcus Aurelius', for the enjoyment of physical safety in the empire's courts, would no doubt have preferred the former. The statement, to be sure, applies only to Romans. It is clear that treatment of 'aliens' in some very broad sense of that term was quite a different matter, and seen to be so; and members of the ruling class when they found themselves abroad were prone to behave as if among a lower species of some sort that had no claim on their humanity – in short, behaved as they would have towards their own slaves at home. In time, habits of law-giving abroad exerted an influence over law-giving even to one's full fellows. So I would explain the development manifestly to be traced in our sources from milder to more severe penal routines. In illustration: during Gaius Verres' provincial governorship in the 70s B. C., «no distinction whatsoever was made» in respect to flogging «between Roman citizens and other people. And the result of this practice was that before long his lictors were in the habit of actually laying hands upon the persons of Roman citizens without so much as waiting for his orders.»²³ Cicero and his audience are shocked by such lawless savagery. Time passes, these developments that I have traced increasingly prevail in the empire's courts, and the great juriconsults of the early third century report on the results.

²³ Cic., II In Verr. 5.140 (trans. L. H. G. GREENWOOD). For Verres' threats of beating to death, see II Verr. 3.70 and 4.85; actual instances, 5.164 f.; «atrocious cruelty» in beating and use of hot metal plates on citizens, 1.122 and 5.163; and crucifixion not only for slaves (5.12) but Romans as well (1.13 and 5.164 f.).

In describing them now it will be clearest if I do so as I described the state of affairs prior to A.D. 200, that is, beginning with capital offenses. Some fourteen crimes so punished continue on the books²⁴ – unless two of them no longer count as capital (which is most unlikely): the two that concern slaves who join the legions, and who betray the state to an enemy. For some crimes formerly capital, the penalty has been raised from decapitation by blow of sword, to crucifixion, burning, or wild beasts. Far more striking, however, is the number of additional crimes counted now as capital. Some are against the state: civilian desertion to the enemy (D. 48.19.38.1 and 49.16.3.10) and sedition (D. 48.19.38.2), both punished by *bestiae* or *furca*, or flight from the place of one's exile (49.19.28.13). Others violate religion: divination (P. Coll. Youtie I 30, a. 198/9), the killing of sacred animals in Egypt (Min. Fel. 28.8), circumcision of non-Jews (*bestiae* being the penalty for slaves, D. 48.8.11), or the disturbing of burials to rob them (D. 47.12.11, the death penalty aimed only at *humiliores* unless arms are employed, 47.12.3.7). Still others concern abuse of litigation: by the slave who brings suit against his master (SHA Pertinax 9.10; CJ 4.55.4.1, a. 224) or by any person whose false testimony results in the execution of another (D. 48.8.1.1; Herodian 1.9.5). Finally, there is homicide: of his master by a slave, now punished by burning at the stake (*crematio*, D. 48.19.28.11); by any robber or poisoner (D. 48.8.3.5), to be sentenced *ad bestias* if a *humilior*; or accidental homicide through a potion (D. 48.19.28.5). The total of charges for which one could expect to lose one's life has almost doubled, compared with that of Antonine times.

At a third point in time, around A.D. 300, the anonymous Pauli Sententiae allows us to take some further measure of the progress of cruelty.²⁵ The work survives only in fragments, in which it is nevertheless possible to find nearly the full list of the older crimes.²⁶ A few of them now receive a milder form of the death pen-

²⁴ Castration remains on the books as capital, D. 48.8.4.2; livestock-theft is punished capitally only among *humiliores* unless by someone who attacks with arms, which merits death by wild beasts (D. 47.14.1.3); parricide remains (D. 48.9.9 pr.); *maiestas* remains (D. 48.4.11), as any attack on either the state or the emperor; arson remains a crime punished by *crematio*, D. 48.19.28.12 (but *bestiae* for *humiliores*, 47.9.12.1, Ulpian); temple robbing remains (D. 48.13.7 [6], *pro qualitate personae*, some sentenced to the beasts, some to burning, some to *crematio*; plotting against his master by a slave remains (*crematio*, D. 48.19.28.11); brigandage also (*furca* or *bestiae*, D. 48.19.28.10 and 15); likewise Christianity; moving of boundary markers by a slave remains on the books as a capital crime (D. 47.21.3.1), as does breaking out of jail (D. 47.18.1) and poisoning (D. 48.19.28.9).

²⁵ For the date, see CALLU 336 and ROUSSELLE (cit. above, n. 2), 244. GARNSEY, *Social Status* 221, sets it near the end of the third century.

²⁶ PS 5.24, *bestiae* or *crematio* for parricide *bodie*, not *culleus*; 5.19A, disturbance of burials; 5.18.2, *gladium*, no longer *bestiae*, for the *atrox* (= armed) *abactor*; 5.22.1, *crux* or *bestiae* for sedition; 5.29.1, *bestiae* or *crematio* for *humiliores* guilty of *maiestas*; 5.21A.2 civilian desertion; 5.21.4, *crux* for divination about his master by a slave; 5.3.6 and 5.20.1, arson prepenne and for the sake of pillage; 5.23.1, *crux* for the *humilior* guilty of poisoning; 5.19, *bestiae* for sacrilege; 5.22.3 f., circumcision of non-Jews; 5.23.13, castration for male prostitution; 5.23.1, *crux* or

alty, but most receive a harsher one. Moreover, eleven new crimes have been added to the capital list: insurrection (PS 5.29.1, «formerly exile»); human sacrifice connected with divination (PS 5.23.16, *bestiae* for *humiliores*); the invention of new and unsettling cults by *humiliores* (PS 5.21.2); hexing (PS 5.23.15, *crux* or *bestiae*) and magic and nocturnal rites in temples (PS 5.21.2f. and 5.23.15 and 17, decapitation, or *crematio* for the performer, *crux* or *bestiae* for his customers); the assuming by *humiliores* of the insignia of higher officialdom in order to practice extortion (PS 5.25.12); the sale of inside knowledge by court employés (PS 5.25.13); counterfeiting by slaves and *humiliores* (PS 5.12.12 and 5.25.1, *crux*); kidnaping, if by a *humilior* (PS 5.30B.1, *crux*, «formerly a fine»); sexual assault on either a boy or a girl (PS 5.4.14); and altering or falsifying a will (PS 5.25.1, *crux* for *humiliores*, beheading for freedmen of the will). In the specification of penalties, incidentally, I have indicated the more severe, where some choice was left to judges; and, where there is no specification of rank, I have assumed that all ranks were intended. Some erosion of the difference between *humiliores* and *honestiores* can be seen here in progress, destined to develop further in the century that follows.²⁷

The rising level of penal severity that appears in the Pauli Sententiae appears also in other sources a little earlier or a little later. I need not depend only on the one witness. Indeed, where I aim to speak generally of moral and judicial values among sixty or so millions, I cannot have enough variety of witnesses. A papyrus of A. D. 278 contains a circular addressed by a high official to district and town magistrates, announcing the rules for the years' dike corvées and threatening infractions with death.²⁸ No such threat can be found, I think, in prior records of Roman Egypt; but the novelty may be compared to the death penalty directed at extortion in other branches of the government, as they are found in the Pauli Sententiae. With that work, another bit of evidence also is entirely consonant: I mean the description of a scene of daily life used by the author of an early fourth century (?) language-instruction booklet. It shows us the forum of some provincial city in the morning:²⁹

bestiae for homicide by *humiliores* but, 5.23.4, if in a *rixa*, the penalty shall be condemnation to gladiatorial combat or the mines; and 5.23.1, *crux* or *bestiae* for false testimony leading to someone's death.

²⁷ GRODZYNSKI (cit. above, n. 2) 384 f.

²⁸ P. Oxy. 1409, οὐ μόνον περὶ χρημάτων ἀλλὰ καὶ περὶ αὐτῆς τῆς ψυχῆς τὸν ἀγῶνα. I cannot find the latter phrase in its present meaning in E. KIESLING'S Wörterbuch der gr. Papyrusurkunden 4, 1 (Berlin 1944) 28 s.v. ἀγών, or the Supplement of 1969.

²⁹ Text in A. C. DIONISOTTI, From Ausonius' schooldays? JRS 72 (1982), 104 f.; date (123), «late third or more probably fourth century». At § 74, *custodis sessurus* = φυλαξεῖν καθημενος I suspect to be a dative plural, where the editor suspects a word (*provinciae*?) dropped out. At § 75, the *quaestionarius* is the soldier to be expected in attendance on the governor. See my Soldier and Civilian in the Later Roman Empire (Cambridge 1963), 67, or D. J. BREEZE, The organization of the career structure of the army, BJBb 174 (1974), 275.

The governor arrives to take his place on the platform between the guards. The platform is prepared. The judge mounts the platform and announces through the herald's voice, «All parties stand». The accused man stands, a brigand. He is interrogated as his doings deserve. He is tortured. The interrogator hammers him, his breast is torn. He is hung up . . . , he is beaten with rods, he is flogged, he passes through the series of tortures and still denies [his guilt]. He is to be punished, undergoes sentencing, is led off to be beheaded.

It is a vignette thought to be useful to the traveller from one province to another, as today we are taught by phrase books to know our way around foreign airports. What a very chilling world it must have been for the tourist then! In those years in particular the persecutions were under way at their worst. What we are told about them fits very naturally into that snapshot of some western Roman forum just offered us. With the persecutions, however, we find ourselves generally in eastern cities, especially of Palestine where Eusebius was resident, took notes, and preserved the memory of his co-religionists' various exquisite sufferings. One novelty especially he records: mutilation. A martyr's leg is broken, the Achilles tendon cut, an eye put out or a nose or ear cut off.³⁰ Everyone watches, tourists or residents alike. The scene is quite public: the local amphitheater or, ordinarily, the marketplace or public portico where the governor presides from his tribunal. What everyone sees, becomes matter-of-fact; at least it accustoms the eye. Moral and judicial expectations are simultaneously expressed and shaped.

The impact of the frequent witnessing of judicial violence can be measured in a peculiarly useful type of source: handbooks for the interpretation of dreams and horoscopes. These served a clientele of small towns as well as cities, and of the not-very-rich as well as the prosperous. Several of them cluster in the last quarter of the second century, against which we may compare Firmicus Maternus' work that reflects the first third of the fourth century. In both the earlier group and this later one the vicissitudes predicted had to be fairly representative of their times if the diviners were to make sense to their customers and stay in business. Their witness

³⁰ Euseb., H. E. 8.6.2f. (Nicomedia); 8.8.1 (Levantine scenes); 8.9.1f. (Egypt); 8.12.1 (Egypt and Cappadocia); 8.12.2 (Antioch); 8.12.6f. (Pontus); 8.12.8–10, «goodness and humanity» advertised by Maximin Daia for his mutilations in the place of executions, cf. Lact., *Mort. persecut.* 36.7, *effodiebantur oculi, amputabantur manus, pedes detruncebantur, nares vel auriculae desecebantur*; most detailed, Euseb., *Mart. Pal.* passim, e.g. 4.10–11, 11.18, or the characterization of governor Urbanus, 7.4, as highly inventive in cruelty, castrating some martyrs, condemning others to the beasts or unarmed combat or the mines; and to the trial description that I quote compare the description (7.7) of the persecutor «rendering judgement from a lofty tribunal among the mass of his military guards – the ruler over the entire province of Palestine». CALLU (art. cit. above, n.2) 333 surveys and quantifies Eusebius' essay: 23 cases of decapitation in it, one crucifixion, 11 burnings, 5 *ad bestias*, etc. But Eusebius reminds us that the torture scenes involving Christians were no different from those involving non-Christians, as Licinius treated them in Antioch (H. E. 9.11.6). Their crime, in this passage, was divination and prophecy.

therefore has some historical value. But in the earlier ones, while beatings for slaves, jail terms, fines, even decapitation are mentioned, and while crucifixion arouses a special horror, nevertheless the over-all picture is nowhere nearly so grim as in the fourth century. Then, the courts and their consequences threaten everyone; and their measures are more violent.³¹ The «ultimate sentence», *summum supplicium*, is seen as terminating one out of every five or six lives – a statistic of course not literally accurate but all the more revealing of people's fears.

And the severest penalties were applied with diminishing respect for rank. A Duke might burn, so the stars predicted; and they did so more truly than the laws, whose prescriptions did not control practice. A town councillor might be strung up for torture and only when he had broken would he be asked the routine question, «What is your status?» (above, note 18).

Firmicus Maternus saw in his lifetime a perceptible acceleration of change in the history I am tracing; for Constantine's reign produced several dozen laws for which the sanction was death; and the great majority of these broke new ground.³² Necessarily these latter were aimed rather particularly at problems of the moment, since the broader categories of serious crime had long since been defined and dealt with. The emperor on a grand scale is thus using the ultimate threat very much as did that regional supervisor in Egypt a generation earlier, in an *ad hoc* administrative fashion. He expresses special fury against his own government servants, assigning to the greedier ones the punishment of amputation of their hands or the fate of being tortured to death (CT 1.16.7 and 1.22.1). He initiates also the form of execution through pouring molten lead down the throat (CT 9.24.1.1); and at the

³¹ See my Social history in astrology, *Anc. Soc.* 2 (1971), 106 and 112 – the findings confirmed and the statistics carried further by GRODZYNSKI (art. cit. above, n. 2) 397–403.

³² Eleven of his constitutions with the death penalty develop previous similar legislation: CJ 4.42.1 (Constantine – no date), regarding the castrating of a slave, cf. D. 48.8.4.2; CT 1.16.7 (331), cf. PS 5.25.13; CT 9.5.1.1 (314/320–3), slaves informing on masters, cf. CJ 4.55.4.1; CT 9.10.1 (317), raising the penalty for *vis* from exile to beheading, on the grounds that *vis* often leads to homicide (which latter is a capital crime, cf. PS 5.23.1 and 4); CT 9.15.1 (319), parricide; CT 9.16.1 (319/320), soothsaying, cf. PS 5.21.4; CT 9.18.1 (315), cf. PS 5.30B.1, kidnaping; CT 9.19.2.2 (320/326), forgery, cf. PS 5.25.1, altering a will; CT 9.21.1 (319/323–5), counterfeiting, cf. PS 5.12.12 and 5.25.1; CT 9.24.1.5 (320/326), rape, cf. PS 5.4.14; and CT 9.40.1 (314/315), adultery, homicide, or magic. As to adultery as a capital crime earlier, cf. BAUMAN (art. cit. above, n. 2) 191 n. 191, on CJ 9.9.9 (224); SHA Aurelian 7.4; and perhaps CJ 2.4.18 (293 – an interpolation?). But Constantine returns to that crime, again with a capital sentence, in CJ 9.9.29(30).4 (326). The remainder of the capital penalties he decrees are novel: CT 1.16.7 (331); 1.22.1 (316); 1.32.1 (333); 4.13.1 (321); 4.13.3 (321); 7.4.1 (325); 8.4.2 (315); 9.3.1.1 (320); 9.21.2 (318/321); 10.4.1 (313/326); 11.16.4 (328); 11.30.8 (319); and 13.5.5.1 – all thirteen of these dealing with official mis-doings; and another thirteen, miscellaneous: CT 2.30.1 (315), 7.1.1 (323), 7.12.1 (323), 9.9.1 (326/329), 9.10.2 (317/318), 9.22.1 (317/343), 10.10.1 (313), 10.10.2 (312), 10.10.3 (335), 13.5.5.1 (326/329), 14.4.1 (334), 16.8.1 (315/339), and, finally, death by fire for heretics, in Constantine's edict of 333, in H.–G. OPIRZ, *Athanasius Werke* 3, 1 (Berlin 1935), 67 f.

thought of those accountants in his government who persist in their venality, he explodes with threats of *tormenta et eculei atque lacerationes* (CT 8.1.4).

Was Constantine deranged, a madman? If that were the case, how could he serve us in any attempt to trace and understand the growth of barbarism in the empire? At most, he might have made that element familiar, but not more tolerable. In fact, his admirers characterized him as unusually merciful and mild.³³ He was merely of his times. His savage measures, looked at from a distance, fit very well into the curve of penal development discovered thus far.

There was much worse to come. Valentinian, as any reader of Ammianus Marcellinus knows from an abundance of vivid incidents, was really a man to watch out for lest, in his proximity, you gave offense, and heard the order for your tongue to be cut out or your hand to be lopped off on the spot.³⁴ More serious matters he dealt with more deliberately, by burning men at the stake.³⁵ Of his brother ruling in the east, Ammianus has quite horrible tales to tell, especially those centering in a case of divination;³⁶ and his son Gratian, when provoked, could annihilate wrongdoers «with immense tortures»,³⁷ quite in the family style. As to Valentinian's general Theodosius (again our source is Ammianus), he maintained military discipline by burning men alive or more often cutting off their hands.³⁸

In the violence of these great men, resort to mutilation attracts special attention. It is characteristic of their period; for, as a judicial penalty, it makes no appearance before the start of the fourth century.³⁹ It continues in use thereafter into the fifth and sixth centuries, in just the manner we have seen, rarely as a statutory sanction, more often as an expression of rage or infliction of insult⁴⁰ – for example, threat-

³³ Paneg. vet. 10 [4].3.3 and 8.1, his *miser cordia* and *clementia* (in A. D. 321); Euseb., *Vita Const.* 4.31 (GCS I 129). It is true, of course, that we hear next to nothing about him from neutral or hostile sources. Only Eutropius (10.8, *multas leges rogavit, quasdam ex bono et aequo, plerasque superfluas, nonnullas severas*) adds a little chiaroscuro.

³⁴ Amm. 28.6.20 and 30.5.19 (note also the characterization of the man and his rages, 27.7.4 and 29.3.2f., with more domestic savagery, as it may be called).

³⁵ E. g. Amm. 27.7.5, cf. Chron. Pasch. 557 Bonn; Eunap. frg. 30, cf. Malal., Chron. 13 p. 339; or Amm. 28.1.28.

³⁶ Amm. 29.1 f., cf. Soz., H. E. 6.8 (PG 67.1313C).

³⁷ Amm. 28.1.57 – Gratian described by Ambrose, *De obitu Valentiniani* 74, as *pius atque mansuetus, puro corde*. Compare the description of Julian «as a mild and gentle emperor» for merely burning alive one person and beheading two others among the population of a city that had resisted him, Amm. 21.12.20.

³⁸ Amm. 29.5.22, 31, 43, and 49.

³⁹ First by Galba (Suet., *Galba* 9.1), but that was impulse not law; dubiously, a century (?) later, as penalty for striking one's father, [Quint.], *Decl.* 372 p. 409 RITTER, *manus ei incidantur*; next, only in the Great Persecution (above, n. 30) and thereafter in CJ 6.1.3 of disputed date (314? 317/323?), cf. SPAGNUOLO VIGORITA (op. cit. above, n. 2) 98 n. 44. Constantine's law of 331, CT 1.16.7, has also been referred to.

⁴⁰ CIL 5.8768 of the 390s threatens anyone who disturbs the burial beneath the stone with amputation of his hand or a heavy fine – a threat more than a law, surely. It is adduced by E. PATLAGEAN, *Byzance et le blason pénal du corps. Du châtement dans la cité* (Rome 1984),

ened against a bishop by Constantius and, in the earlier fifth century, applied to great courtiers, enemies of the state, and similar celebrities.⁴¹ One element shared between mutilation and other drastic pains employed by Constantine and perhaps by third century emperors, too, is dramatic appropriateness: the person who gives wicked advice is to be choked with molten lead, the seller of false promises, «smoke», is asphyxiated over a slow fire; and similarly amputation, whether loss of a foot for a deserter, of a hand for the destroyer of public buildings, or of sexual organs for the pederast (under Justinian), proclaims symbolically the particular evil being punished.⁴²

Proclamation is of the times, too. There had never been a moment when Roman Justice, aroused and representing the cause of right, had hidden her acts of vengeance behind a screen;⁴³ but as the crimes multiplied that earned dramatic retribution – not a mere fine, not even exile, but some more violent assault upon the body of the person convicted – then, more and more, justice is acted out before the people assembled. The stage chosen in Rome is the Septemzodium, where the prefect has an insolent rabble-rouser summarily seized, tied, hung up, and his sides torn.⁴⁴ Or, in a small provincial city, Ptolemais, the stage is «the Royal Stoa, for long a court of justice, now displayed as a torture chamber» by the governor.⁴⁵ Clearest

413 n. 40. In 412 the *notarius* Marcellinus had in mind exact judicial retaliation against members of a mob that put out a man's eye and amputated a finger. Augustine wants to talk him out of it, Ep. 133.1, cf. idem, *De gestis cum Emerito* 9 (PL 43.704), a bishop's tongue and hands cut off in sectarian strife in A. D. 404.

⁴¹ Theodoret, H. E. 2.28 (PG 82.1083) = 2.32.3 (GCS ed. 1954) in the 350s; Oros., *Hist. adv. pagan.* 1.42.4, Honorius mutilates Attalus; *Olymp. frag.* 8, Stilicho mutilated before execution, as the rebel John is likewise treated under Valentinian III. See Procop., *De bell.* 3.3.9 (A. D. 420) and Philostorgius, H. E. 12.13 p. 149 BIDEZ (with other mutilations earlier, 12.3 p. 142 BIDEZ and 12.5 p. 144 BIDEZ). By 458 (Nov. Maj. 4.1.1, against destruction of public buildings) mutilation becomes a set penalty and remains so thereafter in Byzantium, whence it spreads by the mid-seventh century to the west. See R. S. LOPEZ, *Byzantine law in the seventh century*, *Byzantion* 16 (1942–43), 450–455, and PATLAGEAN 408 and 412 (under Justinian).

⁴² I have tried to put this quality of punishment in context, without really explaining it, in *Some pictures in Ammianus*, *Art Bull.* 46 (1964) 452 f.; see further PATLAGEAN 421 f., who draws a parallel to the message implicit in the body of the Christian ascetic. Both teach symbolically. But I would not attribute the appearance of mutilation in the empire's history to the domination of Christianity – except perhaps as carrying forward Jewish ideas. See D. FIENSY, *HThR* 76 (1983), 257 f.

⁴³ For the Republican background, see MOMMSEN, *Strafrecht* 914; for the Principate, above, notes 8–11, and Jos., *B. J.* 2.246, the arch-criminal to be dragged round the city before beheading.

⁴⁴ *Amm.* 15.7.3–5; again in Rome, 28.1.16, many executed *publica morte*; cf. SHA Sev. Alex. 36.2, the Forum Transitorium is the place of execution – a tale I take to be indicative of the fourth century, not historical – and *Coll.* 5.3.2 (FIRA² 2.557), criminals to be burnt alive, *spectante populo* (in Rome). Cf. Hier., Ep. 1.7, varied and hideous tortures on a woman in Ver-cellae, all before the governor and the *populus*.

⁴⁵ Andronicus in Synes., Ep. 57 (PG 66.1389C); cf. Ep. 58 (PG 66.1400B), describing «the

of all, it is Antioch, thanks to descriptions by Libanius. Behold the councillor Kyriakos after receiving 250 lashes and more. He is a mass of blood and water (since a water jar was smashed by the torturer in the midst of his exertions). We see how successive governors, in the name of questioning, «draw forth streams of blood in their courtrooms by floggings, but beat upon bodies bereft of their souls, abusing mere dumb clay». ⁴⁶ The crowds look on, with what emotions we can only imagine. In the very streets they are pursued by the sights of savagery: for beaten men are paraded about the city to exhibit their torn backs. ⁴⁷

In sadistic men, no doubt prevailing standards of permissible severity brought out the worst. Contemporaries knew and recognized the likes of Urbanus, An-dronicus, Eutropius, Festus, Maximus, and others less famous. ⁴⁸ But, by those same standards, conduct that we shudder at was acquitted or vigorously defended. ⁴⁹ Protest might be raised sometimes against violent steps that emperors have in mind or have just taken in individual cases: Ambrose rebukes Theodosius over the massacre in Thessalonica, Augustine tries to soften Honorius' agent in Carthage (Ep. 139.1 f.), Themistius dissuades Valens from excessive application of the death penalty (Soc., H. E. 4.32), John Chrysostom and Libanius independently urge mercy toward those involved in the rioting of 387 in Antioch, and Libanius alone often addresses Theodosius to moderate the punishment of the city's councillors. Spokesmen of eminence were expected to represent both their own communities and the cause of mercy in the abstract. But the right of the emperors to legislate as harshly as they thought necessary is never challenged, and legislation continues to develop along the lines I have been following, that is, toward ever-higher levels of violence.

unheard-of types of torture tools . . . the finger-breaker, the foot-crusher, the presser, the nose-tweezers, the ear-chewer, the lip-twister», employed by this man.

⁴⁶ Or. 28.13 f. and 45.29. Libanius, man of conscience, takes a chance in these descriptions. He returns to the subject, e. g. Or. 27 passim; 54.51; or 4.37, where the wicked Eutropius, governor of Syria in 389, is seen flogging people frightfully, «an outrage to the public image of the city, . . . before the eyes of all». Note the governor's «laughter . . . and his delight».

⁴⁷ J. H. W. LIEBESCHUETZ, *Antioch* (Oxford 1972), 52, citing Or. 1.228 and 29.11. On the disgrace keenly felt through being so displayed, see the description of Nectarius' family, Aug., Ep. 103.4; also, comparatively, J. C. BAROJA, Honour and shame, in *Honour and Shame*, ed. J. G. PERISTANY (London 1965), 103, on the disgrace felt through flogging in 17th cent. Spain.

⁴⁸ There is Urbanus, governor of Palestine, n. 30; also the governor of Syria in the 360s, Festus, in Eunap. frg. 39 (FHG 4.29), «a man of wicked nature . . . , in the penalties he inflicted exceeding the savagery approved by the palace»; or Maximus, *vicarius* of Rome in A. D. 370–371, in Amm. 28.1.10–40; others above, nn. 44 f.

⁴⁹ Constantine, Julian, Gratian, above, nn. 32 and 37; for the argument that harsh laws teach by terrifying, see above, n. 12, and D. 48.19.16.10, «the *supplicium* of a few malefactors may be a warning, *exemplo opus sit*, to the many», cited by CALLU 342 n. 118; and, for a later period, he cites CT 9.24.2 of A. D. 349 (add 11.16.11 a. 365, 9.27.3 a. 382, and 14.3.17 a. 390, all to the same effect; CT 8.5.56 [396] and Eunap. frg. 35 [FHG 4.27]; not quite so explicit are CT 9.16.1 [389] or 11.4.1 [372]).

Now to finish the count of capital crimes, which had risen above sixty-odd at the end of Constantine's reign, including a great many to be punished by something more awful than mere decapitation: heretics continue to be executed in the course of the next three generations, as before, and counterfeiters, rapists, informers, and slaves bringing charges against their masters. New laws reiterate the old on all these and other matters, too, where it is not thought sufficient simply to maintain the legislation of Constantine or his predecessors on the books.⁵⁰ But many, many acts hitherto not specified as illegal at all, or not judged serious enough to deserve capital punishment, now qualify for the death penalty. Pagan rites qualify (CT 16.10.4 and 6), but also any failure to enforce anti-pagan measures on the part of a governor's staff-members (CT 16.10.13.1). That last has about it the ad-hoc quality which begins to appear in the later third century. So likewise does the ban on proposal of marriage to a nun (the suitor is to be burned alive, CT 9.25.2), or on officials' falsely claiming to be on a search for deserters (CT 7.18.17). It is death, again by fire, to divert the waters of the Nile flood from their natural course (CT 9.32.1, cf. D. 47.11.10); death, for a supervisor of an imperial post-station to be absent without leave for more than a month (CT 8.5.36); and death to clerks in Rome who put citizens on the dole illegally (CT 14.7.6). Anyone reading instead of destroying libelous writings is to be beheaded (CT 9.34.7). As for government servants who sell or suspend or bend their authority, of course for a price, they are the target of a particular bombardment of horrific threats, very much in the spirit of Constantine's earlier.⁵¹

Arriving at some date around the sack of Rome, we find ourselves here con-

⁵⁰ Capital punishment for heretics, CT 16.1.4 (386), 16.5.9 (382) and 56 (410) – as also for hiding heretical writings, 16.5.34.1 (398), or permitting meetings of heretics, 16.5.36.1 (399) and 51 (410). Regarding counterfeiters, see CT 9.21.5 (343), 9.21.6 (349), 9.23.1 (348/352–6), and 11.21.1 (371); slave rapists, 9.24.2 (349); informers, 10.10.10 (365), 10.10.12.2 (380), and 10.10.13 (380); and slave litigants, 9.6.1 (376) and 3 (397). More or less reiterative laws threaten deserters and their accomplices (7.18.2, 4, 6, and 8), brigands (even though veterans, 7.20.7), assault (9.10.4), magic (9.16.11), astrology (9.16.8), divination (9.16.4), infanticide (for divination, 9.14.1), inflicting injury on *navicularii* (13.5.16) or taxing them (13.5.17), plotting homicide against senators and high officials (9.14.3), and conversion to Judaism wrought by a Jew (16.8.6 and 16.9.2).

⁵¹ CT 1.16.5 and 11; 7.4.30; 8.1.13; 8.5.14, 41, and 47; 9.27.5; 9.28.1; 9.40.16; 11.1.22; 11.8.1; 11.11.1; 12.1.179.4; 12.6.5 and 30; 12.11.2; 13.10.8; and 14.15.6. Slightly different is the illegal assigning of confiscated estates (5.15.21), peculation of gold from the imperial stores (10.24.2), or exporting of goods raised as taxes (13.5.33). Besides bureaucratic corruption, broadly defined, the death penalty smites libel (a second time, CT 9.34.10), marriage to a niece (3.12.1), to a barbarian (3.14.1), or to a woman, by a male homosexual (9.7.3; GRODZYSKI 378 n. 50). Self-mutilation to avoid conscription was a capital crime (7.13.5); torturing decurions (if by a judge, *index*: 9.35.2) or hiding them if they are fugitives (12.1.50); hiding the property of the proscribed (9.42.5); harboring brigands (if a *vilicus*, *crematio*: 9.29.2); appointing a Christian as a temple-warden (16.1.1); offering violence to a Christian priest (16.2.31); religious rioting (16.4.1); and catamites (9.7.6 = Coll. 5.3.2, above, n. 44).

fronting a system of penal repression announced, open, unapologetic, and in full accord with the brutal impulses recorded of individual emperors. We cannot dismiss any one of them, no matter how bloodthirsty they may appear, as an unrepresentative departure from moral values and standards in the surrounding society. Men and laws are of a piece.

But the development in turn leading up to that system of repression can be followed out at the level of day-to-day judicial activity in the provincial courts. There also the tendency to severity is manifest. Its early targets had been people of no weight or standing in their communities, *humiliores*, whose gradual subjection to torture as defendants and even as innocent witnesses was outlined above (p. 152 f.). Much of that process of degradation of *humiliores* is inferred from a similar process working upon their superiors, town councillors and higher, the *honestiores*; and the loss of rights by these latter is likewise a gradual thing. Protest by Lactantius early in the fourth century illustrates what is happening (*De mort. persecut.* 21.2 f.): a Roman emperor is modelling his conduct on that of an Oriental despot, who treats all men as if they were slaves; and «not only are town councillors tortured by him but the very foremost in cities, men of the rank «Distinguished» and «Most Excellent», and even in trivial and purely civil matters». It is outrageous, and Lactantius supposes his readers will be shocked, that traditional rights are being so violated. Only a few years later, however, Constantine (CT 9.19.1, a. 316) takes up the matter of forged wills and provides for the torture of the accused, town councillor or not. Then in 319 (CT 9.21.1) he recognizes the special status of decurions as opposed to mere plebeians, in regard to permissible penalties for counterfeiting. For magic, however – a serious charge – «although the bodies of persons of rank are exempt from torture», yet even such a one «shall be handed over to the rack, and have his sides consigned to the tearing claws» (or «hooks», CT 9.16.6, a. 358).

Back and forth, without consistent practices, the tendency of the laws and judges alike vacillates; yet generally in an Oriental direction, as Lactantius would say. At last we arrive at Antioch of Libanius' day and at those horrific beatings of decurions which he details.⁵² More than one of their victims died under the lash. The harshest times begin in the late 370s or 380s, and conclude the process by which more and more of the population is reduced to the judicial vulnerability of slaves. To this end, governors in provincial settings have contributed quite as much as emperors and legists in the capital.

To recount the history of judicial savagery in the empire, to follow it from its least to its most pronounced form over a span of four centuries and more, to quantify its effects in terms of capital punishment especially, and to indicate how

⁵² Above, p. 160. On cruel and abusive treatment of decurions, see LIEBESCHUETZ 166 and 173 f., n.7; P.PETT, *Libanius et la vie municipale à Antioche* (Paris 1955), 258 f.; and B.SCHOUER, *Libanios. Discours moreaux* (Paris 1973), 114 and 117.

pervasive it was and how naturally it seems to conduct the civilization of the ancient world into the medieval and Byzantine – all this is one thing. Explanation is another.

Some preliminary statements: first, it is safe to say there is no explanation for which any real demonstration has been offered. Second, it is not likely that so broad a development will have a single cause. And third, the devices of cruelty, crucifixion in particular, and the willingness to use them, did not have to be invented for the uses of the empire. They could be drawn from neighbors or absorbed in the course of conquest.⁵³ In the end, however, they had to be applied internally. It hardly counted that they might have been turned against the enemy in defeat, like the Astures whose hands were cut off (Dio 53.29.2, in 24 B. C.) or the Jews who were crucified in 70 (Jos., B. J. 5.450); against the mercenaries who had deserted to the enemy and were later caught and thrown to the beasts in 147 B. C. (Val. Max. 2.7.13), or the full citizens who defected from the empire and could be burned alive as if enemies (D. 48.19.8.2). Special brutality may be reserved for the outsider by any code of law without implying a match in the measures it employs on members of its own community.

It is worth recalling at this point the protection accorded to citizens in the Republic. They were neither tortured nor executed. At worst they might be deported, like Milo; or like Verres they might seek voluntary exile as their best choice. Only in two settings in Roman society was this protection absent: where masters confronted their slaves, or officers, their men. In both settings, so long as there was provocation, extremest severity was looked on as entirely proper. And, for members of the ruling class, both settings formed a part of their normal life experience, thus providing a particular, variant, but acceptable standard in the use of force by superiors against inferiors. In various ways and arguments, the importance of the slave- and soldier-model has been recognized.⁵⁴

The psychological explanation has been recognized, too, by which standards of

⁵³ Drawn from Greece, for example. I am not competent to explore the matter. For Athenian judicial savagery, however, Plato, Rep. 361C, is most informative and horrible; and, besides the institution of ἀποτυμπανισμός, Romans had many a glimpse of Greek barbarism, e. g. Livy 32.38.8, 39.35.8, and 45.10.14. As to modes of torture, crucifixion is not so likely to be Greek (HENGEL, Crucifixion, 30) as Carthaginian (ibid. 22 and CALLU, 337); and most or all fancy devices to inflict pain appear in eastern provincial (therefore originally Hellenistic?) settings.

⁵⁴ GRODZYSKI 393 points to the approximation of the colonus' condition to that of slaves, as an aid in explaining the fourth century penal standards – the century of «férocity maximale. Pire qu'avant, pire qu'après» (396, cf. 372). And all writers on penal law from MOMMSEN through GARNSEY recognize in the sources the prominence of the rules of servitude in defining extreme tolerable force – punishment *servili modo* or the like phrase. Of the soldier model, CALLU (318 and 321 f.) found prominent mention in the later biographies of the Augustan History and uses that source (331 f.) to illustrate how the army could be seen as «le modèle disciplinaire de la société toute entière» in the later empire.

humanity that governed other relationships could be dispensed with: for rank and distance set apart the men who ordered and the men who suffered violence. TOQUEVILLE has been quoted to good effect: «à mesure . . . que les peuples deviennent plus semblables les uns aux autres, ils se montrent réciproquement plus compatissants pour leurs misères, et le droit s'adoucit». ⁵⁵ Contrariwise, in the Roman empire, as men were distanced from each other, they might try to bend others to their will with ever greater ferocity; for they could not imagine themselves ever having to suffer what they inflicted on their inferiors. The ultimate restraint was thus lost: the restraint of inner pain and horror felt vicariously. Penal law merely rationalizes this.

It is easy to identify distance and antipathy sufficient to explain how Augustus, Tiberius, or Claudius could mistreat conspirators against themselves. As the monarchy became more established, moreover, so the gulf continued to widen between the emperor and everybody else. To so high a person as himself, it might seem right to treat even the most eminent citizens as if they were delinquent aliens, slaves, or private soldiers. It is easy, too, to understand the loss of traditional guarantees against corporal punishment in the face of the emperor or his immediate delegates presiding over appellate courts in the capital, say, in Pliny's day. The impact on penal law of the monarchy itself has often been discussed. ⁵⁶ We are not even surprised that harsh treatment might be employed against provincials by someone like Pliny, thoroughly decent according to the values and standards of his own society. Like so many men of his class at some point in their careers, he found himself fifteen hundred miles from home, High Commissioner or Gouverneur-Général over colonial folk totally different from himself and totally subject to his authority. Some who alleged Roman citizenship knew no Latin to speak of, or speak with. How could they say, then, that they were entitled to the same consideration that this decent man would show to his neighbors around Como? Distance, again. Being compounded of social and cultural membership as much as the bare law, citizenship was vulnerable to extra-legal attack, and gradually yielded its associated guarantees against *tormenta et eculei atque lacerationes*. It yielded to considerations of wealth, accent, education, dress and demeanor. These were what established your claims to be considered «one of our kind» by your judges.

Evidence? We have only one courtroom speech from all the period of the empire: Apuleius' *Apologia*. In it he is at pains to establish the alignment of his own with the judge's general culture, which is, of course, Greek and Latin rhetoric plus the supporting parts, or tags, of ancient literature, history, and philosophy. The value set on such knowledge, to the point of defining a person's whole merit and

⁵⁵ GARNSEY (art. cit. above, n. 2) 158.

⁵⁶ Ibid. 141 f. (MONTESQUIEU and others); and BAUMAN (art. cit. above, n. 2) 202 f. and 208 f., discussing how the interpretation of crimes like counterfeiting or sedition as *laesa maiestas* might make them subject to harsher treatment. But the evidence all comes from the late empire.

admission into the governing cadre, is easily discovered at any point in the second century.⁵⁷ One might compare the weight, equivalent to all that could be won in mathematics and science, assigned by the British Civil Service examinations to a knowledge of exactly those things that defined Pliny and Apuleius. Over these examinations, cultural leaders were still asserting their personal supervision well into our own century.⁵⁸ Extraordinary!

Definition of citizenship in terms of culture rather than according to the letter of the law seems to me the best explanation, over most of the Principate, for the denying of rights to a person having technical title to them; for the central phenomenon we must explain is (to repeat) not new cruelty, but cruelty applied to new categories of person. The perception of the targets then must have undergone some gradual change, expressed among the more powerful members of society by a bearing and tone of address that we call <autocratic>. Gradually, too, but after a lapse of time, change found more formal expression in law – at which point (but as a symptom, not a cause) we can describe the judicial consequences found in such terms as *humilior*, *inferior*, and so forth. But it is important not to confuse cause and affect.

Another cause has been suggested, too: jurisdictional changes. Perhaps by the Severan period they were beginning to make a difference. Much civil litigation – eventually all – passed from jury trials to the criminal courts before a judge. The latter tended more naturally toward severity.⁵⁹ However that may be, from Severan times onward the life of the emperor more often involved him directly in warfare, he spent more time in camp, he more often rose to the throne from the camp, and the cumulative effect of the circumstances may explain an increasing disregard for civilian niceties in sentencing. Finally, in the fourth century of «férocité maximale»,⁶⁰ the ambitions of the imperial government overtopped its ordinary powers

⁵⁷ See Apul., *Apol. passim*, for parade of learning, e. g. § 30; more especially § 25 lines 30 f. in the Oxford edition, inviting the judge «to recall with me» a long passage quoted in Greek from Plato; 36 line 12, praising the judge's *eruditio* and knowledge as well as admiration (41 line 11) of Aristotle's works; and again, appeal to the judge's familiar reading of Plato (64 lines 12 f.). Note also the exclaiming over the exquisite literary style of the previous governor, 94 lines 16 f.

⁵⁸ J. ROACH, *Public Examinations in England 1850–1900* (Cambridge 1971), 196, on the scoring; E. ABBOT and L. CAMPBELL, *Life and Letters of Benjamin Jowett* (New York 1897), 2.350; EIDEM, *Letters of Benjamin Jowett* (New York 1899), 153; *Dict. National Biog.* 1912–1921, 513, and J. W. MACKAIL, *James Leigh Strachan-Davidson* (Oxford 1925), 87 – with thanks to F. TURNER's kindness in getting at these matters.

⁵⁹ GARNSEY (art. cit. above, n. 2), 150 and 157 f., without indicating the basis for saying that judges sentenced more harshly than juries. I am not sure the evidence for a comparison exists. The change in any event does not seem to concern the erosion of citizen *rights* as opposed to non-legal claims to a mild sentence.

⁶⁰ Above, n. 54 (GRODZYSKI), or A. PIGANIOL, *L'empire chrétien* (Paris 1972), 454: «La législation criminelle du IV^e siècle laisse une impression d'horreur; beaucoup de lois semblent dictées par des furieux.»

of enforcement; it imposed too many, too complicated, and too painful obligations on its citizens, who would not do as they were told; and it resorted increasingly to extraordinary punitive pressure. Judicial cruelty was the «*signe parmi tant d'autres d'un pouvoir qui se voudrait obéi et se sait impuissant*».⁶¹

So a succession of causes and changes carry my subject to the edges of another era. But I should not leave the last word to the angry oratory of imperial legislation. After all, it is men that make laws, not vice versa. Their ideas of right derive from their whole experience; they are taught by the whole of their society and by all the roles they may have played. At the end, there is less of the reader of Paul's *Sententiae* or the Gregorian Code, and more of the army commandant and master of slaves, in the character of that great power at court and future emperor, Constantius. Surely he appears before us, around the time of the sack of Rome, a more medieval or Byzantine man than Roman.

«Constantius as he circulated kept his eyes down and his expression lowering. He had large eyes, also a thick neck, a flat head always held low over the neck of the horse that bore him. Thus he seemed to everyone, as the saying has it, «most truly autocratic»».⁶²

By the plotting of this ugly and sinister man and no doubt in the presence of Honorius (for executions of high officials ordinarily did take place before the throne), the ex-Master of Offices «was killed through being beaten with clubs at Constantius' orders, after having his ears cut off».⁶³

Department of History
Yale University
P.O. Box 1504A Yale Station
New Haven, Conn. 06520 – 7425
U.S.A.

⁶¹ J. GAUDEMET, *Aspects politiques de la codification théodosienne, Istituzioni giuridiche e realtà politiche* (Milan 1976), 279; on the ineffectiveness of imperial legislation, often noted, see the Theodosian Code *passim*, noting the repeated laws that had not been obeyed, redoubled harshness of penalties that had not deterred, and a general tone of frustration. For a few details, see my *Social mobility and the Theodosian Code*, *JRS* 54 (1964), 49 f.

⁶² εἶδος ἄξιον τυραννίδος, *Olymp. frg.* 23 (FHG 4.62).

⁶³ *Idem frg.* 8 (FHG 4.59), on Olympius' death. Stilicho's party had been killed at Pavia before the emperor and so was Eusebius at Ravenna (also by clubbing, *Olymp. frg.* 13, FHG 4.60).