

1-1-1968

Why Penalties Become Harsher: The Roman Case, Late Republic to Fourth Century Empire; Note

Peter Garnsey

Follow this and additional works at: http://scholarship.law.nd.edu/nd_naturallaw_forum



Part of the [Law Commons](#)

Recommended Citation

Garnsey, Peter, "Why Penalties Become Harsher: The Roman Case, Late Republic to Fourth Century Empire; Note" (1968). *Natural Law Forum*. Paper 143.

http://scholarship.law.nd.edu/nd_naturallaw_forum/143

This Note is brought to you for free and open access by NDLScholarship. It has been accepted for inclusion in Natural Law Forum by an authorized administrator of NDLScholarship. For more information, please contact lawdr@nd.edu.

WHY PENALTIES BECOME HARSHER: THE ROMAN CASE, LATE REPUBLIC TO FOURTH CENTURY EMPIRE

Social or legal thinkers who have sought to explain historical changes in patterns of punishment have commonly illustrated their theories with reference to Rome. The case of Rome, where, according to the accepted view, a lenient penal system in the late Republic gave way to a progressively harsher system under the Empire, has been cited in particular as evidence that political causes underlie fluctuations in penalties. It has been suggested that the upward trend in penalties in Rome can be explained in terms of the substitution of monarchy for aristocracy, and the increasingly absolutist tendencies of the monarchy. In the following pages, this and other theories of penal change are considered, in the light of developments in Rome over a period of about five hundred years, roughly from the middle of the second century B.C. to the close of the fourth century A.D.

The theory that changes in penal law are closely related to political developments was first put forward by Montesquieu.¹ He regarded the view as vindicated by the example of Rome: ". . . I believe that punishments are connected with the nature of governments when I see this great people changing their civil laws in this respect [that is, in respect of punishments] in accordance with alterations in their form of government."² Montesquieu found that penalties were harsh in Rome when the government was tyrannical in nature; for example, under the early kings, at the time when the *Twelve Tables* were in operation in the early Republic, and in certain periods under the Empire when individual Emperors reigned more like military despots than constitutional monarchs. Under monarchies, the risk of arbitrariness was reduced and concessions were made to rank. Thus, he argued, the rule of the more moderate Emperors was marked by differential treatment of higher and lower orders — the former were punished leniently, the latter severely. Only under the Republic (after the penal sanctions of the *Twelve Tables* had been set aside) were arbitrariness and inequality absent and leniency practiced towards all citizens in the administration of the law.³

Montesquieu did not discuss in detail the reasons for the characteristic harshness of the penal codes of despotic regimes, stating only that severe penalties were inevitable when despots ruled by inspiring terror in their subjects. Black-

¹ MONTESQUIEU, *DE L'ESPRIT DES LOIS* bk. VI *passim* (1748). At any rate, Montesquieu claimed originality, in a gloss to the beginning of ch. 15: "J'ay du plaisir quand je trouve l'occasion de faire voir le rapport que les loix civiles ont avec les loix politiques, chose que je ne sçache pas que personne ait fait avant moy."

² "Je me trouve fort dans mes maximes, lorsque j'ai pour moi les Romains; et je crois que les peines tiennent à la nature du gouvernement, lorsque je vois ce grand peuple changer à cet égard de loix civiles, à mesure qu'il changeoit de loix politiques." *Id.* at VI, 15.

³ The above section is a summary of chaps. 9 ("De la sévérité des peines dans les divers gouvernemens") and 15 ("Des loix des Romains à l'égard des peines").

stone gave a more precise explanation of the same phenomenon when he wrote, in the *Commentaries*:

We may further observe that sanguinary laws are a bad symptom of the distemper of any state, or at least of its weak constitution. The laws of the Roman kings, and the twelve tables of the *decemviri*, were full of cruel punishments: the Porcian law, which exempted all citizens from sentence of death, silently abrogated them all. In this period the republic flourished: under the emperors severe punishments were revived; and then the empire fell.⁴

Blackstone seems to be asserting that the severity of the penal code of a state is an index of the weakness or insecurity of the government of that state. His choice of examples (the kings, the decemvirs, the emperors) suggests that he thought absolute governments were necessarily or at least typically "of weak constitution."⁵

The political explanation of penal change recurs in Durkheim's *Deux lois de l'évolution pénale*, as part of a general theory of historical changes in penology. His "Law of Quantitative Variation" states that the penal systems of societies become milder, on the one hand as societies become more "advanced" in structure and organization, and on the other hand as their governments move away from absolutism.⁶

Durkheim, in his analysis of the political factor, emphasizes that a penal system will reflect the quality of the relationship between ruler and ruled. The relationship between an absolute sovereign and his subjects is not reciprocal but unilateral. As a Roman father by the civil law "possessed" his son, almost as he might possess a piece of property, so the absolute sovereign, according to Durkheim, has complete control over his subjects; he is not obliged to keep one side of a contract, nor is he bound by any regulation to protect the rights of the individual. Moreover, the absolute ruler is so far raised above the common run of men that he is likely to acquire a semidivine status. Since the ruler is the source of all law, not only crimes which threaten his life and dignity, but all or most infringements of the law are likely to be punished harshly, as akin to sacrilege.⁷

Durkheim was aware that the two factors (one sociological, the other political), which in his mind determined the quality of a society's penal code, are

⁴ WILLIAM BLACKSTONE, 4 COMMENTARIES 17 (3rd ed., 1768-9). See J. HEATH, EIGHTEENTH CENTURY PENAL THEORY 190 (Oxford, 1963).

⁵ This idea is not totally absent from DEL L'ESPRIT DES LOIS (see, e.g., V, 14), but is given little emphasis there.

⁶ DURKHEIM, 4 L'ANNÉE SOCIOLOGIQUE 65-95 (1899-1900), discussed, to my knowledge, only by E. A. Tiryakian, *Durkheim's "Two Laws of Penal Evolution,"* 3 JOURNAL FOR THE SCIENTIFIC STUDY OF RELIGION 261-6 (1963-4). The Law runs: "L'intensité de la peine est d'autant plus grande que les sociétés appartiennent à un type moins élevé — et que le pouvoir central a un caractère plus absolu."

⁷ DURKHEIM, *op. cit. supra* note 6 at 66-8, 93-4. On the father-child relationship, Durkheim might have quoted CICERO, PRO PLANCIO 12. 29: "parente . . . quem ueretur ut deum, neque enim multo secus est parens liberis."

quite independent.⁸ Absolute power may be associated with single or complex kinds of society (societies which are less "advanced" or more "advanced"), and, in a single state, a drift towards or away from absolute rule is not necessarily accompanied by organizational or structural changes of a social kind. He saw Rome as a case in point. The basic cause of the relative harshness of Imperial penal law as compared with Republican penal law was, in his eyes, the tendency towards absolutism of the government under the Empire.⁹ It is curious that, although the factor of central importance for Durkheim was the degree of complexity of a society, most of the material he assembled in the course of his sweeping survey of history from ancient Egypt to nineteenth-century Europe relates only to the political explanation. He does not seem to have recognized that this casts doubt on the relevance of the social factor, the degree of advancement of a society, as a determinant.

The political explanation for penal changes, as outlined by the theorists so far considered, is too general to be very informative, but it at least provides a starting point for a more detailed discussion of the issues involved. Its usefulness will depend on the extent to which it can be related to specific developments in the Roman penal system, which I now propose to analyze.

I

The accepted view is that the penal system of the middle and late Republic was relatively mild. The system as we know it was milder in practice than it was in theory. In theory, death was the penalty for a number of crimes, among them, apparently, treason, incest, homicide (including parricide and murder by poison, which in Rome was commonly connected with sorcery), judicial corruption, the forgery of documents or coins, and public violence. However, officials having responsibility for law enforcement did not as a rule see to it that the death sentence was executed. A defendant on a capital charge was allowed the opportunity of leaving Rome and Italy before he was actually found guilty by the court. This "self-imposed" banishment became permanent when a bill of outlawry, or "interdiction from fire and water," was passed, stating in effect that any "exile" who returned to Roman soil might be put to death with impunity by anyone. The system appears to have been modified in two respects in the closing decades of the Republic. First, outlawry was apparently transformed from an administrative sanction, in the form of a bill passed perhaps once each year and applying retrospectively to all voluntary exiles of the year, into a formal penalty applying by law to a particular defendant found guilty of a capital offense. Whether the death penalty was suspended about the same time, as some scholars have believed, must remain doubtful.¹⁰ That it was rarely applied throughout

⁸ DURKHEIM at 69. The sociological factor is treated at length in Durkheim's earlier works, *DE LA DIVISION DU TRAVAIL SOCIAL* (1893), and *LES RÈGLES DE LA MÉTHODE SOCIOLOGIQUE* (1895).

⁹ "Mais quand, avec l'empire, le pouvoir gouvernemental tendit à devenir absolu, la loi pénale s'aggrava." *Id.* at 74.

¹⁰ See, e.g., E. LEVY, *DIE RÖMISCHE KAPITALSTRAFE* 14 (Heidelberg, 1931). The best book on Roman criminal law is still TH. MOMMSEN, *RÖMISCHES STRAFRECHT* (Leipzig, 1899).

the period, however, is not disputed. Secondly, Julius Caesar attempted to ensure that those convicted of capital crimes did not get off with all their financial assets as well as their lives. According to Suetonius, Caesar enacted that parricides should suffer total confiscation, and other capital offenders should retain half of their property.¹¹

So far it is possible to proceed with a measure of confidence, although the answers to some questions are uncertain. But more difficult problems are encountered when it is asked to what extent the system as described above was applied. All the evidence for the evasion of the death penalty through voluntary exile is related to defendants from the senatorial order. We have no information regarding the treatment of rank-and-file citizens as defendants. It may be that the magistrates, drawn from the senatorial order, were less inclined to permit low-status defendants to remain out of custody before trial, than they were to grant this to high-status defendants.¹² A remark of a leading senator in a senatorial debate of 63 B.C. suggests that the ruling class in Rome did not have the concept of a uniform penal code for all Romans. When Silanus the consul-designate opposed the use of the death penalty against senators allegedly implicated in the Catilinian conspiracy, he argued that the highest penalty for a senator was imprisonment.¹³ By implication, he did not exclude execution as a penalty for ordinary citizens.

As for aliens of free birth, some communities within the Empire were able, to the best of our knowledge, to dispense criminal justice over their own citizens even in the late Republic. Again, little information is available about the way in which aliens were dealt with by Roman judges and juries, both where local tribunals had given up jurisdiction over crimes to proconsuls, and in Rome, where aliens seem to have had access to Roman courts. Of course aliens, as technically outside the civil law, were allowed no legal means of defense against magisterial arbitrariness—they could not appeal against summary beating, imprisonment, or execution. But to say this is not to convey any information about the quality of the justice which aliens regularly received from Roman judges, or about the kinds of penalties they suffered when the judgment went against them. To my mind it is a safe conjecture, that, just as the Romans in their political relations with their subject peoples did not regard them as one homogeneous class, but favored the local aristocracy (confirming them in power in their cities, granting them citizenship and access to the higher orders in Rome), so in their administration of the law they gave more generous treatment to the wealthy and influential than to the mass of provincials.¹⁴

To summarize: the penal system of the Roman Republic was milder for citizens than for noncitizens, and in all probability for higher orders than for

¹¹ Suetonius, *Divus Iulius* 42.

¹² It should of course be borne in mind that some crimes, e.g., judicial corruption and extortion, were only abnormally committed by men of low rank.

¹³ Plutarch, *Cicero* 21, 3.

¹⁴ See n. 48 below, for judicial hearings for noncitizen defendants. For local criminal jurisdiction and the intrusion of the governor, see Mommsen, *op. cit. supra* note 10 at 222-50; Peter Garnsey, *The Criminal Jurisdiction of Governors*, 58 *Journal of Roman Studies* (1968). On appeal, see A. H. M. Jones, *Studies in Roman Government and Law* 53f. (Oxford, 1960); Garnsey, *The Lex Iulia and Appeal Under the Empire*, 56 *Journal of Roman Studies* 167 (1966).

lower orders within both the citizen population and the noncitizen population of the Empire. Under the Empire, outlawry, or interdiction, was made the basis of a formalized penalty of exile. Exile was no longer a self-imposed sanction by which the legal penalty (death) was eluded, but a regular sentence, enforced by the state.¹⁵ Defendants on capital charges were not normally able to choose whether to flee or to wait for a verdict. Before their trial they were, where possible, arrested or kept under surveillance. If found guilty, they were escorted out of the country, often to a specific place of banishment. Imperial rulings fixed the consequences of exile: they consisted of loss of status (including citizenship) and partial confiscation of property.¹⁶

The death penalty, meanwhile, was not suddenly reintroduced. As before, it was there to be invoked in exceptional circumstances, and especially for the punishment of high treason. In the senatorial debate already referred to, Cicero and Cato persuaded the majority of the Senate, against the advice of Caesar and Silanus, that Lentulus and his alleged co-plotters had forfeited their rights as citizens by conspiring to overthrow the constitution, and merited immediate execution. Where the Empire diverged from the Republic was in the interpretation of what constituted high treason.

The crime of treason was not amenable to precise definition. Cicero described treason, or "the diminution of *maiestas*," as "the diminution of the dignity, grandeur and power of the people or of those to whom the people have entrusted power."¹⁷ Under the Republic the treason law was comparatively narrow in scope. It covered armed rebellion, sedition, and certain offenses of magistrates or promagistrates, such as unauthorized departure from a province or unauthorized waging of a war.¹⁸ It would plainly be difficult to restrict the number of offenses included in the law once the focus of the law had changed and its chief purpose had come to be seen as the protection of the *maiestas* of the Emperor. There was no theoretical limit to the number of ways in which the Emperor's majesty might be thought to be compromised or slighted. Some extensions of the treason law were accomplished relatively early, and were predictable — for example, slander of the Emperor and the Imperial family, and adultery with a princess. The first of these was in fact resisted by Augustus and by Tiberius, who also stood in the way of the efforts of ambitious accusers and "loyalist" senators to expand the law to encompass numerous petty offenses. But what one Emperor considered trivial a later Emperor might think serious. Tiberius had refused to regard as treason trifling acts of disrespect against a consecrated Emperor (Augustus).¹⁹ However, in the second and the early third century, when greater emphasis was placed on Emperor worship, acts of a

¹⁵ On voluntary exile, see CICERO, PRO CAECINA 100; cf., on exile as a penalty, DIGEST 37.14.10 (Labeo, Augustan jurist, cited).

¹⁶ For enactments of Augustus and Tiberius on the content of exile, see DIO 56.27.2-3; 57.22.5.

¹⁷ CICERO, DE INVENTIONE 2.53: "maiestatem minuere est de dignitate aut amplitudine aut potestate populi aut eorum quibus populus potestatem dedit, aliquid derogare."

¹⁸ For offenses of proconsuls, see, e.g., CICERO, IN PISONEM 50.

¹⁹ These acts included the introduction of an actor-prostitute among worshippers of Augustus, the sale of a statue of Augustus with (other) garden property, and perjury by Augustus' name. See TACITUS, ANNALES 1.73.

similar kind were definitely punished as treason.²⁰ Later Emperors further extended the treason law, by subsuming under it offenses which were more properly covered by other laws, for example, the forgery of coins and the murder of a high official.²¹

Two ways in which the Imperial treason law differed from the Republican treason law have now been specified. A law which had been designed primarily to protect the state was in practice employed to safeguard the position of the Emperor, as the personification of the state; the law was open-ended and far from static. A third difference concerned penalties. Executions for treason were more common under the Empire.²² Execution was exacted for treason under the Republic on those infrequent occasions when the safety of the state was thought to be endangered by armed rebellion or sedition. Those executions, moreover, were carried out in a military rather than a judicial context: they followed the passing of a decree (*senatusconsultum ultimum*) which was a declaration of martial law. Emperors faced not only the threat of armed rebellion, but also that of assassination. Few Emperors, if any, were without enemies, and some felt themselves surrounded by them. In the first century of the Empire alone, a substantial number of senators and equestrians were put to death or forced to take their own lives for allegedly plotting against the Emperor. Further, the basic insecurity of the position of the Emperor was reflected in the administration of the other sections of the treason law. The Republican Senate declared war on and put to death those whose activities were thought to be dangerous to the state, but allowed others convicted of treason to go into exile. Under the Empire, the death penalty was expected in virtually all cases covered by the treason law.

Treason, however, was a special case. The higher orders under the early Empire ran little risk of execution as long as they did not plot against the life of the Emperor or cause him offense. (Given the personalities of some of the Emperors, this was not always easy.) Their position deteriorated little in the second and early third centuries. There is explicit evidence for the applicability of the death sentence in this period only for parricide and arson in its most dangerous form (arson in a city for plunder).²³ The claim of a Neronian senator that exile was the highest penalty for a senator was otherwise true for

²⁰ DIGEST 48.4.5-6.

²¹ CODEX THEODOSIANUS 9.21.9, A.D. 389, 392 (forgery); 9.14.3, A.D. 397 (murder). Add 16.1.4, A.D. 380 (heretics who provoke agitation). For the virtual identity of sacrilege and treason, see n. 72, below.

²² It is unnecessary to document this in detail. The Republican *senatusconsultum ultimum* was used against C. Gracchus (121 B.C.), Saturninus (100 B.C.), Catiline (63 B.C.) and the false Marius (44 B.C.), to mention the best-known cases. For the Empire we must consider both executions which followed military rebellions, and deaths arising out of treason trials (for which there is no Republican equivalent). Even if the Republican proscriptions of, e.g., Sulla are included, the numbers would still be unequal, as the testimony of Tacitus, Cassius Dio, Suetonius, and other sources for the early Empire, should make clear.

²³ DIGEST 48.19.15 (parricide); COLLATIO 12.6.1; DIGEST 48.19.28.12 (arson). No cases of execution for either crime are recorded by the sources for this period, which are scanty and generally of mediocre quality. It is not known whether in the latter case the penalty was stepped up. The penalty for parricide had increased if senators were allowed to escape death under the Republic (see n. 11, above). Of course, the first reference is explicit evidence only for the execution of municipal aristocrats for parricide.

the period up to and including the Severan age (A.D. 193-235).²⁴ The aristocracy lost ground only in the late third and the fourth century, when magic, simple homicide, adultery (and other sexual offenses), public violence, and some kinds of forgery were added to the list of crimes punished with death.²⁵

However, for the lower orders, that is to say, slaves, free aliens, freedmen and citizens of low rank, death was a common penalty, and not only death by decapitation (the least painful and degrading form of execution), but also death by fire, exposure to wild beasts, crucifixion, and mortal combat. At least some of these sanctions had been used under the Republic, but only against slaves and deserters with any degree of regularity.²⁶ The novelty lay in their application under the Empire to free men of low status whether citizens or noncitizens. We should be careful not to exaggerate the rate at which the situation of this group worsened (and the extent to which it worsened). Citizens on occasion had died like slaves at the hands of harsh governors in Republican times. Moreover, such events may have been equally rare and equally disapproved of in the first century of the Empire.²⁷ By the Severan period, however, what had once been irregular was now the norm. This can be gauged, first, from juristic generalizations. Callistratus, writing at about the turn of the second century, remarked that cremation was mostly a slave penalty, but that "plebeians" and "men of low rank" (*humiles personae*) too were burned alive.²⁸ His younger contemporary Macer made the remarkable statement (reversing the expected sequence) that slaves were punished after the example of men of low rank (*humiliores*).²⁹ These comments are supported by evidence, dating from Hadrianic times (A.D. 117-38), of the prescription of these penalties in the punishment of arson, murder, parricide, the more serious cases of sacrilege, and so on.³⁰ Finally the jurists warned against throwing to the wild beasts,

²⁴ Dio 62.15.1a (Thrasea Paetus, a victim, subsequently, of the law of treason under Nero):

²⁵ SENTENTIAE PAULI 5.23.17; cf. 16; CODEX THEODOSIANUS 9.16.1; 4; 8 (magic); SENTENTIAE PAULI 5.23.1 (homicide); CODEX THEODOSIANUS 9.38.1 (adultery); *ibid.* 9.10.1 (public violence); 9.21.5; 9.22; etc. (forgery). Constantine brought back the old, harsh punishment for parricide. See *ibid.* 9.15.1. It is possible that public violence was not punished with death after Constantine except in the case of particularly notorious offenders. It was not one of the unpardonable offenses. See *ibid.* 9.38.3-4, 6-7, etc. The question arises, to what extent were these constitutions applied? This must have depended upon the initiative of the high Imperial officials and the attitude of the reigning Emperor (as well as the discretion of the ordinary judge). Not all prefects of Rome were as zealous as the acting-prefect Maximinus was in detecting, prosecuting and punishing senatorial crime, and not all Emperors were as unsympathetic towards senators as Maximinus' Emperor, Valentinian. A lengthy description of Maximinus' judicial activities is presented in AMMIANUS 28.1.5f. (It is obvious that neither Ammianus nor any other ancient writer was interested in judicial affairs for their own sake, independent of their political import. No cause-list can be reconstructed from the primary sources for any period.)

²⁶ Crucifixion: LIVY 1.26.6; CICERO, PRO CLUENTIO 66.189; PRO RABIRIO 5.16; VALERIUS MAXIMUS 8.4.2; Beasts: *ibid.* 2.7.13; LIVY, PERIOCHAE 51.

²⁷ Republic: CICERO, AD FAMILIARES 10.32.3; 2 IN VERREM 5.162f. (Cicero, needless to say, was bitterly critical of these actions.) Empire: SUTONIUS, GALBA 9; JOSEPHUS, BELLUM JUDAICUM 2.301f.

²⁸ DIGEST 48.19.28.11.

²⁹ *Ibid.* 48.19.10 *pr.*

³⁰ For condemnation to the beasts, see DIGEST 48.9.9 *pr.* (parricide); 47.14.1.3 (rustling); 48.8.3.5 (murder); 48.13.6 (sacrilege). In the case of rustling, the text shows

crucifying, or burning alive decurions (city councillors, the nucleus of the local aristocracy), soldiers, veterans and their children. (A fortiori, the equestrian and senatorial orders were held to be immune from punishments of this kind.) This may be held to confirm indirectly that the penalties were in use.³¹ On a deeper level, it may be taken as firm evidence for the dual nature of the Roman penal system. Individual governors, and Emperors too, in their crueler and more irresponsible moments, used servile or "plebeian" penalties against decurions, equestrians and even senators. But these were isolated acts which clashed with established custom.³²

A number of penalties were not "legal," in the sense that they were never recognized or prescribed by any statute, and, more specifically, by any of the statutes which defined particular offenses and set up jury-courts for their punishment. The criminal law of the late Republic knew as penalties only death (which was normally by decapitation), outlawry or interdiction, and the money fine. Penalties such as crucifixion and cremation were applied in an admin-

that the introduction of the penalty was a post-Hadrianic development. Were these penalties actually applied? Sometimes the text leaves no doubt of it. i) Ulpian knew from personal experience ("*scio*") that many were condemned to the beasts for sacrilege (*ibid.* 48.13.6). It must be stressed that the Antonine and Severan jurists commonly held important posts in the Imperial administration, which carried judicial responsibilities. See W. KUNKEL, *HERKUNFT UND SOZIALE STELLUNG DER RÖMISCHEN JURISTEN* (Weimar, 1952). ii) In *DIGEST* 48.8.3.5, Marcianus states not that exposure to the beasts is the official, or stated, penalty for members of low-status groups, but that it is the *customary* penalty for them if convicted of homicide (or other offenses covered by the Cornelian law *de sicariis et veneficiis*). iii) Where a penalty is laid down in a rescript by an Emperor, it is reasonable to assume (where the context shows that he has been consulted by an official) that the consulting official would follow the Emperor's instructions. In the case of parricide (*ibid.* 48.9.9 *pr.*), it was Hadrian who revised the penalty. The governor in c. A.D. 177 in Lyons sent noncitizen Christians (and Attalus, a citizen) to the beasts after consulting Marcus Aurelius, presumably on the matter of penalties, and receiving a reply. See EUSEBIUS, *HISTORIA ECCLESIASTICA* 5.1.44, 47. Christians frequently suffered this penalty. See F. CABROL, H. LECLERCQ, 1 *DICIONNAIRE D'ARCHÉOLOGIE CHRÉTIENNE ET DE LITURGIE* 452 f., v. "ad bestias" (1924).

³¹ See *DIGEST* 28.3.6.10; 48.19.9.11; 49.16.3.10; 49.18.3. The contexts do not indicate explicitly that any decurions, veterans, et al., actually suffered these penalties. Cf. n. 36, below.

³² JOSEPHUS, *BELLUM JUDAICUM* 2.301f.; PLINY, *EPISTOLAE* 2.11 (governors); Suetonius, *GAIUS* 27.3-4 (Emperor). If the sources were more adequate, we would doubtless be able to add to these references. It is nonetheless correct to regard these as "deviant" cases. i) The proper penalty for *decurions* (and for those with equal *honor*, cf. *DIGEST* 49.18.3) in the case of ordinary capital offenses was exile. See, e.g., the rescript of Marcus and Verus (A.D. 161-7) in *ibid.* 48.22.6.2. Given the nature of the sources, it is not possible to prove that this "official" policy was earned in a majority of cases (see n. 25 *fn.* for comments on the orientation of the sources; there is even less concern with the administration of justice in the provinces than in Rome). Further, *DIGEST* 48.19.15 suggests that decurions suffered nothing more serious than decapitation for "extraordinary" capital offenses (treason, parricide, etc.). The phrase *capite puniri* is normally used for the simple death penalty, death by decapitation, and *summum supplicium* for aggravated forms of the death penalty. ii) As for *equestrians* and *senators*, the evidence for their treatment as defendants is concentrated in the writings of the literary sources for the first century A.D. To balance the three incidents recorded by Josephus, Pliny and Suetonius (above), which were recounted with disapproval by those authors, and explicitly referred to in one case (Josephus) as novel, are numerous cases where exile was the sentence or death by decapitation or the noose. iii) Finally, the evidence already cited (see text to nn. 28-31 and nn.) seems to me to show that *plebeians* regularly suffered aggravated forms of the death penalty.

istrative rather than a judicial setting: they were principally used against members of social groups with no standing in Roman law. One development of the early Empire was the emergence alongside the jury-courts of tribunals which were empowered to try offenses by an inquisitorial procedure. (The jury-courts operated according to an accusatorial procedure.) The judge who administered the new procedure (*cognitio*) controlled the whole trial, including the choice of penalty. As no laws or magisterial edicts governed his investigation, in selecting a penalty he was not restricted to the few which the law recognized. There was no fixed number of penalties, and ingenious judges could devise new ones. One penalty introduced in the early Principate was *metallum*, or condemnation to hard labor in the mines.

Metallum was the most severe secondary penalty in the penal code of the Empire. It was a life sentence. The condemned was beaten, branded, and loaded with chains. His legal position was tantamount to that of a slave. Labor on public works and services, or *opus publicum*, was a milder penalty of the same kind. In this case the condemned retained his freedom, and his sentence was not necessarily for life. These two penalties established themselves in the course of two centuries as the standard alternatives to deportation (or capital exile) and relegation (or noncapital exile). They were intended for defendants of low status alone. This was already indicated by judicial decisions of Hadrian and Pius in the early second century, which allowed for variation of penalty on the basis of status.³³ Moreover, the Severan jurists showed themselves alive to the danger of the indiscriminate use of the penalties of hard labor by identifying specific status groups which were exempt from them.³⁴ That the danger was real is shown by Imperial rescripts, for example, the rescript of Severus Alexander to one Demetrianus, confirming that his mother should not have been (*non oportuisse*) sent to the mines if she was a decurion's daughter.³⁵ The differential-penalty system was naturally more difficult to enforce in practice, especially in outlying areas of the Empire, than it was to set up in theory.

Among minor penalties beating may be singled out. Beating with a rod (or with a whip in the case of a slave) was a form of coercion which magistrates under the Republic were entitled to apply only to noncitizens. In Imperial times, however, it was regularly employed against men of low rank (whether citizens or not) as an alternative to the fine, or as a preliminary to the more severe low-status punishments. In the case of beating also, exemptions applying to certain privileged groups, including, for example, decurions, are implicit or explicit in legal texts of the Antonine and Severan periods.³⁶ The exemptions were, on the whole, maintained in the fourth century, in official policy at least, although the attitude of some Emperors wavered. Meanwhile the

³³ DIGEST 47.21.2 (*opus*); 48.13.8.1 (*metallum*).

³⁴ *Ibid.* 48.19.9.11; 49.18.3.

³⁵ CODEX JUSTINIANUS 9.47.9; cf. *ibid.* 5.

³⁶ DIGEST 48.19.28.2, 5; CODEX JUSTINIANUS 2.11.5. The first text states that convicts of low rank were customarily (*solent*) beaten. The second is a rescript of Septimius Severus (A.D. 193-211) to one Ambrosius, which by its wording leaves no doubt that he, a decurion, had been improperly beaten. It is unlikely that this rescript was the only one of its kind. See DIGEST 48.19.28.2 *fn.* (. . . *idque principalibus rescriptis specialiter exprimitur*).

sanction itself had become more severe, with the substitution of a whip tipped with lead for the rod as the main instrument for beating.³⁷

By the second and third centuries, then, a large proportion of the population of the Empire (for the privileged groups were numerically a small minority) was subject to two new and degrading sanctions, *metallum* and *opus*, which deprived the individual of liberty temporarily or permanently (and in the former case reduced him to the state of a slave), and to bodily chastisement. But we must still ask just how prevalent were these sanctions. To answer this question it is necessary to introduce and explain the jurists' distinction between "public" crimes and "private" (or "extraordinary") crimes. By "public" crimes, the jurists understood those offenses which were defined by statutes and at first investigated by the jury-courts and punished with the penalties established by those statutes. As already stated, execution, interdiction and the fine were the only statutory penalties. The jurisdiction of the jury-courts was gradually undermined by the new mode of criminal justice, *cognitio*, and the courts lapsed into inactivity, at least by the Severan period.³⁸ The statutes, however, had not been revoked; and the crimes, and the courts which judged them, were still thought to possess a special status. In Imperial times, the word "*crimen*" was no longer restricted to offenses punished in "public" courts. In the course of the first century A.D. new "crimes" began to make their appearance, many of which had previously been treated as private delicts, to be avenged by the individual (rather than punished by the state) by a private suit, the object of which was the winning of compensation. By the Severan age there were no "private" offenses which could not be punished by the same procedure which had displaced the criminal jury-courts, *cognitio*.³⁹ Now the judge who investigated a "public" crime by *cognitio* might be guided by the statute which defined the crime and set a penalty, but he was by no means obliged to apply that penalty. If the crime was acknowledged to be capital, the judge was expected to retain "the penalty of the law," interdiction (or its successor, deportation), for defendants of high status, and to sentence others to *metallum* or to some form of the death penalty, depending on the gravity of the crime.⁴⁰ Noncapital crimes, for which a monetary penalty had been laid down by law, would be punished by a fine, or a mild form of exile, or some minor disability (in the case of defendants of high station), and by some kind of public labor or corporal punishment (in the case of other defendants). As for the "private" crimes, no

³⁷ Immunity of decurions: CODEX THEODOSIANUS 9.35.2 *pr.*, A.D. 376 (but see *ibid.* 2.1); 12.1.80, A.D. 380; cf. *ibid.* 85, A.D. 381 (but see 12.1.117, A.D. 387). (Other) references to the leaden whip include: 11.7.3, A.D. 320; 7, A.D. 353; 8.4.14, A.D. 383; 2.14.1.2, A.D. 400; 16.5.40.7, A.D. 407; 53, A.D. 412.

³⁸ Garnsey, *Adultery Trials and the Survival of the Quaestiones in the Severan Age*, 57 JOURNAL OF ROMAN STUDIES 56 (1967).

³⁹ E.g., DIGEST 47.1.3.

⁴⁰ Low-status defendants were on occasion sentenced to some form of exile. See, e.g., Suetonius, *Divus Augustus* 51.1; Tacitus, *Annales* 4.63; 14.62.4; Pliny, *Epistolae* 8.14.12; Digest 48.10.13.1; CODEX THEODOSIANUS 9.17.1, A.D. 340; 8.5.17.1, A.D. 364; 15.12.3, A.D. 397; 9.30.5, A.D. 399; 9.36.2, A.D. 409; 16.5.65.3, A.D. 428. *Relegatio*, or non-capital exile, was of course used as an extralegal sanction in Republican times by fathers (against children), by patrons (against freedmen), and by masters (against slaves). See Mommsen, *op. cit. supra* note 10 at 18f.

"legal" or statutory penalties existed for them, and the judge, if he was not assisted by specific Imperial constitutions, was necessarily influenced by the way in which "public" crimes were dealt with in his day. He would be aware that common use was made of harsh or undignified punishments.

The rule that the use of torture, whether "third-degree" or inquisitorial, was confined to slaves was by and large observed under the Republic. However, an exception was made for enemies of the state both external and internal, and this exception prepares us for the torture of suspected plotters and would-be assassins in Imperial times. There is ample evidence in the literary sources that when treason was uncovered or suspected, defendants and witnesses of any rank were liable to examination by torture.⁴¹ The legal writings too bear witness indirectly to the increased use of the sanction in the judicial system. Certain categories of free men proved vulnerable to torture in the early second century, if not before, and the Emperors were called upon to confirm the exemptions of several groups on the fringes of the privileged class.⁴² But official policy hardened in the fourth century, and whereas immunity from the "plebeian" penalties was apparently retained by those who had possessed it previously, immunity from "servile" torture was definitely limited. High rank ceased to provide protection from torture in cases of magic (or the related activities of astrology, soothsaying, etc.) in addition to treason.⁴³ Further, the least influential and most exposed of the status groups, the provincial aristocracy or "curial class," became, by a ruling of Constantine (A.D. 316), subject to torture in cases of the forgery of documents, whether private or public.⁴⁴ Later Emperors, moreover, drew a distinction between the leading men in this group (the so-called *decemviri* or *principales*) and the rest, and exempted only the former.⁴⁵

It remains to consider imprisonment. Preventive detention before trial, sentence, or punishment is amply documented both for the Republic and for the Empire, and its use was uncontroversial. Imprisonment as a penalty, however, never won official recognition. This suggests that the Romans did not fully understand the direction in which their legal system was moving. In their attempt to control the movements of low-status criminals, the judicial authorities had devised a set of medium-range penalties which were in essence forms of custody. At the same time, the most effective form of custody, long-term incarceration, was regarded as an abuse. The Severan jurist Ulpian complained of the "custom" of governors of sentencing condemned men to prison, and wrote: "Prison is properly regarded as a way to retain men, not as a way to

⁴¹ See DIO 57.19.2; 58.21.3; 24.2; 27.2; SUTTONIUS, TIBERIUS 62 (Tiberius; only in the first case is it specifically stated that treason was the charge); DIO 59.25.5b; cf. SENECA, DE IRA 3.18.3; DIO 59.26.4 (Gaius); DIO 60.15.5-6; 60.31.5; TACITUS, ANNALES 11.22 (Claudius—he had sworn not to torture any free man. DIO 60.15.6); TACITUS, ANNALES 15.56; 16.20 (Nero).

⁴² DIGEST 50.2.14; CODEX JUSTINIANUS 9.41.11. In neither case is it clear from the text that the constitutions were issued in response to complaints of individuals against the employment of torture against them. This is, however, a reasonable assumption.

⁴³ CODEX THEODOSIANUS 9.35.1, A.D. 369; etc. (treason; also, forgery of an Imperial signature, cf. 9.19.2, A.D. 326); 9.16.6, A.D. 358 (magic). For torture in treason trials see AMMIANUS 19.12.17 (cf. MOMMSEN, *op. cit. supra* note 10 at 407, n. 4).

⁴⁴ CODEX THEODOSIANUS 9.19.1, A.D. 316.

⁴⁵ *Ibid.* 9.35.2.1, A.D. 376; cf. *ibid.* 6, A.D. 399.

punish them." The Emperor Caracalla (A.D. 197-217) found the charge of one Apion that a free man had been sentenced to life imprisonment (*perpetua vincula*) incredible, as in his view the penalty was scarcely appropriate even for slave criminals. But judges evidently took a less purist stance, and imprisonment became a regular alternative to penalties such as exile, the fine, and public labor.⁴⁶

To sum up: it is possible to distinguish under the Empire a trend towards a more rigorous penal system.⁴⁷ In the first two centuries A.D., the simple death penalty and cruel forms of execution became more common, the deprivation of liberty combined with manual labor under harsh conditions was instituted as a secondary penalty, and other degrading punishments became normal for the less serious offenses. Most of these penalties were in origin administrative sanctions used mainly against slaves. Low-status citizens and high-status citizens were probably treated differently already in Republican times. But the downgrading of the position of the humble citizen virtually to that of the free alien was a development of the first century A.D. (The poor citizen was favored above the alien if both were defendants on the same charge. But the distinction between poor citizens and aliens was insignificant in comparison with that between senators, for example, and men of low status, whether citizens or aliens.)

Meanwhile, the position of the most vulnerable of the privileged groups, the gentry of the cities of the Empire, had become precarious. With severer

⁴⁶ DIGEST 48.19.8.9 (Ulpian); CODEX JUSTINIANUS 9.47.6 (Caracalla); SENTENTIAE PAULI 5.17.21; 5.18.1; 5.21.1-2. See also CODEX THEodosIANUS 9.3.2, A.D. 326 (Constantine). One abuse that is well documented in the CODEX THEodosIANUS is the holding of suspects for extended periods in prison. Several Emperors threatened with punishment judges (that is, provincial governors) who allowed this to happen by delaying trials, sometimes with the collusion of prosecutors. See CODEX THEodosIANUS 9.3.1, A.D. 320 (Constantine); 9.1.7, A.D. 338 (Constantius); cf. 9.3.6, A.D. 380 (Gratian, Valentinian, Theodosius); 9.1.18, A.D. 396 (Arcadius and Honorius). Doubtless preventive detention was misused from time to time throughout the period under survey. Reference is made in the CODEX also to the holding in prison of men condemned to exile. See *ibid.* 9.40.22, A.D. 414. *Ibid.* 23, A.D. 416 has a different tone, and may indicate that the practice had won a measure of recognition. One matter which cannot be decided is whether conditions in prisons worsened during our period. For the situation in the fourth century, see, e.g., LIBANIUS, ORATIONES 45; CODEX THEodosIANUS 9.3.1, A.D. 320; cf. *ibid.* 7, A.D. 409.

⁴⁷ By no means all the evidence has been cited in the previous discussion. An upward trend can be discerned if one examines the way in which particular offenses, e.g., kidnapping, were punished over a period of time. i) Kidnappers were at one stage fined (perhaps in the late Republic) but the Severan jurist Ulpian could speak of the offense as "capital" (DIGEST 48.15.1). This probably indicates that loss of status rather than death was involved, for the late-third century jurist Hermogenianus knew condemnation to the mines as the commonest penalty (*ibid.* 7). Constantius (CODEX THEodosIANUS 9.18.1, A.D. 315) prescribed the penalty of condemnation to the beasts (or, as an alternative, mortal combat, with the stipulation that there should be no chance of survival) for the crime. ii) Peculation, normally a high-status crime (whereas kidnappers were perhaps predominantly men of low status), was once punishable by a fine, but became a capital offense, perhaps as a result of a constitution of Theodosius (CODEX THEodosIANUS 9.28.1, A.D. 392; but see 9.27.5, A.D. 383, and, for the offense when committed by decurions, 12.1.117, A.D. 387.) It is implied in the constitution that there were no intervening steps between the imposition of the monetary penalty and of the capital penalty. The truth of this cannot be tested. iii) Penalties for religious offenses increased in the course of the fourth century, as the Christian Emperors became less tolerant of nonconformists and pagans. For the details, see P. R. COLEMAN-NORTON, ROMAN STATE AND CHRISTIAN CHURCH vols. I-II (London, 1966)..

penalties readily available and in extensive use, the temptation of senatorial judges, far from Rome, to employ them against all provincials without discrimination, must have been strong. The references in the legal sources to the exemption of the provincial elite from "plebeian" penalties begin in the early second century and are scattered through the Antonine and Severan periods. They testify to the desire of the central government to protect this group (there were sound political and economic as well as social reasons for doing so) and to the practical difficulties involved in achieving this.

The difficulties which faced the groups of higher status in Rome were precisely the converse: they were uncomfortably close to the center of power. Executions for political offenses were inevitable, especially in the first century A.D., when the monarch and the aristocracy were feeling their way towards a *modus vivendi*. But if treason and one or two other extraordinary offenses are disregarded, exile was the worst a senatorial criminal was likely to suffer, until the fourth century.

Some problems are raised by this analysis, and they should be dealt with before the argument is taken any further. It might be thought that the misfortunes of low-status defendants under the Imperial system have been exaggerated. There might appear to be a case for saying, for example, that the criminal law was extended to a larger group of persons under the Empire, and that as a result a greater proportion of the population had a better chance of securing justice. Specifically, it is evident that free noncitizens became subject to trial by judges according to the *cognitio* procedure. This argument, however, seems to proceed from the assumption that noncitizens under the Republic were not covered by the criminal law, that is to say, were not given judicial hearings, but were subject regularly to summary, extralegal coercion by magistrates or pro-magistrates acting in an administrative capacity. The Republican evidence, though scanty and uneven, is adequate enough to show that this assumption is false.⁴⁸ It is true that noncitizens under the Republic possessed no guarantees against arbitrary treatment, whether in a judicial context or not, but in this respect they were no worse off than noncitizens under the Imperial system. Moreover, although the numbers of citizens increased substantially under the Empire, citizenship was worth less as it came to carry fewer legal benefits.⁴⁹

Again, doubts might be felt about the omission from the above account of certain substantive improvements, which were achieved mainly under the

⁴⁸ Aliens might be parties in the criminal courts in Rome. See MOMMSEN, *op. cit. supra* note 10 at 200. For direct or indirect evidence that noncitizens in the provinces were given trials by governors, see, e.g., CICERO, 2 IN VERREM 1.71f.; 2.68f.; 2.83f.; AD QUINTUM FRATREM 1.2.5; esp. V. EHRENBERG and A.H.M. JONES, DOCUMENTS ILLUSTRATING THE REIGNS OF AUGUSTUS & TIBERIUS doc. 311 iv (Augustan in date, but relevant to the earlier period) (Oxford, 1955). For a discussion of these and other texts, see Garnsey, *op. cit. supra* note 14.

⁴⁹ See A. N. SHERWIN-WHITE, THE ROMAN CITIZENSHIP chs. 9-10 (Oxford, 1939). Sherwin-White demonstrates that the content of citizenship had diminished substantially by the second century A.D., and that this was true of both *iura privata* and *iura publica*. He nevertheless overestimates the degree of protection possessed by the rank-and-file citizen against the magistrate.

Empire, in the legal position of groups having few or no rights in Republican times. The reforms which might seem relevant to the present theme include the disappearance of the penal powers of a husband over his wife, the placing of legal restrictions on the power of discipline of a father over his child, and the protecting of slaves against overharsh punishment by cruel masters. It has been thought that these and other reforms came about largely as a result of the humanizing influence of Stoicism and Christianity.⁵⁰

These improvements are to be seen as an aspect of the expansion of the state's activities in the sphere of jurisdiction at the expense of private jurisdiction, not as reforms of the penal law. For example, the Petronian law, which laid down that a master should not give his slave to the beasts without first obtaining the consent of a judge, maintained the use of this inhuman penalty against slave criminals.⁵¹

Why was it that the Romans were able to mitigate some of the rigors of their legal system in the field of "household" law while allowing their penal law to become more harsh? Here I can only suggest a possible approach to the question. First, the improvements in the position of wives, children, and slaves are not adequately explained in terms simply of the "humanizing influence" of philosophical or religious movements. The political aspect of these developments, that is, the intrusion by the state into the sphere of private jurisdiction, has already been mentioned. In addition, the developments which affected wives and children might be regarded as delayed adjustments in the law to a changed household structure and new inheritance patterns, which had been evolving since the early days of the Roman city-state under the impact of economic change, while the measures in favor of slaves probably had in view the safety of the master as well as the welfare of the slave.⁵² There were no such factors working for a reform of the penal system. The trend was in the other direction.

Secondly, it may be doubted whether Stoic and Christian thought was marked by the kind of attitudes which might have reversed the trend, supposing, for the sake of the argument, that such reversal was possible. A study of Stoic writings reveals no trace of protest at the employment of harsh penalties

⁵⁰ See, e.g., F. SCHULZ, PRINCIPLES OF ROMAN LAW ch. 10, "Humanity," 189-222 (Oxford, 1936), for what is perhaps the standard view. Schulz acknowledges also the influence of Greek thought.

⁵¹ For the Lex Petronia (hardly later than Tiberius), see DIGEST 48.8.11; 18.1.42. It should not be assumed that this and other legislation in favor of slaves was efficacious. Note that Pius's legislation against *saevitia* contained nothing new: he was reinstating the existing law, presumably because it had not been observed. See COLLATIO 3.3. (The restriction of castration [SÜETONIUS, DOMITIANUS 7; DIGEST 48.8.6 & 4] was not observed: there was no shortage of eunuchs.) Not all Romans, and indeed not all Stoics, were as liberal as Seneca was in the treatment of slaves. See SENECA, EPISTOLAE MORALES 47; DE CLEMENTIA 7, 18; DE BENEFICIIS 3, 18f. Contrast CICERO, DE OFFICIIS 2, 24 (Panaetius: *saevitia* allowable).

⁵² *Quot servi tot hostes* was an old Roman proverb. It is interesting that, running parallel to the legislation affording slaves a measure of protection against their masters, are to be found enactments of conspicuous brutality, designed to deter slaves from murdering their masters. For the *senatusconsultum Silanianum*, see DIGEST 29.5 *passim*; SENTENTIAE PAULI 5.5; CODEX JUSTINIANUS 6.35. Cf. TACITUS, ANNALES 14.42f. with PLINY, EPISTOLAE 8.14 and DIGEST 29.5.10.1. The Christian Emperor Justinian reaffirmed the decree. See CODEX JUSTINIANUS 6.35.11-12.

and tortures in the early Empire. Seneca, in *de clementia*, exhorted the young Nero not to inflict the harsher penalties and in particular to avoid the death penalty. This request, however, did not amount to a plea for a general scaling down of penalties. In the first place, Seneca recommended that *clementia* be given sparingly, only to those judged capable of redemption.⁵³ Again, Seneca apparently had no quarrel with the level at which penalties were set in his day. He defined *clementia* as the withholding of penalties which were *deserved*, and this suggests that he did not believe that penalties were disproportionate to crimes.⁵⁴ Just as Seneca can perhaps be taken as a representative of enlightened Stoic opinion, so it may be legitimate to regard Augustine and Ambrose as spokesmen for liberal Christian thought in the fourth century.⁵⁵ Both men favored moderation in punishment. Augustine, bishop of Hippo, urged Donatus, proconsul of Africa, to punish "enemies of the Church" (presumably Donatists) in accordance with the requirements of Christian mildness.⁵⁶ Again, he praised Marcellinus, who presided over an Imperial inquiry into the Catholic-Donatist controversy, for having conducted his investigation without having recourse to the most cruel tortures.⁵⁷ Ambrose, bishop of Milan, advised his correspondent Studius, a Christian judge, to show clemency, citing as a model Jesus' treatment of the adulteress.⁵⁸ But neither Augustine nor Ambrose advocated a reduction of penalties or the abolition of torture. Augustine stressed the importance of obtaining confessions from suspects, and he commented that these could frequently be extracted only by a severe *inquisitio*.⁵⁹ While ruling out the more

⁵³ DE CLEMENTIA 1.2.2. Cf. DE BENEFICIIS 1.4.2; 4.18: Beneficence was for the worthy rather than the needy. (See also *ibid.* 1.10.3-4: the Stoics looked for a return. Ingratitude was the greatest vice of all.)

⁵⁴ DE CLEMENTIA 2.3.1-2. Moreover, from his description of pity as a defect of the mind (*vitium animi*), it may perhaps be inferred that Seneca did not feel, or did not allow himself to feel, horror or repugnance at the violence of the harsher sanctions employed in his day. See *ibid.* 2.4.4. In general, the Stoics were much more concerned with the state of a man's mind and will than with the external conditions of his life. Epictetus thought poverty and disease were not true evils. See 4.6.2; cf. 3.3.17f.; 17.8. For the primacy of the spiritual life, see SENECA, EPISTOLAE MORALES 8.15. Further, the conservative outlook and background of individual Stoic thinkers made them supporters of the status quo rather than advocates of change. For Panaetius' views on property, see CICERO, DE OFFICIIS 1.29f.; cf. 51-2; 2.73f. He was a member of the governing nobility at Rhodes. His pupil Posidonius favored the *optimates*. See F. JACOBY, DIE FRAGMENTE DER GRIECHISCHEN HISTORIKER n. 87 F, 110-11. For Seneca's political views, see EPISTOLAE MORALES 73. 1f.; cf. DE CLEMENTIA, *passim*; DE BENEFICIIS 2.20 (criticisms of Brutus and Cato).

⁵⁵ Augustine (A.D. 354-430) of course spans the fourth and fifth centuries. (Ambrose died in A.D. 397.) A full discussion of Christian views of punishment in the fourth century cannot be undertaken here. It is clear that Christian attitudes were divergent. Some, including bishops, favored the death penalty against heretics (AMBROSE, EPISTOLAE 24.12; 26), while others urged that judges who sentenced to death should be denied communion (e.g., *ibid.* 25.9). Ambrose took up a middle position (see below). On the attitudes and policies of the Christian Emperors, see n. 63, below.

⁵⁶ AUGUSTINE, EPISTOLAE 100.1 (A.D. 409); cf. 91.9 (A.D. 408).

⁵⁷ AUGUSTINE, EPISTOLAE 133.2 (A.D. 411).

⁵⁸ AMBROSE, EPISTOLAE 25.6, citing John 8.8f. Jesus, rather than condemning or absolving the woman, got rid of her accusers with the words: "Let him that is without sin cast the first stone." There is an interesting parallel in SENECA, DE CLEMENTIA 1.6.2f.

⁵⁹ "Inquirendi quam puniendi necessitas maior est; ad hoc enim et mitissimi homines facinus occultatum diligenter atque instanter examinant; ut inveniatur quibus parcant. Unde plerumque necesse est, exercentur acrius inquisitio, ut manifestato scelere, sit ubi appareat

barbaric methods of torture, he sanctioned Marcellinus' use of the rod, remarking that this method of coercion was customary in the home, in the school, and in episcopal courts.⁶⁰ In general, Augustine believed that strict judges and severe laws were necessary, but that their purpose was to induce repentance and not to exact vengeance.⁶¹ Similarly, Ambrose considered that the death penalty should be retained in the law "to repress the madness of crime." The judge who did not sentence to death took the better course. But, according to Ambrose, he should have free choice in the matter, and not be forced to show mercy "by the necessity of the law."⁶² In sum, while Augustine, Ambrose, and other church leaders of progressive views clearly had a beneficent influence on the administration of the law,⁶³ it is evident that they did not attempt to promote a movement of penal reform, and did not conceive of such a movement.⁶⁴

II

We may now ask in what manner and to what extent political developments in Rome affected the penal system.

mansuetudo." AUGUSTINE, EPISTOLAE 133.2. Seneca's attitude to torture is similar. See DE CLEMENTIA 2.4.3.

⁶⁰ It may be doubted whether fathers and teachers administered beatings for the same reasons as bishops in their courts.

⁶¹ E.g., AUGUSTINE, EPISTOLAE 100.1: "Unde ex occasione terribilium iudicium ac legum, ne in aeterni iudicii poenas incidant, corrigi eos cupimus, non necari; nec disciplinam circa eos neglegi volumus nec supplicia, quae digna sunt, exerceri."

⁶² AMBROSE, EPISTOLAE 25.9 (Ambrose's view is the traditional one—*maluerunt priores nostri . . .*). A Christian judge who sentenced to death could be "excused." *Ibid.* 25.3.

⁶³ Beneficent influence: AUGUSTINE, EPISTOLAE 115 (A.D. 410); cf. 268; PETER BROWN, AUGUSTINE OF HIPPO 195 (Berkeley, 1967); AMBROSE, EPISTOLAE 51 (A.D. 391); 54 (A.D. 392). But both bishops favored strict measures against heretics and non-Christians. See, e.g., AUGUSTINE, EPISTOLAE 173 (A.D. 416); 179 (A.D. 418); 191 (A.D. 418). For Ambrose, GESTA CONCILII AQUILEIENSIS (MIGNE, PATROLOGIA LATINA vol. 16, 955f.) on heretics, and EPISTOLAE 40-1 (A.D. 388) on Jews. The Christian Emperors of the fourth century were responsible for some minor improvements. Constantine, for example, banned gladiatorial games (CODEX THEodosIANUS 15.12.1, A.D. 325), crucifixion (VICTOR, CAESARES 41), and branding on the face (CODEX THEodosIANUS 9.40.2, A.D. 315). His motives were not so much "humanitarian" as religious (e.g., branding of the face, but not of other parts of the body, was forbidden because of the fashioning of the face *ad similitudinem pulchritudinis caelestis*). On the other side could be mentioned Constantine's intolerance of religious nonconformity and moral deviation, which showed itself in legislation against heresy (EUSEBIUS, VITA CONSTANTINI 3.64-5; CODEX THEodosIANUS 16.2.1, A.D. 313 [?]; 16.5.1, A.D. 326), schism (CORPUS SCRIPTORUM ECCLESIASTICORUM LATINORUM 26.211-2, A.D. 315 = COLEMAN-NORTON, *op. cit. supra* note 47 at I, 24), Jews (CODEX THEodosIANUS 16.8.1, A.D. 315; 2, A.D. 330), and pagans (*ibid.* 16.10.2, A.D. 341), on the one hand, and abduction and rape on the other (*ibid.* 9.24.1 A.D. 320—Constantius reduced the penalty because judges would not inflict it, *ibid.* 2, A.D. 349). Subsequent Emperors in the fourth century further expanded the criminal law and increased sanctions. For example, the number of offenses punishable by death multiplied in the course of the fourth century. There were minor concessions, e.g., *ibid.* 9.38.3, A.D. 367 (pardons issued on account of Easter); 9.35.4, A.D. 380 (no torture for 40 days before Easter); 9.3.7, A.D. 409 (Sunday inspection of prisons). But limitations were placed on the right of sanctuary. See *ibid.* 9.45.1, A.D. 392; 3, A.D. 398. These last constitutions show that the State could not always expect the cooperation of the Church in the administration of the law. See also 9.40.15, A.D. 392; 16, A.D. 398.

⁶⁴ The "inadequacies" (from the modern viewpoint) which are here attributed to Stoicism and Christianity were not peculiar to those creeds — no ancient philosophy or religion advocated large-scale social and legal change.

It should first be recognized that the penal changes which occurred in Rome were closely associated with wider developments in the judicial system, for which the Emperors were responsible. Among these developments, the institution of *cognitio*, the new procedure which coexisted with, and in time superseded, both the formulary system in civil law and the jury-court system in criminal law, is of central importance. *Cognitio* stood for the principle that it was the state's responsibility to administer justice. Criminal law in Rome as elsewhere began as private vengeance.⁶⁵ The community encroached on private punishment only to impose a penalty and to provide arbitration between the two parties. At the time of the *Twelve Tables*, only high treason, murder, and arson were punished by the state. We have seen that in the late Republic several other offenses were singled out as "public," or as offenses against the state, and that "public" jury-courts were set up by the People to try them. After Augustus no additions were made either to the number of "public" courts or to the number of "public" crimes. But within two hundred years there were no active jury-courts and no "private" offenses which could not be punished by a criminal procedure, the same procedure which had displaced the jury-courts.

The introduction of *cognitio* and the decline of the older procedures made possible fluctuations in penalty on a large scale. There are two reasons for this. First, in fixing a penalty for one of the "private" crimes, the judge was likely to consider not only the loss suffered by an individual (often precisely calculable), but in addition the damage done to society (incalculable and susceptible of differing interpretations). If these were not strictly regarded as crimes against the state, they were at least a social nuisance or a social danger, a threat to peace and good government. Secondly, in the case of the tribunals which operated by the *cognitio* procedure, the penalty was not dictated by the laws which set up the jury-courts and defined the crimes concerned. If we take these two points together, we arrive at the following result: once the principle of private compensation for injury or loss was pushed into the background by the transformation of delicts into crimes, neither the law nor the judicial system provided any ceiling for punishments.

The reformed criminal law of the Empire, then, had a new flexibility. It remains to explain why, instead of remaining static or improving, the position of defendants measurably deteriorated. One factor relates to problems of law enforcement. The Roman state lacked an efficient police force at every level, Imperial, provincial, and local. As the Imperial "police" forces throughout our period were only rudimentary, the responsibility for putting down crime must have devolved largely on the provincial governors.⁶⁶ But the governors lacked sufficient resources for effective crime detection — this, rather than innate degeneracy or laziness (to which Imperial constitutions of the fourth century

⁶⁵ See W. KUNKEL, *AN INTRODUCTION TO ROMAN LEGAL AND CONSTITUTIONAL THEORY* 26f. (trans. J. M. Kelly, Oxford, 1966). Cf. R. SALEILLES, *THE INDIVIDUALIZATION OF PUNISHMENT* 21f. (trans. R. S. Jastrow, London, 1911); A. HARDING, *A SOCIAL HISTORY OF ENGLISH LAW* ch. 1 (London, 1966).

⁶⁶ For the Imperial "police" forces in the second and third centuries, see O. HIRSCHFELD, *KLEINE SCHRIFTEN II* 566f. (Berlin, 1913); the fourth-century evidence is collected in A. H. M. JONES, *1 LATER ROMAN EMPIRE* 479f., 499f. (Oxford, 1964).

often refer),⁶⁷ must have been the chief reason for their evident inadequacy. Local magistrates and councils were expected to join forces with the governors in apprehending criminals, but they lacked both the equipment and the enthusiasm necessary for the task. As a result much must have been left to private persons. Criminal trials were in any case launched by private accusers, in the absence of a system of public prosecution. In general, however, individuals were unlikely to denounce criminals and act as prosecutors unless moved by strong personal considerations, especially as no criminal accusation could proceed without the filing of a formal *inscriptio*, in which the accuser both agreed not to abandon the prosecution and made himself liable to severe penalties if he failed to prove his case. In practice, therefore, crimes must frequently have gone undetected and unpunished. The Emperors were nonetheless anxious to punish and stamp out crime in the interests of order, efficiency, and security. This, coupled with the belief that crime could be curbed most effectively by severity, may have contributed to a scaling up of penalties.⁶⁸

A more basic factor, stressed as we have seen by Montesquieu and Durkheim, was the absolutist trend in Roman government. The Principate of Augustus was a disguised monarchy. Augustus did not abolish the Republic, but claimed to have restored it. As late as the Severan age, jurists were stressing that the Emperor's powers were constitutional, that is, they were received from the Senate and People.⁶⁹ But, inevitably, his extraconstitutional powers had come to the fore. Among them was the power to make law. Even advice given less formally than by edict was obeyed as an order, so that the Severan jurist Ulpian could write that any decision of an Emperor had the force of law.⁷⁰ Moreover, the Emperor was godlike, worshipped after his death and to a certain extent in his lifetime. This added to the mystique of the law of which he was increasingly the source, and therefore to the outrageousness of a crime. Treason, as was to be expected, was loosely defined and harshly punished. But other crimes, which did not endanger the Emperor's life or directly insult his person, might nonetheless be taken as slights to his majesty.

In the late third and the fourth century, no attempt was made to perpetuate the myth of the constitutionality of the Emperor's position, and his powers were more openly displayed. Diocletian and his successors, reacting against the pro-

⁶⁷ For overt or implied criticism of judges, see, e.g., CODEX THEODOSIANUS 7.18.4.4, A.D. 380; 2.1.6, A.D. 385; 1.5.9, A.D. 389 (*iudices corpore marcentes et negligentes desidiae somniis oscitantes*).

⁶⁸ Even Seneca, who regarded *emendatio*, correction, as a possible aim of punishment (DE CLEMENTIA 1.22.1; cf. GELLIUS, NOCTES ATTICAE 7.14.1), acknowledged that *severitas* was the best corrective (*ibid.* 2.). (See also *ibid.* 2.4.4 on the compatibility of *clementia* and *severitas*.) He further admitted that Emperors normally punished for retribution, or revenge (*ibid.* 1.20.1-2). Some of the legal reformers of the eighteenth century argued that moderate penalties would achieve the desired result, if combined with a certainty and promptness of punishment. See L. RADZINOWICZ, 1 HISTORY OF ENGLISH CRIMINAL LAW AND ITS ADMINISTRATION FROM 1750, at 277, 330 (London, 1948), for Beccaria and Romilly.

⁶⁹ GAIVS, INSTITUTIONES 1.5; DIGEST 1.4.1 (Ulpian). See next note.

⁷⁰ DIGEST 1.4.1: *quod principi placuit, legis habet vigorem*. Ulpian went on to claim that the power to make law was constitutionally based. But to the best of our knowledge, the *lex de imperio*, the law which conferred power on the Emperor, did not grant him this right.

longed anarchy of the mid-third century, sought greater safety in a new exaltation of themselves and their office. Diocletian introduced oriental court ceremonial and declared himself Jupiter on earth, using the title "Iovius." The Christian Emperors claimed only to be servants of the divinity.⁷¹ But it was sacrilege to disobey their edicts.⁷²

III

The results of the discussion to this point may now be summarized. The following factors begin to explain the extended use of harsher penalties under the Roman Empire: absolutist tendencies in government and the growth of a ruler cult; the increased activity but continued inefficiency of the central administration in the sphere of law enforcement; the removal of limitations within the judicial system through the substitution of flexible for rigid and formalized procedures, and the expansion of the criminal law. These were all a direct or indirect result of the substitution of Monarchy for Republic. Thus the theory that the severity of penalties is related to the nature of government is indeed confirmed by the case of Rome.

It would be surprising if an explanation of the trend to harsher penalties in Rome which mentioned only factors of a political nature and omitted all reference to social factors were adequate. Durkheim's theory of social development is not appropriate. He argued, as we have seen, that the development of a society from simplicity of structure and organization to complexity of structure and organization is accompanied by a reduction in the harshness of penalties. This does not apply in the Roman case.⁷³ The only enlightenment provided by Durkheim's theory lies in the analogy which is suggested between the nature of crime, and hence of punishment, in a community governed by an absolute ruler and in a primitive community—in both kinds of community, crimes take on a sacrilegious character. However, it should be possible to find a connection between variations in the severity of punishment and changes in social structures and attitudes without subscribing to holistic theories of social evolution.

A view which became current in the nineteenth century is that an amelioration in penalties may be set in motion by the emergence of humanitarian attitudes, especially towards the punishment of criminals. This view (which Durkheim rejected outright with eccentric logic)⁷⁴ drew support from the phe-

⁷¹ See, e.g., the letters of Constantine quoted in EUSEBIUS, *VITA CONSTANTINI* 2.24-42, A.D. 324 (certainly authentic, see COLEMAN-NORTON, *op. cit. supra* note 47 at I, 106), and *ibid.* 2.48-60, A.D. 324 (perhaps not authentic, COLEMAN-NORTON, *ibid.* 98). The ambiguity of a Christian Emperor's position is captured nicely by CODEX THEODOSIANUS 15.4.1, A.D. 425.

⁷² The earliest reference comes from the reign of Constantine. See CODEX THEODOSIANUS 11.30.6, A.D. 316. Cf. 9.42.6, A.D. 364; 1.6.9, 6.5.2, A.D. 384; 8.8.3, 6.35.13, A.D. 386; 10.10.24, A.D. 405. Sacrilege and treason are virtually identical. See 9.42.6, A.D. 364; 9.38.3, A.D. 367.

⁷³ Durkheim's theory indeed seems to be applicable only to primitive societies on the one hand, and modern capitalist societies on the other.

⁷⁴ DURKHEIM, *op. cit. supra* note 6 at 85-6. According to the conventional argument which Durkheim was attacking, "l'adoucissement des moeurs" would produce a horror of punishments, with the consequence that the scale of punishments would be reduced. Durk-

nomenon of a movement for legal reform which brought about a reduction in penalties even in states where the form of government was by no means democratic.⁷⁵ It is worth inquiring whether the increase in the intensity of penalties in Rome was related to a change in Roman social values.

The almost general amelioration in penalties in the period of legal reform of modern times was forced on governments by the demands of a wide section of the community. In Rome there was no comparable pressure for penal reform from the most influential section of the population, the highest status groups. Within the governing class there were doubtless men of progressive views, of whom the Stoic Seneca is one example, who were concerned that principles of humanity should be applied, not only in the private dealings of men with their fellows, but also in the administration of the law. Seneca, however, did not in his writing commit himself to a positive program of reform (he seldom progressed beyond enlightened generalizations), nor, to my knowledge, did any improvements come about through his influence. Meanwhile the interests of the aristocracy as a whole were in the maintenance of their privileges. It was this same small privileged group which, possessed of considerable discretionary powers as judges and administrators, presided over the steady deterioration of the condition of the ordinary free man and low-ranking citizen. (The situation of their own group did not materially change for the worse until the fourth century.) There is a case for saying that new degrading penalties could not have been introduced into general use, and the level of penalties could not have continued to rise, if the ruling elite had not been progressively more indifferent to the lot of the mass of the population of the Empire. To argue in this way is not to fall back on the old theme of moral decadence and the fall of Empire. An alternative approach, which draws on more concrete phenomena, recognizes that Roman social values were a product of a highly stratified society.

It was an insight of de Tocqueville that social values and attitudes are intimately related to patterns of social stratification. In his writings this idea appears in conjunction with the thesis that changing social values have an impact on the law. He argued that education, the influence of religion, "civilization," do not in themselves bring about a humane attitude to punishment. A general equality of social conditions is an essential factor. To paraphrase de Tocqueville, as the individuals in a society become more like one another, they show greater sympathy for those among them who suffer, and as a result the law of the society becomes milder.⁷⁶ The leniency characteristic of the Amer-

heim held that if we feel this horror of harsh penalties, we would simultaneously feel a *greater* horror or anger at the crimes for which these penalties are awarded. The result would thus be a *raising* of penalties.

⁷⁵ On the movement for penal reform, see, e.g., M. GRÜNHUT, *PENAL REFORM* (Oxford, 1948); G. ROSE, *THE STRUGGLE FOR PENAL REFORM* (London, 1961).

⁷⁶ ALEXIS DE TOCQUEVILLE, *2 DE LA DÉMOCRATIE EN AMÉRIQUE* pt. 3, ch. 1 (1840), is entitled "Comment les mœurs s'adoucisent à mesure que les conditions s'égalisent." The section ends with the comment: "A mesure . . . que les peuples deviennent plus semblables les uns aux autres, ils se montrent réciproquement plus compatissants pour leurs misères, et le droit des gens s'adoucit." The reference here is to relations between nations, and to international law, but the remark is equally applicable to relations between individuals, and to the law of a community — the subject of most of the chapter.

ican criminal law in his day was for him a consequence of the "equality of conditions," the homogeneity of American society; while the class divisions of contemporary English society were in his view reflected in the greater severity of its penal system. We might claim, adapting his thesis, that the tendency towards harsher penalties in Imperial Rome was encouraged by the increasingly stratified nature of Roman society.

De Tocqueville illustrated his theory with a brief reference to the Roman penal system, without, however, attempting to explain the changes it underwent in the course of the transition from Republic to Empire or during the Empire. Moreover, he did not look beyond the distinction between Roman citizens and free aliens. This was a fundamental distinction in the civil law, but not the most significant in social terms. It was not so much possession of citizenship as possession of social status which provided prestige, political influence, and the full benefits of the law. Citizenship was most valuable when it was the exclusive possession of men of high rank, but this stage had been passed by the beginning of our period, and citizenship declined further in importance under the Empire. In early Imperial times, gradations in rank were given a more formal basis; and the division between *honestiores* and *humiliores*, those of (relatively) high rank and those of (relatively) low rank, was accentuated.⁷⁷ In the fourth century the Imperial government attempted to reduce social mobility and to impose something approaching a hereditary caste system.⁷⁸ Differences within the higher orders became more marked, and, at the same time, administrative corruption and economic oppression widened the gap between the upper and lower strata in the society as a whole. Thus it can be argued with some plausibility that the spirit of the criminal law became less humane, and the atmosphere increasingly unfavorable to penal reform, as social divisions became more rigid and as wealth was concentrated in fewer hands.

In the preceding pages an attempt has been made to isolate some of the factors which explain the mounting severity of the Roman penal system under the Empire. The chief impetus was provided by political developments; in particular, the change in the nature of political authority in Rome, and the increased activity of the state in the judicial sphere. The conservatism of Roman social values (that is, the values of the Roman upper classes), and the hierarchical structure of Roman society, helped to create a climate favorable to increased repression and unfavorable to penal reform.

The inquiry has been in no sense exhaustive.⁷⁹ There is scope for a further

⁷⁷ See G. Cardascia, *L'Apparition dans le Droit Des Classes D' "Honestiores" et D' "Humiliores,"* 27 REVUE HISTORIQUE DE DROIT FRANÇAIS ET ÉTRANGER 305-37, 461-85 (1950), on the *honestiores-humiliores* distinction.

⁷⁸ The attempts of the Emperors to stop decurions and their sons escaping from their responsibilities for local liturgies by taking up other careers is particularly well documented. See CODEX THEODOSIANUS 12.1 *passim*. For fugitive *coloni*, see, e.g., *ibid.* 5.17.1, A.D. 332 (Constantine); 11.24.1, A.D. 360; 11.1.7, A.D. 361; 10.12.2, A.D. 368; 5.17.2, A.D. 386, etc.

⁷⁹ In particular, more consideration could have been given to causes of an economic nature which may lie behind changes in the penal system. One illustration will suffice, one which shows, incidentally, the way in which social, economic, and political forces may work together to produce changes in patterns of punishment. It could be suggested that the penalty of condemnation to the mines was promoted in the early Empire partly in order to provide labor for the imperial mines. The maintenance of an adequate work force must

study, taking particular penalties, or particular segments of the penal law (for example, the punishment of property offenses or religious offenses), with the aim of explaining their development over a period of time. This essay has been more general in purpose and exploratory in nature. It has achieved its aim if it has demonstrated the potential value of investigations into the causes of historical variations in crime and punishment.⁸⁰

PETER GARNSEY

have become more difficult under the Empire, as the supply of slaves fell off and their price rose. The employment of convicts on the building and repair of roads and aqueducts and on other services such as bread-making (*opus publicum*) was also an economic necessity. Nevertheless, when we consider the introduction of forced labor as a penalty under the Empire, we cannot avoid referring to political and social factors. Condemnation to the mines became a possible penalty when the state, in the person of the Emperor, began to take over mines in Italy and the provinces from private hands. Again, the penalty would not have gained the status of a regular secondary penalty without the tacit consent or active support of judges and administrators. (In eighteenth-century England, proposals for the introduction of an equivalent of the Roman *opus publicum*, forced labor on public works, and especially in His Majesty's dockyards, were consistently blocked in Parliament on constitutional grounds and "as incompatible with the dignity of the English people." See L. RADZINOWICZ, *op. cit. supra* note 68 at 33.)

⁸⁰ I am grateful to Professor P. Selznick for helpful suggestions.