

A Double Standard in Roman Criminal Law? The Death Penalty and Social Structure in Late Republican and Early Imperial Rome

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In memory of Professor Morton Smith

A modern audience reflecting on crime and punishment in the United States in the last generation could not help noticing some trends that have become the subject of heated political debate in the media. Among these developments, two stand out as particularly alarming and infamous. First, in reaction to a perceived rise in crime, penalties tended to become harsher, to the point that even some judges have occasionally found themselves morally unable to abide by mandatory sentencing laws. In 1991, the *New York Times* reported that Harold H. Greene, a federal district judge (Washington, D.C.), refused to sentence Joseph Hunter, convicted of selling one tablet of Dilaudid (synthetic morphine, allegedly the equivalent of one-eightieth of one gram of crack), to the mandatory sentence of seventeen and a half to twenty-one and a half years in jail as required by federal guidelines and imposed instead a thirty-seven-month term. Judge Greene, a key activist in the civil rights movement in the 1960s, commented that

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the mandatory sentence violates the Eighth Amendment's ban on "cruel and unusual punishment," due to the "enormous disparity" between crime and penalty, and called it barbaric.¹ Back in the 1980s, with substantial public support, the Reagan and Bush Republican administrations relentlessly pushed for expanding the list of capital offenses, and the pressure mounted so high that some members of Congress felt the need in the fall of 1990 to introduce legislation limiting the use of the death penalty to cases involving at least two aggravating factors.²

Second, since the death penalty was declared constitutional by the Supreme Court in 1976 and reinstated in thirty-eight of the fifty states, the system has been suspected of being unfairly skewed toward black people, who are "three times more likely to be charged, convicted and executed for killing whites than whites are for killing blacks."³ Harsher punishments and a double standard in their application are the products of contemporary American society and of its political and judicial systems but are neither confined to them nor historical novelties. This essay will discuss both phenomena in the context of Roman society from the late republican period to the beginning of the fourth century A.D. In doing this, I will try to illustrate how Roman law reflected Roman practices and how ancient attitudes evidenced by legal, literary, epigraphical, and papyrological sources were consistent with then existing social structures.

Sources

I start with a survey of ancient sources. There is no such thing as a Roman code of criminal law. Civil law and criminal law were originally parts of

1. *New York Times*, 27 Jan. 1991, A18. M. Weil, in an obituary published in the *International Herald Tribune* (31 Jan. 2000, 5), reports that Judge Greene had developed over the years a reputation for "fairness, energy, intelligence and—in particular—commitment to due process, the rule of law and the independence of the judiciary."

2. See *New York Times*, 25 Sept. 1990, B9 (N. C. Nash, quoting Professor I. P. Robbins, American University in Washington).

3. *Ibid.* Governor George Ryan, a Republican who still supports capital punishment, decided to declare a moratorium on execution while a committee reviews the death penalty procedures, because of the high risk of killing innocent persons (*International Herald Tribune*, 1 Feb. 2000, 4). A similar measure was passed in 1999 by the Nebraska legislature but was eventually vetoed by its Republican governor. Other states (Pennsylvania, Washington, New Jersey, and Maryland) are considering legislation to halt executions temporarily, while the National Bar Association has for years called for a national moratorium. A new study of the application of capital punishment in the United States by a Columbia University law professor, J. Liebman, underlines other faults with the American system (see *International Herald Tribune*, 13 June 2000, 3).

the same package.⁴ Thus, the legislation of the Twelve Tables dealt incidentally with criminal offenses. Its provisions belonged to an earlier socio-historical context, and it is unclear to what extent they were still valid and enforced in the late republican period. The material preserved in this “codification” reflects the gradual transition from private to state-administered justice. For my purpose here, its value lies in underlining the symbolic aspect of punishment; the connection between the nature of a crime and its penalty, most visible in the mode of execution in capital cases; and the occasional substitution of monetary compensation for physical retaliation, thus creating a new distinction between the concepts of civil damages and criminal repression.

Most of the criminal legislation in force during the Principate was enacted by Sulla, Augustus, and Augustus’s successors. It is partly preserved in Justinian’s *Digest* and *Code* (book 9). The classical jurisprudence compiled in the so-called *Libri terribiles* (*Dig.* 47–49) is the closest we get to a Roman scholarly discussion of criminal law.⁵ It consists of legal opinions about the application of individual laws from the time of Augustus to the first half of the third century A.D. Quite a few jurists wrote books on criminal procedure⁶ or appeal.⁷ They and others focused on magistrates with judiciary competencies, such as Roman prefects or provincial governors.⁸ Books on the latter category may offer a glimpse of the application of Roman criminal law in the provinces. Aelius Marcianus authored a book on prosecutors,⁹ and Arcadius Charisius, in the late third century, wrote one on witnesses.¹⁰ Papinianus, Paulus, and Ulpianus published

4. See Alexander 1984; Lovisi 1999, 65–95.

5. See Bauman 1996, 115–40.

6. Volusius Maecianus *Libri XIII de iudiciis publicis*; Venuleius Saturninus *Libri III de iudiciis publicis* (= *publicorum iudiciorum*); Callistratus *Libri VI de cognitionibus*; Aemilius Macer *Libri II publicorum iudiciorum* (= *de publicis iudiciis*); Paulus *Liber singularis de cognitionibus*; Paulus *Liber singularis de extraordinariis criminibus*; Paulus *Liber singularis de publicis iudiciis*; Ulpianus *Libri X de omnibus tribunalibus*; Marcianus *Libri II de publicis iudiciis* (= *publicorum iudiciorum*); and possibly Marcellus *Libri II publicorum*. Add Ateius Capito, according to Gell. *Nat.* 4.14 and 10.6; see Bauman 1996, 116, 193 nn. 5–6.

7. Aemilius Macer *Libri II de appellationibus*; Paulus *Liber singularis de appellationibus*; Ulpianus *Libri IV de appellationibus*; Marcianus *Libri II de appellationibus*.

8. See Venuleius Saturninus *Libri IV de officio praesulis*; Aemilius Macer *Libri II de officio praesidis*; Paulus *Libri II de officio praesulis*; Ulpianus *Libri X de officio praesulis*; Paulus *Liber singularis de officio praefecti vigilionum*; Paulus *Liber singularis de officio praefecti urbis*; Ulpianus *Liber singularis de officio praefecti vigilionum*; Ulpianus *Liber singularis de officio praefecti urbis*; Arcadius Charisius *Liber singularis de officio praefecti praetorio*; and possibly Marcellus *Liber singularis de officio praesidis*(?).

9. Marcianus *Liber singularis de delatoribus*.

10. Arcadius Charisius *Liber singularis de testibus*.

monographs on specific crimes,¹¹ such as adultery. Imperial constitutions and senatorial decrees were the subjects of learned commentaries by various authors.¹² Herennius Modestinus, Claudius Saturninus, and Paulus wrote on penalties.¹³ Ancillary questions, pertaining, for example, to convicts' property rights and succession, were dealt with in a treatise by Paulus.¹⁴ Although this legal material has been heavily excerpted, arranged, and sometimes updated by the compilers, it still provides a fairly detailed and accurate picture of what criminal law looked like during the Principate and, to some extent, of its chronological development.

Apart from the Justinianic tradition, another compilation, attributed to the late classical jurist Paulus, was written in Africa around 300 A.D. and transmitted through a Visigothic channel. The so-called *Sententiae (Pseudo-)Pauli* were held in high regard by Constantine, who gave them force of law, ranking in authority only second to imperial legislation.¹⁵ In the last chapters of this work, the reader can find a striking variety of forms of punishment for a far-from-comprehensive list of crimes, such as theft of cattle, violations of tombs and other sacrilegious acts, arson, astrology and other forms of divination, theft in an imperial mine or mint, desertion, rebellion, murder and poisoning (including human sacrifice and abortion with a lethal outcome for the mother), parricide, forgery, public violence and robbery, corruption and embezzlement of public funds, *maiestas*, illegal canvassing, kidnapping, and military treason, to name only some.¹⁶

The historical perspective is, however, largely enhanced by the use of literary sources, mostly historiographical. Few topics exert more fascina-

11. Papinianus *Libri II de adulteriis*; Papinianus *Liber singularis de adulteriis*; Paulus *Libri III de adulteriis*; Paulus *Liber singularis de adulteriis*; Ulpianus *Libri V de adulteriis* (= *ad legem Iuliam de adulteriis*).

12. Gaius *Libri XV ad legem Iuliam et Papianam*; Iunius Mauricianus *Libri VI ad legem Iuliam et Papianam*; Paulus *Libri X ad legem Iuliam et Papianam*; Paulus *Liber singularis ad senatus consultum Turpillianum*; Paulus *Liber singularis ad senatus consultum Libonianum*; Ulpianus *Libri II ad legem Iuliam de adulteriis*; Ulpianus *Libri XX ad legem Iuliam et Papianam*; Marcianus *Liber singularis ad senatus consultum Turpillianum*.

13. Herennius Modestinus *Libri IV de poenis*; Claudius Saturninus *Liber singularis de poenis paganorum*; Paulus *Liber singularis de poenis omnium legum*; Paulus *Liber singularis de poenis militum*; Paulus *Liber singularis de poenis paganorum*.

14. Paulus *Liber singularis de portionibus quae liberis damnatorum conceduntur*.

15. *Cod. Theod.* 1.4.2 (A.D. 322). See Liebs 1993; Rilinger 1988, 63–82.

16. Paulus *Sent.* 5.17–31, to which one should add certain forms of damage done to a person, such as procuring *Uenocinium*; cf. 5.4 (*de iniuriis*). The so-called Leiden fragment, first published in 1956, also concerns criminal law; see Kunkel 1973, 149 n. 1.

tion on any audience than does the suffering of others. Reports of tortures and executions are considered highly entertaining and provide ancient (and modern) writers with a way to assess the judge's, the executioner's, the crowd's, or the victim's character and to picture the hardship of the past. The biographical genre, from Suetonius to the *Historia Augusta*, had no qualms about exploiting this rhetorical device. An abundant Christian literature, including the New Testament and the Acts and Passions of martyrs, supplements, with various degrees of objectivity, the more or less fictional accounts of Greek and Latin pagan writers. No less biased, but legally more accurate and detailed, are the few forensic speeches allegedly pronounced by Cicero and Apuleius on the occasion of actual criminal trials. On the basis of such questionable and heterogeneous sources, historians must try to reconstruct the Roman criminal system and its application over a large geographical area and a long time span. A significant help derives from the all too scarce documentary evidence provided by Latin inscriptions recording municipal laws and private correspondence and by Greek papyri preserving judiciary proceedings and petitions from Roman Egypt.

Criminal Procedure

How the Roman authorities responded to crimes, to what extent their response was determined by social factors, and what explicit or implicit meanings were attached to penalties depended on the structure of the judicial system. The emergence of a state-sponsored criminal procedure (*iudicia publica*) is connected with the police jurisdiction (*coercitio* as part of *imperium*) of Roman magistrates, mostly the urban praetor and the *tresviri capitales*. These magistrates, or their representatives (*quaesitores*), were assisted by ad hoc courts (*quaestiones extraordinariae*) acting as advisory committees (*consilium*). During the second century B.C., some of these courts became permanent (*quaestiones perpetuae*) and specialized in certain categories of crimes. For instance, the *quaestio de falsis* tried all cases of forgery (wills, etc.) and counterfeiting. Such jury courts provided the setting for the enforcement of later criminal legislation: Sulla's *leges Corneliae* and Augustus's *leges Iuliae*. In this system, any citizen could act as prosecutor, whether or not he had been wronged, because in this role he was considered as a defender of public order. His motives could be, needless to say, quite different. The jury would reach a verdict, and in case of convic-

tion, the sentence and its execution were left to the magistrate's care.¹⁷

Augustus's political and judiciary reforms resulted in the establishment of a new criminal procedure—derived in fact from the procedure prevalent outside Rome, Italy, and Roman colonies¹⁸—whereby justice was administered by a representative of the Roman state (the emperor or the Senate) who was in charge of the whole procedure, from the presentation of the evidence and testimonies up to the verdict, sentence, and execution. In addition to traditional republican promagistrates in charge of provinces, the emperor himself had a criminal jurisdiction attached to his *imperium proconsulare*, exercised in part by his legates and procurators. In the city of Rome, the emperor enjoyed a loosely defined right of *intercessio* (attached to his *tribunicia potestas*), allowing him to participate in judicial matters. New positions were soon created, and the jurisdiction of the prefects (*praefecti urbi, praetorio, vigilum, annonae*) superseded that of traditional magistrates. Because of their longer office terms, the prefects could often draw on a great deal of experience in legal matters. Consequently, justice was administered swiftly and with more coherence. Criminal trials no longer required a formal prosecution, and the presiding official could dispense with the assistance of the jury courts that survived nevertheless until the Severan period.

Labeled *cognitio extra ordinem* by modern scholars, this new type of criminal procedure allowed the presiding official a free hand in deciding the penalty of convicted criminals.¹⁹ Therefore, although magistrates did at times receive precise guidelines from the emperor, they felt entitled to apply them with discretion, as did the governor presiding over the procedure following the anti-Christian uprising in Lyons in 177: reportedly ordered to behead those who refused to deny their faith, he complied to the letter with regard to those whose Roman citizenship had been established, but he condemned all the others to death by animals, a more spectacular mode of execution.²⁰ While providing a more flexible and therefore potentially fairer instrument of retribution for crimes, the *cognitio extra ordinem* also left room for a great deal of arbitrariness and opened the door to institutionalized abuse and injustice.

17. See Kunkel 1973, 64–74; Manfredini 1996.

18. See Pugliese 1982, 728.

19. The magistrate's discretion in choosing the penalty is a controversial question; see Bauman 1996, 136–39 (with bibliography).

20. See *Letter on the Martyrs of Lyons* (A.D. 177), quoted in Euseb. *Hist. ecl.* 5.1.47 (p. 76 Musurillo); MacMullen 1986.

Equality before the Law?

Equality before the law was never a strictly defined or enforced Roman principle.²¹ For centuries, Roman society had been organized along the concepts of status and class. Each individual's standing was defined by his or her legal status and by the class to which he or she belonged. The population of the empire was divided into two mutually exclusive groups, free-born persons and slaves (in criminal law, freed people were caught in between, as I will show later in this essay). Nonslaves were either *cives Romani* (or *Latini*) or *peregrini*. Citizens were often subjected to the authority of the head of their family (paterfamilias), who technically had the power of life and death over all his dependents.²² Moreover, a small minority of the population belonged to one of the privileged *ordines* (senatorial, equestrian, decurional, etc.). Status and *ordo* were instrumental in defining one's standing before the law and the kind of protection and privileges one could expect from it.

At the bottom of the social ladder, slaves had no rights. In court, they enjoyed no more support than what their masters were able and chose to muster on their behalf. Foreigners fared hardly better, except that some forms of cruelty were thought to be inconsistent with freedom. The condition of Roman citizens was quite different, at least during the republican period. A set of laws, a *lex Valeria* from the late sixth century and three *leges Porciae* from the second century B.C.,²³ protected citizens from summary physical abuse, such as flogging, and allowed them to appeal death sentences through a *provocatio ad populum*, tantamount to the grant of a trial before the centuriate assembly. Even during the Principate, citizenship mattered, and governors were ready to grant a reprieve and a new trial to whoever made a credible claim during judiciary procedure, as the apostle Paul and other persecuted Christians discovered.²⁴ Higher social standing was a source of further legal privileges: in the midst of his speech against

21. This view is pace Cardascia (1950, 307), who claims that the principle of equality before the law was observed during the republican period.

22. Harris 1986.

23. On the Porcian laws *de provocazione* and *de tergo civium*, see Liv. 10.9.3–6; Cic. *Rep.* 2.54; Cic. *Rab. perd.* 4.12. On the Valerian law *de provocazione*, Cicero (*Rep.* 2.53) writes: "ne qui magistratus civem Romanum adversus provocationem necaret, neve verberaret." See Lovisi 1999, 208–13.

24. See Ac 25:10. According to the *Letter on the Martyrs of Lyons*, quoted in Euseb. *Hist. eccl.* 5.1.44 (p. 74 Musurillo), a claim probably inspired by Paul's example was made for Attalus in 177 but was unsuccessful in the end, since Attalus was sent to the beasts and tortured by fire in the arena (*Hist. eccl.* 5.1.50–52).

the Catilinarians, Caesar alluded to "a Porcian law and other laws granting citizens convicted of serious crimes the right to choose to go into exile" in order to escape capital punishment.²⁵ After Clodius's assassination, Milo, who was facing capital charges, chose to follow this course of action and retired to Massilia, where he reportedly enjoyed the local cuisine.²⁶ One can reasonably doubt that ordinary people, lower-class citizens, and foreigners would have been treated with such leniency.

One's legal status was not irrevocable. Its loss was accounted for in Roman law under the name of *capitis deminutio*, with various degrees of intensity as it affected freedom, citizenship, or position within the family. Cato the Younger argued that the Catilinarians, while planning to overthrow the Roman state, had become public enemies (*hostes*) and should be treated as such.²⁷ The crime itself was viewed as the cause for outlawing those who committed it.

During the Principate, *capitis deminutio* was attached to certain penalties. Gaius explicitly said that a condemnation to death entailed an automatic loss of citizenship and freedom, to the effect that between sentencing and execution the convict could be questioned under torture to give evidence against others.²⁸ Further, a condemnation to hard labor in the mines (*metallum*), always intended as a life sentence, was combined with a reduction to slavery (*servitus poenae*).²⁹ By contrast, those condemned to temporary labor in public works (*opus publicum*) retained their legal status

25. Sall. *Cat.* 51.22: "Sed, per deos immortales, quam ob rem in sententiam non addidisti uti prius verberibus in eos animadverteretur? An quia lex Porcia vetat? At aliae leges item condemnatis civibus non animam eripi, sed exilium permitti iubent"; 51.40: "Tum lex Porcia aliaeque leges paratae sunt, quibus legibus exilium damnatis permissum est." On voluntary exile, see Bauman 1996, 13–18.

26. See Dio Cass. 40.54.2.

27. Sall. *Cat.* 52.25: "intra moenia deprehensis hostibus." Cato's position is subtle, as he also calls the conspirers *crudelissimi parricidae* (52.31) to be punished *more maiorum*, their confession amounting to a manifest crime ("de confessis, sicuti de manifestis rerum capitalium, more maiorum supplicium sumendum," 52.36). The mode of execution by strangulation ("laqueo gulam fregere," 55.5) shows that Cethegus and his colleagues were eventually regarded as *hostes* rather than *parricidae* (executed by drowning in a *culleus*, a bag filled with animals). Roman citizens would have been beheaded or hanged from the *arbor infelix* and beaten to death (as evidenced in Liv. 1.26.6: "caput obnubito; infelici arbori recte suspendito; verberato vel intra pomerium vel extra pomerium"; Suet. *Nero* 49.2: "nudi hominis cervicem inseri furcae, corpus virgis ad necem caedi"). On Catilina's criminal status, see Habinek 1998; Bauman 1996, 45–48 (citing Cic. *Cat.* 1.28: "at numquam in hac urbe, qui a re publica defecerunt, civium iura tenuerunt"; 2.17, 27; 4.10).

28. See Dig. 4.5 (*De capite minutis*), with incidences in private law. Gaius ([1 *ad legem Iuliam et Papianam*] Dig. 48.19.29) writes: "Qui ultimo supplicio damnantur, statim et civitatem et libertatem perdunt."

29. See Ulpianus (48 *ad edictum*) Dig. 48.19.2; Ulpianus (9 *de officio proconsulis*) Dig. 48.19.8; Kaser 1952, 63 n. 68; Zilletti 1968; Pugliese 1982, 766–67.

and, on completion of their term, could theoretically resume their former social position.³⁰

On the other hand, the mode of execution was supposed to reflect the convict's status before sentencing: "I'll tell you how you die and I'll tell you who you are."³¹ Penalties were meted out according to the convicted criminal's legal status and social standing, usually defined by his or her *status libertatis* and *status civitatis* during the republican period and by the dichotomy *honestiores* versus *humiliores* during the Principate. The transition from one set of criteria to the other is complicated and somewhat uncertain. Modern scholars tend to link the new dichotomy to the introduction of the *cognitio extra ordinem*. They regard it as established by the first century A.D., textually attested by the reign of Antoninus Pius (138–61), and superseded in the fourth century.³² The two categories of *honestiores* and *humiliores* refer to the sociological concept of class rather than to the juridical and political concepts of status and order. The origin of the double standard goes back to the archaic division of Roman society between patriciate/*nobilitas* and plebs, two concepts with social and political connotations and with implications in both criminal and civil law. For example, the Augustan jurist Labeo reportedly denied an action carrying *infamia* for fraud when the request was introduced against a person of superior status, standing, order, or habits (whatever that means).³³

Under these conditions, it is necessary to determine which category represents the norm in Roman criminal law.³⁴ In other words, should we think that the law became harsher toward lower-class citizens, because they were treated more and more like provincials and slaves, whereas legal protection applied strictly to the elite? Or should we consider that the condition of provincials and slaves improved as a result of the growing influence of humanitarian ideas spread by philosophical schools and religious groups? Was the bulk of the population, composed of average (i.e., poor) citizens and of noncitizens, both slaves and nonslaves, regarded as equal before the law in criminal matters despite obvious differences in legal sta-

30. See Millar 1984.

31. See Hartog (1980, 149), commenting on Hdt. 4.64–72: "La mort est signe d'altérité . . . elle est opérateur de différence; soit: 'Dis-moi comment tu meurs et je te dirai qui tu es.'"

32. See Garnsey 1970, 171–78.

33. Labeo is cited by Ulpianus (II *ad edictum*) Dig. 4.3.11.1: "Et quibusdam personis non dabitur. ut puta liberis vel libertis adversus parentes patronosve, cum sit famosa. Sed nec humili adversus eum qui dignitate excellere debet dari: puta plebeio adversus consularem receptae auctoritatis, vel luxurioso atque prodigo aut alias vili adversus hominem vitae emendatoris. Et ita Labeo."

34. Bauman (1996, 199 n. 40) considers "preposterous" De Robertis's 1939 position making "the *humiliores* penalties the norm and the *honestiores* the exception."

tus, while the elite, made up of the senatorial, equestrian, and curial orders, in addition to orders and members of the imperial administration, was granted special and specific privileges reflecting its political importance to the regime? The answer to these questions is not necessarily simple, but it will illustrate (1) to what extent the double standard established by law closely reflected distinction in daily life and (2) whether citizenship or just freedom actually mattered in a court of law during the Principate. The result of this investigation will show that the ancient sources may have misrepresented the condition of the lower classes. In focusing on the distinction between those entitled to privileges and those liable to the full extent of the law, they overlooked long-established and unquestioned differences at the bottom of the social ladder that led to uneven application of the death penalty.

Harsher Punishments

There is hardly any doubt that across the social spectrum punishments became harsher during the early empire. While Thrasca Paetus could claim under Nero, perhaps in a self-serving defense, that the ultimate penalty for senators was exile,³⁵ it is a well-known fact that by the (late?) third century A.D., homicide, "magic," sexual "deviancies," public violence, and forgeries had become capital offenses, even for the upper classes.³⁶ Legislators devised new and harsher penalties, such as hard labor, mandatory exile, and deportation to an island. The use of torture, theoretically restricted to slaves in the republican period, had been extended to all *humiliores* during the Principate and even to decurions by the time of Constantine.³⁷ Roman citizens were occasionally flogged. Appeals remained possible during the Principate, but exceptions were made when public safety was at stake—for instance, in cases involving notorious bandits, subversive activists, and leaders of factions.³⁸ P. Garnsey described this development and linked it to the absolutist tendencies of political authorities, the inefficiency of the central government in dealing with ris-

35. See Dio Cass. 62.15.1a.

36. For the situation in the *Sententiae Pauli* (ca. 300), see Grodzynski 1984, 383; Grodzynski includes a list of all cases where *summa supplicia* were applied with no distinction of status.

37. See *Cod. Theod.* 9.19.1 (A.D. 316).

38. Modestinus (6 *differentiarum*) *Dig.* 49.1.16 writes: "Constitutiones. quae de recipiendis nec non appellationibus loquuntur, ut nihil novi fiat, locum non habent in eorum persona, quos damnatos statim puniri publice interest: ut sunt insignes latrones vel seditionum concitatores vel duces factionum."

ing criminality, and the removal of limitations within the judicial system with the introduction of the extraordinary procedure. Garnsey also stressed that the essential factor for mitigation of penalties called for by criminal law, namely, a general equality of social conditions, was totally absent, and he suggested 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."³⁹

One disturbing aspect of this development was what is commonly regarded as the increasing assimilation of lower-class citizens and provincials with slaves within the category of *humiliores*. Again, modern scholars seem to agree on the fact that cruel punishments, such as the so-called *summa supplicia*, were applied indiscriminately to all *humiliores*, whether free or slaves, *peregrini* or citizens. Did this assimilation represent the worsening condition of freeborn people or, rather, an improvement for slaves? The third-century jurist Aemilius Macer remarked that slaves ought to be punished in the same way as *humiliores*,⁴⁰ thus pointing to the latter idea and suggesting that the treatment of *humiliores* represented the norm in criminal law, while *honestiores* were spared some of the severity sheerly out of privilege.⁴¹ However, Macer's contemporary Callistratus indicates that while burning at the stake was the common penalty for slaves conspiring against the life of their master, it was also occasionally applied to free plebeians and people of low standing.⁴² The same jurist was still well aware that in earlier times the severity of punishments varied according to the criminal's legal status.⁴³ One generation before him, Claudius Saturninus went even further in advocating that the judge should take into account the legal status and social standing of both the offender and the victim, their personal relationship (if there were any), and their respective ages.⁴⁴

Claudius Saturninus's opinion is reminiscent of a provision (concerning theft) of the Twelve Tables that is recorded by Aulus Gellius, a con-

39. Garnsey 1968, 159.

40. Macer (2 *de publicis iudiciis*) *Dig.* 48.19.10 *pr.*: "In servorum persona ita observatur, ut exemplo humiliorum puniantur."

41. See Cardascia 1950, 476.

42. Callistratus (6 *de cognitionibus*) *Dig.* 48.19.28.11: "Igni cremantur plerumque servi, qui salutem dominorum suorum insidierint, nonnumquam etiam liberi plebei et humiles personae."

43. Callistratus (6 *de cognitionibus*) *Dig.* 48.19.28.16: "Maiores nostri in omni supplicio severius servos quam liberos, famosos quam integre famae homines punierunt."

44. Claudius Saturninus (*sing. de poenis paganorum*) *Dig.* 48.19.16.3: "Persona dupliciter spectatur, eius qui fecit et eius qui passus est: aliter enim puniuntur ex isdem facinoribus servi quam liberi, et aliter, qui quid in dominum parentemve ausus est quam qui in extraneum, in magistratum vel in privatum. In eius rei consideratione aetatis quoque ratio habetur."

temporary.⁴⁵ Should we suspect an anachronism based on widespread antiquarian interest in preclassical law? This is unlikely, as other statutes of the second century A.D. required that slaves be subject to harsher punishment than freeborn people.⁴⁶ In any case, the Romans were always notoriously sensitive about status distinction: Ulpianus, in his commentary on the praetor's edict, granted an action for defamation (*iniuria*) to a freeborn person who had been arrested under the suspicion of being a runaway slave.⁴⁷ Diocletian and his colleagues went one step further by granting an action against all those who intentionally called a freeborn person a slave.⁴⁸ Such opinions and enactments do not reflect assimilation of freeborn people and slaves. How, then, are we to understand this ambiguous and somewhat conflicting evidence?

Some Principles of Ancient Penology

Roman modes of punishment were originally a matter of practice, not statute. One aspect that certainly governed the choice of a penalty was the willingness to underline the symbolic connection between crime and punishment. In the royal period, according to Livy, the Romans had the Alban dictator Mettius Fufetius executed for treason. After his arrest, King Tullus Hostilius lectured him that his death would teach others to stick to their word: yesterday his soul was split between Fidenae and Rome; today his body would be stretched and quartered.⁴⁹ Similarly, when Nero used the Christians of Rome as scapegoats for the fire that had destroyed the

45. Gell. *NA* 11.18.6–9, especially 8; see also Ulpianus (41 *ad Sabinum*) *Dig.* 47.2.23, citing Iulianus (22 *digestorum*) and Labeo.

46. See Ulpianus (7 *de officio proconsulis*) *Dig.* 48.8.4.2, recording Hadrian's rescript regarding the application of the *lex Cornelia de sicariis* to cases of castration; Paulus (54 *ad edictum*) *Dig.* 47.9.4.1, recording Antoninus Pius's rescript on robbery and plundering during a shipwreck. Other passages are somewhat ambiguous, as they refer to the concepts of *condicio* or *qualitas personae*, representing, in my opinion, social standing rather than legal status; see Ulpianus (9 *de officio proconsulis*) *Dig.* 47.11.10; Modestinus (8 *regularum*) *Dig.* 47.21.1; Callistratus (3 *de cognitionibus*) *Dig.* 47.21.2 ("de poena tamen modus ex condicione personae et mente facientis magis statui potest"); Ulpianus (7 *de officio proconsulis*) *Dig.* 48.13.7(6) ("Sacrilégii poenam debebit proconsul pro qualitate personae proque rei condicione et temporis et aetatis et sexus vel severius vel clementius statuere").

47. Ulpianus (1 *ad edictum praetoris*) *Dig.* 47.10.22: "Si liber pro fugitivo adprehensus erit, iniuriarum cum eo agi."

48. *Cod. Iust.* 9.35.9 (A.D. 294): "Qui liberos infamandi gratia dixerunt servos, iniuriarum conveniri posse non ambigatur."

49. Liv. 1.28.9: "At tu tuo supplicio doce humanum genus ea sancta credere quae a te violata sunt. Ut igitur paulo ante animum inter Fidenatem Romanamque rem ancipitem gessisti, ita iam corpus passim distrahendum dabis."

city, he had some of them burned on crosses as arsonists.⁵⁰ Just before the emperor Elagabalus's lynching by the Praetorians, his partners in debauchery were reportedly killed in an exemplary fashion, by genital mutilation or anal impalement "so that their death would be congruent with their previous lifestyle."⁵¹ Such symbolic reflections can even be twisted and exacerbated in the somewhat fictional Christian accounts of martyrdom, because martyrs are made to rejoice in obtaining a share of Jesus' suffering, be it by flogging, crucifixion (discussed later in this essay), or one of many other ways. Other aspects may also be emphasized: thus, on the occasion of Perpetua's martyrdom in the amphitheater at Carthage (203), a heifer was selected to match her gender. As a result of cumulation and diversity of tortures, Christian victims were supposed to win a more glorious crown.⁵² Finally, because of religious precepts and their forced transgression, some punishments were regarded as unbearable: Christian maids, whose virginity or chastity was considered vital, were commonly sent to a brothel.⁵³

Translated into law at a further stage, provisions concerning penalties became fixed features, escaping the laws of evolution, until changes in criminal procedure opened the door to outside cultural influences⁵⁴ and to the pressure of practicality. As I mentioned before in the context of the *cognitio extra ordinem*, Roman magistrates had acquired some leeway in interpreting the law. Unfortunately, the legal material cannot tell us if and to what extent they took advantage of this relative freedom or whether

50. See Tac. *Ann.* 15.44.4–7; MacMullen 1986, 158–59.

51. SHA *Heliogab.* 16.5: "cum alios genitalibus exemptis necarent, alios ab ima parte perfoderent, ut mors esset vitae consentiens." Harries (1999, 136–37) has other examples of this fact, mostly from Suetonius and the *Historia Augusta*.

52. *Passio SS Perpetuae et Felicitatis* 18.9 reads: "Ad hoc populus exasperatus flagellis eos vexari per ordinem venatorum postulavit; et utique gratulati sunt quod aliquid et de dominicis passionibus essent consecuti"; 19.2 reads: "Saturninus quidem omnibus bestiis velle se obici profitebatur, ut scilicet gloriosorem gestaret coronam"; 20.1 reads: "Puellis autem ferocissimam vaccam ideoque praeter consuetudinem comparatam diabolus praeparavit, sexui earum etiam de bestia aemulatus." See also Euseb. *Hist. eccl.* 8.14.13; Harries 1999, 131.

53. *Martyrdom of Pionius* 7.6 (Smyrna, mid-third century A.D.) reads: αἱ γὰρ μὴ ἐπιθύουσαι εἰς πορνείων ἴστανται. In the *Life of St. Theodotus of Amvrya* (written ca. 360, some fifty years after Theodotus's martyrdom), seven virgins were sentenced to be raped, but the penalty was not carried out, because they appeared to be "too mature" for that. They were instead paraded naked. *Vita S. Theodoti Amvryani* 13 (fol. 87r) reads: τέλος ὑπερζέσας τῷ θυμῷ ἐκέλευσεν (scil., ὁ ἀσβεστατος τυρρανός) ἀκολάστοις νέοις παραδοθῆναι ταύτας εἰς φθοράν; 14 (fol. 88r) reads: ἦγον οὖν αὐτάς διὰ μέσου τῆς πόλεως γεγυμνωμένας τοῖς σώμασιν (ed. Pio Franchi de' Cavalieri [Rome, 1901/1966], 69–70). See Mitchell 1982; Elm 1994, 51–59.

54. This is a topos in ancient rhetoric; cf. Sall. *Cat.* 51.39: "Sed eodem illo tempore, Graeciae morem imitati, verberibus animadvortebant in civis, de condemnatis summum supplicium sumebant."

they stuck to the letter of long-established customs, the spirit of which was, by then, long lost to most practitioners.⁵⁵ Thus, the rules recorded by second- and third-century legal writers may reflect much earlier practices, and their interpretation requires that modern scholars try to reconstruct the logical principles and symbolic meanings attached to specific penalties. This undertaking is made possible by the examination of nonlegal material originating in various geographical areas and times.

Although the record of the application of Roman criminal law may have shown some substantial variations in Italy and in the provinces (partly as a result of the influence of local customs), we should not assume that diversity was the rule, considering the available documentary evidence: a petition addressed by a veteran of the Arsinoites to the prefect of Egypt shortly after 7 September A.D. 147 reports the reckless and violent behavior of a former village scribe, who had mistreated not only the petitioner but even the local *strategos* who outranked him. The text is unfortunately damaged but unambiguously refers to the “beating, flogging, and scourging of freemen as if they were slaves,” which illustrates that even provincials were aware of the rights attached to freedom, the benefit of which they claimed for themselves.⁵⁶ This was not an isolated case: a fourth-century governor of the Thebaid issued an edict explicitly forbidding the flogging (with a whip) of freeborn people. Most significantly, the governor himself acknowledged that such punishments inflicted on slaves, although deplorable, were not altogether against the law.⁵⁷ This edict is consistent with the rule recorded by Aemilius Macer whereby slaves were to be flogged with a whip (*flagellum*), whereas freeborn people could only be beaten with rods (*fustis*);⁵⁸ and even then, Callistratus specifies that earlier imperial constitutions had spared *honestiores* such a rigorous punish-

55. Iulianus (55 *dig.*) *Dig.* 1.3.20 reads: “Non omnium, quae a maioribus constituta sunt, ratio reddi potest”: Neratius (6 *membranarum*) *Dig.* 1.3.21 reads: “et ideo rationes eorum, quae constituuntur, inquiri non oportet: alioquin multa ex his quae certa sunt subvertuntur.”

56. *P. Wisc.* I 33, lines 10–12, read: (. . .) Πάν/τω/ν αἰσχιστόν ἐστιν τῶν ἐν τῷ βίῳ ἀδικημάτων τὸ ἐλευθέρους ἀνθρώ/πους ὕβρεως (τρυγχάνειν (. . .)). line 20 reads: (. . .) καί|ι τοὺς ἐλευθέρους τυπτειν καὶ παίειν καὶ μαστιγοῦν ὡς δο|ύλο|υς (. . .). Note the dotted letters in key words.

57. *P. Oxy.* IX 1186 (before 368) reads: Αὐρήλιος Ἡρώδης ὁ διασημότητος ἡγούμενος/Θηβαΐδος λέγει τὸ τὴν διὰ τῶν ἰμάντων λη/ταρι/κῶν ἐπιχωρίως οὕτω καλουμένων αἰκεί/αν ὑπομένειν ἐστὶν μὲν καὶ ἐπὶ τῶν δουλι/κῆν τύχην εἰληχότων, ἀνιαρόν, οὐ μὴν κατὰ/τὸ παντελές ἀπηγορευμένον ἐλευθέρους δὲ/ἀνδρας τοιαύτην ὕβρειν ὑπομένειν οὔτε τοίς/ [νόμοις] ἀκόλ|ου|θον ἀδικεῖαν τε [ἐ]χον ἐστὶν ἐν/ . . .

58. Macer (2 *de publicis iudiciis*) *Dig.* 48.19.10 *pr.*: “et ex quibus causis liber fustibus caeditur, ex his servus flagellis caedi et domino reddi iubetur.”

ment.⁵⁹ Later on, the proceedings of a criminal trial before Flavius Leonorius Beronicianus, *praeses* of the Thebaid in the late fourth or early fifth century, restate the rule that freeborn people should not be beaten.⁶⁰ Thus, while variations existed, they were not universally accepted by jurists and judges.

All three of the preceding cases of congruence between law and practice come from Egypt: this is due to the availability of the papyrological evidence. There is no reason to think that the situation in other provinces was different. African farmers in the *Saltus Burunitanus* complained of rough treatment at the hand of soldiers sent by an imperial procurator, “who had some of us arrested and mistreated, others bound, and some, even Roman citizens, beaten with rods.”⁶¹ Flogging must have been a common event in the life of the lower classes, accepted with submissiveness when the victim was actually guilty of a crime, but strongly rejected with protests of innocence: an interesting tablet of the late first or early second century A.D. from Vindolanda (Roman Britain) records the petition of a *homo transmarinus*, probably a trader from the continent, to an unnamed official (referred to as “maiestas” and “dominus”), asking for redress after being flogged, perhaps by soldiers or officers, for a crime he claims he had not committed. The writer stresses that last point but subtly underlines his status as “tra(n)smarinus,” possibly a discrete allusion to what he perceived as his higher standing (better than a local *Brittunculus*) and a hidden reference to distant connections. If so, the threat was obviously lost on those lower-ranking officers (*beneficiarius*, centurions) to whom he had first turned while the prefect in charge was allegedly on sick leave.⁶² Awareness of one’s rights in law was perhaps the preserve of the smart or the rich: it

59. Callistratus (6 *de cognitionibus*) *Dig.* 48.19.28.2: “Non omnes fustibus caedi solent, sed hi dumtaxat qui liberi sunt et quidem tenuiores homines: honestiores vero fustibus non subiciuntur. idque principalibus rescriptis specialiter exprimitur.”

60. *P.Lips.* 40, col. III, line 21: Ελευθέρους μὴ τύπτειτε. See Taubenschlag 1957.

61. *FIRA F*, no. 103, col. ii, lines 10–14 (A.D. 180–83): “missis militib(us) / [in eun]dem saltum Burunitanum alii[os nos]trum adprehendi et vexari. alii[os] vine[ri]. nonnullos, cives etiam Ro[m]anos, virgis et fustibus effligi iusser[unt].”

62. *Tab. Vindol.* II 344 reads: “. . . / eo magis me ca[.] . . . / d . . . [.] . . .]em mercem [.] . . . / r[.] vel effunder[.] . . . / r[.] . . . / [.] . . .]mine probo tuam maiest[.]atem imploro ne patiaris me / [i]nnocentem virgis cas[.]igatum / esse et domine prov[.] . . .] prae[.]f[.]ecto non potui queri quia va[.]l[.]etudini detinebatur / ques[.]tu[s] sum beneficiario / [.] . . .]cen[turionibu[s] / [.] . . .] numeri eius [.] . . . / [.] . . .]tuam misericord[.]iam / imploro ne patiaris me / hominem trasmarinum / et innocentem de cuius f[.]ide / iniquitas virgis crucient[.]u[m] / esse ac si aliquid sceler[.]is / commissem.” See Bowman and Thomas 1994, 329–34 (with convincing comments); Peachin 1999, especially 227–30.

was certainly more widespread than could be expected in an almost illiterate society.⁶³

Furthermore, the Romans seem to have been rather sophisticated in evaluating the gradation of penalties. The *Sententiae Pauli*, which call for mandatory punishment in response to specific crimes, provide useful guidelines. Punishments are there arranged in three categories: the harshest penalties, *summa supplicia*, include crucifixion, burning at the stake, and beheading; the mildest ones are relegation to an island, exile, condemnation to public works, and imprisonment; between these two poles lie condemnation to the mines or the games and deportation.⁶⁴ Thus, arsonists of agricultural products were to be condemned to the mines (a *mediocris poena*) if they belonged to the lower classes and relegated to an island (a *minima poena*) if they were upper-class. Nighttime robbery of a temple was punished by condemnation to the beasts, regardless of the social standing or legal status of the criminal, while daytime theft of sacred property in a temple was followed by deportation for upper-class people and by work in mines for lower-class people. All three punishments belong to the middle category (*mediocres poenae*), but their respective degrees of severity are obviously gradual.⁶⁵

The same source stipulates that punishments are meted out "pro qualitate dignitatis" and illustrates this general principle with the case of seditioners who are to be crucified, fed to the lions, or relegated to an island.⁶⁶ While there is little doubt that, given the choice, Napoleon would have chosen Saint Helena over the cross on the Via Appia or the lions in the Colosseum, it is not necessarily obvious to modern scholars which of the latter two forms of torture would be worse. From the practical point of view of the sentencing judge, one form may be more expedient than the other. Execution by beasts implied the organization of games, which might not be forthcoming. This meant postponement of execution, with

63. See *Martyrdom of Pionius* 13 (Smyrna, mid-third century A.D.): Pionius wants to wait for the proconsul's arrival and does not recognize the jurisdiction of either the *neôcoris* Polemon or the *hipparch* Theophilus; see also 10.4. Conversely, the apostle Paul made no use of his rights as a Roman citizen when he was severely beaten by Roman colonial magistrates at Philippi (Ac 16:22–24, 35–39); see Fox 1991, 309.

64. Paulus *Sent.* 5.17.2: "Summa supplicia sunt crux crematio decollatio: medioerium autem delictorum poenae sunt metallum ludus deportatio: minimae relegatio exilium opus publicum vincula."

65. See Paulus *Sent.* 5.20.5 (*de incendiariis*), 5.19 (*de sacrilegis*).

66. Paulus *Sent.* 5.22.1: "Auctores seditionis et tumultus vel concitatores populi pro qualitate dignitatis aut in crucem tolluntur aut bestiis obiciuntur aut in insulam deportantur."

all the problems attached to such a delay.⁶⁷ Likewise, execution by crucifixion could be problematic because of scarcity of wood in desert areas.⁶⁸ The prospect may have been quite different from the point of view of an ancient Roman. That crucifixion was considered a harsher penalty than the beasts is suggested by the fact that, according to Ulpianus, forgers who had meddled with the purity or weight of gold coins were fed to the lions if they were free, crucified (“summo supplicio”) if they were slaves.⁶⁹ The victims themselves might have expressed personal preferences, based on their previous experience (as eyewitnesses) or rumor. At the time of Perpetua’s martyrdom at Carthage (A.D. 203), her companion Saturus was particularly afraid of dying by a bear and wished for himself, to no avail, the quick mauling of a leopard.⁷⁰

If we were to survey all recorded cases of punishment applied to *humiliores*, including slaves, across the whole empire from the late Republic to the fourth century, with close attention to each convict’s social standing and legal status, we would get a more precise idea about the relationship, in terms of discrepancy or congruence, between theory and practice in Roman criminal law. The result of such a survey would also demonstrate to what extent Roman judicial authorities were willing to acknowledge differences not only in social standing but also in legal status. Conceding to brevity, I proceed with a case study on the use of crucifixion.

A Case Study: Crucifixion

The choice of crucifixion for this case study can be explained in many ways. First, the evidence has been conveniently collected in two recent and comprehensive studies.⁷¹ Second, the evidence fits the chronological framework of this essay: according to Aurelius Victor, the emperor Constantine, out of

67. *Martyrdom of Polycarp* 12.2 (ca. 155) (p. 10 Musurillo) reports that the crowd asked the Asiarch to send a lion against the martyr, to which request the official objected that “the days of the animal games were past.” The crowd then called for burning alive, a form of torture that conveniently matched the martyr’s previous vision of his pillow set on fire; cf. the *Letter on the Martyrs of Lyons* (A.D. 177), cited in Euseb. *Hist. eccl.* 5.1.37 (p. 72 Musurillo) (concerning an occasion when special arrangements had to be made), 5.1.42 (p. 74 Musurillo) (when the animals unexpectedly spared the victim). See also the discussion of Jesus’ crucifixion later in the present essay.

68. See Joseph. *BJ* 5.451. See also the subsection “Insurrection and Rebellion” later in this essay.

69. Ulpianus (7 *de officio proconsulis*) *Dig.* 48.10.8: “Quicumque nummos aureos partim raserint, partim rinxerint vel finxerint: si quidem liberi sunt, ad bestias dari, si servi, summo supplicio adfici debent.”

70. See *Passio SS Perpetuae et Felicitatis* 19.1–6, especially 4.

71. Hengel 1977; Kuhn 1982.

consideration for Jesus Christ's death, abolished crucifixion as a legal penalty; crucifixion survived sporadically in the early fourth century and was replaced by the fifth century with hanging on a U-shaped fork (*furca patibulum*).⁷² Third, the evidence is geographically very diverse. The most discussed and worst documented of all known criminal cases in ancient times, the double trial of Jesus Christ before the Sanhedrin and the prefect of Judaea and his alleged execution on the cross, raises interesting questions about criminal law and its application in a provincial setting. Fourth, among all penalties in use in Roman times, crucifixion conveys the clearest message regarding the symbolism attached to capital punishment and its victims' status. My purpose now is to establish, on the basis of a review of all known cases, which crimes were punished with crucifixion and whether all crucified people shared some features that would explain why this mode of execution was preferred to any other.

Seneca noted that a *crux* could be used in many different ways to cause pain resulting in the victim's death.⁷³ What, then, should be counted as crucifixion? How should other cases be categorized? Greek and Latin terminology is vague. Words designating the act or the instrument of torture do not provide a useful criterion for distinguishing crucifixion from hanging, impalement, exposure and abandonment, beheading or flogging at the stake, or pillory. Ancient sources are tricky in this respect. Take the case of that poor wretch Laureolus named after a famous bandit of an earlier epoch: his execution, a "fatal charade" inspired by Prometheus's fate, took place during the reign of Domitian and happened to be no more than a fake crucifixion, as the victim was ultimately gutted by a bear.⁷⁴ In 250 at Smyrna, Pionius was nailed to a stake, only to be burned alive. The literary motif is clearly borrowed from the case of the old bishop Polycarp,

72. Aur. Vict. *Caes.* 41.4–5. See also Cassiod. *Var.* 1.9; Sozom. *Hist. eccl.* 1.8.34; Dinkler-von Schubert 1992; Harries 1999, 139. Crucifixion was still applied in 314; see *Cod. Theod.* 9.5.1, with the objections of Grodzynski (1984, 371 n. 28); on another instance in Cyprus (A.D. 335), see Aur. Vict. *Caes.* 41.11–12 (reporting on the fate of one rebellious Calocerus *magister pecoris camellorum* "quo ex cruciatio, ut fas erat, servili aut latronum more"). See the commentary of H. W. Bird (1994, 192) and Salamon 1984, 80 n. 7, 83–84. *FLA P*, no. 94, lines 28ff. *Vedictum Constantini de accusationibus*, between 313 and 323) reads: "In servis quoque sive libertis, qui dominos vel patronos accusare aut deferre temptant. . . . patibulo adfixus." See Chastagnol 1972, 100.

73. Sen. *Ad Marciam de consolatione* 20.3: "Video istic cruces non unius quidem generis sed aliter ab aliis fabricatas: capite quidam conversos in terram suspendere, alii per obscena stipitem egerunt, alii brachi patibulo explicuerunt." For *suspensio* as a nonlethal form of punishment, see Cantarella 1991, 177–78.

74. Mart. *Spect.* 9(7).3–4 reports: "nuda Caledonio sic viscera praebuit turso / non falsa pendens in cruce Laureolus." The penalty is tantamount to *ad bestias*. A mime on a similar subject was enacted in the reign of Caligula; cf. Juv. *Sat.* 8.187–88: ". . . / iudice me dignus vera cruce . . ."; Suet. *Calig.* 57.4; Tert. *Adv. Valent.* 14.4. See Coleman 1990, 64–65.

himself burned in the same city less than a century earlier after requesting to be spared the nails to show the effect of divine strength during torture.⁷⁵ The use of nails rather than ropes before burning was obviously regarded as a privilege, supposedly because the bleeding victim would have gone into shock before the fire had picked up enough strength for the smoke and the heat to be unbearable.⁷⁶ In any case, there is no reason to regard these examples as mixed crucifixions, even though the writer's intention may have been to recall the ultimate martyrdom—Jesus—to his readers' minds. For the purpose of this essay, I will only consider cases in which the executioner clearly intended to inflict a slow, most painful and humiliating death by suspension.

From a clinical point of view, victims of crucifixion could die from several causes. Medical experts say that "the major pathophysiologic effect of crucifixion was an interference with normal respiration."⁷⁷ Exhaustion asphyxia was combined with hypovolemic shock when hemorrhage was caused by preliminary flogging of the victim and the nailing of the victim's wrists and feet onto the cross. Thus, death could be accelerated by nailing the victim to the cross (instead of binding him or her to the cross with ropes) and/or by breaking the victim's legs (whence *crura frangere* sometimes means "to crucify" in Latin),⁷⁸ to prevent the victim from using pres-

75. See *Martyrdom of Pionius* 21.2, 7 (pp. 162–64 Musurillo); *Martyrdom of Polycarp* 13.3–14.1 (p. 12 Musurillo). The Greek expression εἰς τὸ ξύλον ἀνορθῶθη is translated, in Latin, "ligno crucifixerunt": see *Martyrdom of Saints Carpus, Pappus, and Agathonice* 37 (under the reign of Marcus Aurelius?) (recensio graeca, p. 26 Musurillo), 4.2 (recensio latina, p. 32 Musurillo).

76. Miss Julie Martin, from the Ecole des Hautes Etudes en Sciences Sociales, pointed out to me that the text of the *Martyrdom of Polycarp* is problematic, because it is explicitly said at the beginning of chapter 14 that the saint was bound: Οἱ δὲ οὐ καθήλωσαν μὲν, προσέδησαν δὲ αὐτόν. Ὁ δὲ ὀπίσω τὰς χεῖρας ποιήσας καὶ προσδέθεις. . . . The use of the verb προσδέω, even with no object, may be inconsistent with my initial interpretation that the saint, with his hands bound behind his back, would have been free to step down, thus making his acceptance of this dreadful form of martyrdom even more admirable.

77. Edwards, Gabel, and Hosmer 1986, 1461.

78. This is pace Parente (1979, 375). The ancient evidence is abundant: see Fabbrini 1995, 109 n. 68. In the story of the passion of Apollonius, also called Sakkeas, during the reign of Commodus, the proconsul Tigidius Perennis, then governor of the province of Asia, took pity on the stubborn but soft-spoken martyr and, short of releasing him against imperial order, had his legs broken: the outcome was certainly lethal. *Passio Apollonii* 45 (pp. 102–3 Musurillo) reads: πλὴν φιλανθρώπους χρήσομαι σοὶ ἐν τῷ θανάτῳ, καὶ ἔδωκεν σίγνον κατ' αὐτοῦ κατατεργῆσαι τοῦ μάρτυρος τὰ σκέλη. The text gives no further information about the mode of punishment, but Euseb., *Hist. eccl.* 5.21.4 and the Armenian version speak of beheading. According to Eusebius (*Hist. eccl.* 5.21.3), leg breaking was applied to the informer, who happened to be one of Apollonius's own servants, "because the law did not permit that he live," a possible anachronism. Cf. *FIRA I*², no. 94, line 28 (quoted in n. 72); and cf. *Acta Andreae* 51, where denying the breaking of the martyr's legs is viewed as an act of cruelty. See Barnes 1968, 40.

sure on the lower limbs to lift his or her body intermittently and permit normal breathing. Death could be delayed by sitting the victim on a kind of stool (*suppedaneum*) fastened to the upright post of the cross (*stipes*), to limit or postpone suffocation. In contrast with hanging and impalement, death by crucifixion never comes quickly. Unlike exposure, pain is immediate and continuous.⁷⁹

A few aggravating factors made this mode of execution especially dreadful. Crucifixions were usually carried out outside the city limits, thus stressing the victim's rejection from the civic community.⁸⁰ Because of the absence of blood shed out of an open and lethal wound, which evoked the glorious fate of warriors, this type of death was considered unclean, shameful, unmanly, and unworthy of a freeman.⁸¹ In addition, the victim was usually naked.⁸² Essential, too, was the fact that the victim lost contact with the ground, which was regarded as sacrilegious.⁸³ Denial of burial after death was a common element of the punishment,⁸⁴ and the physical horror of the torture was combined with the prospect of becoming the prey of wild beasts, dogs, birds, or witches: any kind of postmortem mutilation was terrifying to ancient people.⁸⁵

Slaves

Most historical and fictional cases of crucifixion are related to slaves. This point is so well established and documented that it is unnecessary to dwell on it, as recorded cases would add up ad nauseam. Whether it was ordered

79. Isid. *Etym.* 5.27.34 (Lindsay) reports: "Patibulum enim vulgo furca dicitur, quasi ferens caput. Suspensum enim et strangulatum ex eo exanimat; sed patibuli minor poena quam crucis. Nam patibulum adpensos statim exanimat, crux autem subfixos diu cruciat." The ἀποθυμιατισμός of the Greeks seems to have been closer to crucifixion than to mere exposure; see Halm-Tisserant 1998, 158–88.

80. See Frascchetti 1984, 127 n. 118, with reference to Zonar. 7.8.12. See also Artem. 2.53, 68; Halm-Tisserant 1998, 99–100.

81. These concepts are developed in anthropological studies; see Cantarella 1984, 40–41, 62. For a similar concern in the penalty for *parricidium* (by contrast with *peuduellio*), see Briquel 1980, 95.

82. Nakedness in punishment was not restricted to crucified people: Polycarp spontaneously took off his clothing before climbing onto the pyre; see *Martyrdom of Polycarp* 13.2 (p. 12 Musurillo).

83. See Voisin 1979. See also the subsection "Insurrection and Rebellion" later in this essay.

84. But it was not necessary, as is shown by the inscription from Puteoli (*AE* 1971, no. 88, lines 13–14, quoted in n. 86) and some archaeological remains; see Ducrey 1971; Yadin 1973. In general, see Fabbrini 1995, 169.

85. See Voisin 1984. See, among numerous texts, Juv. *Sat.* 14.77–78; Luc. *Bellum Civile* 6.543–49. In 177, the bodies of the martyrs of Lyons, who had been strangled in jail, were thrown to the dogs, left unburied for six days, then burned, and their ashes were scattered in the Rhone River, to prevent their later use as relics, and with the aim of depriving the martyrs of the hope of resurrection; see Euseb. *Hist. eccl.* 5.1.59–62 (p. 80 Musurillo).

by the slave's master following some domestic transgression or by public authorities as the consequence of a judicial conviction, the crucifixion of a slave was a public event. In the colony of Puteoli, it was performed by a private undertaker under public contract. His obligations to provide the necessary gear, such as a beam, shackles, ropes, nails, and the executioners (*verberatores* and *carnifex*), who were hired at a fixed rate, were regulated in a municipal law preserved in a Latin inscription dated to the end of the republican period or to the early empire.⁸⁶ The document is a *lex locationis de munere publico libitinario*, including provisions governing contracts for the office of public undertaker. Whereas the first provision, relative to the execution of slaves at their masters' request and expense (*privatim*), is unambiguous about the victims' status and the mode of execution, the second provision, regarding execution ordered by municipal magistrates (*publice*), is ambiguous on these details. As pitch, wax, and candles are among the items to be provided free of cost by the contractor under the second provision, it seems that the convict was to be fastened to a stake and burned alive, unless this material was to be used for some kind of torture applied prior to or during crucifixion.⁸⁷ In the context of the second provision, a reference to two different modes of punishment is not to be excluded, and it is perhaps no coincidence that the victims' status was left undefined. Worth noticing, too, is the fact that the executioner, dressed in a red outfit and ringing a bell, was required to get rid of the body by dragging it with a hook to a dumping site or mass graveyard.

Although crucifixion is the quintessential *servile supplicium*, it is of course not the only kind of lethal torture inflicted on this category of people. However, crucifixion of nonslaves represented, I will contend, a conscious attempt to treat them as slaves and implied for the victim a total loss of legal status (*capitis deminutio maxima*) that occurred *de facto* prior to sentencing.

86. *AI* 1971, no. 88, especially lines 8–10: "Qui supplic(ium) de ser(vo) servave privatim sumerte) volet uni is qui sumi volet ita supplic(ium) sumet: si in cruce(m) / patibul(um) agere volet redemptor) assert(es) vincula) restes verberatorib(us) et verberator(es) praerber(e) d(ebet) et / quisq(tuis) supplic(ium) sumet pro oper(is) sing(ulis) quae patibul(um) ferunt verberatorib(us)q(ue) item carnifici) HS IIII d(are) d(ebet)": 11–14; "Quot(iens) supplic(ium) magistrat(us) public(e) sumet ita imperat quotiencumq(ue) imperat(um) er(it) praestu esse supplic(ium) (s)u sumerte) cruce) statuere clavos pecem ceram candelas) quaeq(ue) ad eas res opus erunt reo / gratis praest(are) d(ebet): item si unco extrahere iussus erit oper(a) rursat(a) id cadaver ubi plura / cadavera erunt cum tintinnabulo extrahere debet." See De Martino 1973; Bodel 1994, 72–80.

87. Cf. Cic. *2 Verr*: 5.63.163.

Several cases of crucifixion of freedmen were recorded, despite the fact that, as Cicero put it with rhetorical purposes, manumission should have freed them from the very "fear of the cross."⁸⁸ However, in the case of serious offenses against their masters, those people who had been informally manumitted could see their condition reversed at their masters' wills. The tradition records the story of Vindicius, a slave who unveiled the conspiracy by Brutus's sons in 509 B.C. As a reward, the Roman state gave him freedom, citizenship, and money from the public treasury and eventually had him crucified for betraying his masters.⁸⁹

At the beginning of Tiberius's reign, the freedwoman Ida was crucified, together with some priests of Isis she had bribed, for tricking Paulina, a highly respected and virtuous Roman matron and Isis's worshiper, into having sexual intercourse with her former master, Decius Mundus. A member of the equestrian order, Mundus was sent into exile for that crime, his lust for Paulina being regarded as a mitigating circumstance. We do not know any more detail about the priests' legal status, but it is possible that they, too, were slaves or former slaves of Eastern origin. Josephus or his source(s) may also have extrapolated the priests' punishment from the freedwoman's. In any case, the story smacks of romance, and as it is an etiological tale for Tiberius's repression of the cult of Isis and expulsion of the Jews from Rome in A.D. 19, its details, although realistic, were probably invented.⁹⁰

Caligula had a freedman crucified for objecting to the assassination of Tiberius.⁹¹ Although technically correct, this case is representative of typical extrajudicial murders that the ancient historiography recorded or

88. Cic. *Rab. perd.* 5.16: "Harum enim omnium rerum [= *carnificis et obductionis capitis et crucis*] non solum eventus atque permissio sed etiam condicio, expectatio, mentio ipsa denique indigna cive Romano atque homine libero est. An vero servos nostros horum suppliciorum omnium [= *verberorum et unci et crucis*] metu dominorum benignitas vindicta una liberat." See Dinkler-von Schubert 1992.

89. *Sibylla ad Iuvenalem* 8.266–68 (ed. Wessner, 152–53; probably dating from the late fourth century) reads: "Vindicius servus, qui indicavit filios Bruti Tarquinio portas velle reserare, quos pater securi ferit, servum autem ut conservatorem patriae manu misit et ut delatorem dominorum cruci adfixit." Livy (2.5.9–10) tells the story of the slave Vindicius, first to be manumitted through the procedure *vindicta* (= an etiological account), but is mute about his subsequent punishment.

90. See Jos. *AJ* 18.65–80, especially 79 (καὶ ὁ Τιβέριος . . . ἐκείνους τε ἀνεσταύρωσεν καὶ τὴν Ἰδην), 80 (Μοῦνδον δὲ φυγῆς ἐτίμησε).

91. Suet. *Calig.* 12.4 reads: "liberto, qui ob atrocitatem facinoris exclamaverat, confestim in crucem acto."

invented to illustrate the reign of infamous emperors, a recurring motif, as will be seen later on.

Twice, Vespasian had freedmen of Vitellius crucified. As these men had been raised to equestrian status by his predecessor, Vespasian may have resorted to crucifixion as a mode of execution to demonstrate that the usurper's legal acts had no validity whatsoever.⁹²

The classical jurists provide little information about crucifixion of freedmen. In his comments on Sulla's law on forgery and counterfeiting, Pseudo-Paulus stipulated that *honestiores* should be deported to an island, whereas *humiliores* should be condemned to hard labor in the mines or crucified. He adds that slaves manumitted after the crime ought to be put to death, undoubtedly through crucifixion: I take it that in this text, the expression "capite puniuntur" referred to the death penalty in general (as opposed to hard labor) rather than to decollation.⁹³

To sum up, even though freedmen appear to have been occasionally crucified, they were markedly less often executed in that way than were slaves. This fact suggests that crucifixion was indeed widely regarded as a *servile supplicium* and that Cicero's apologetic remark in his *Pro Rabirio perduellionis reo* reflects a common practice in the application of criminal law.

Freeborn People

Crucifixion as a mode of execution aims only incidentally at maximizing the victim's pain. Its primary purpose is to emphasize the victim's final and irrevocable rejection from the civic and international community and the total denial of any form of legal protection based on rights guaranteed by *ius civile* and *ius gentium* and attached to any legal status above slavery.⁹⁴ It may sound odd, then, to find out that a significant number of texts record the paradoxical event of a freeborn's crucifixion. Unless such cases fit within the logic of that basic claim, one would have to admit either that the thesis is mistaken or that the daily practice of criminal law shows significant departure from the spirit and letter of the law. The following survey is arranged according to the type of crime punished by crucifixion, in the order of increasing frequency in the sources.

92. Tac. *Hist.* 4.4.2 reports: "Solacio fuit servus Vergilii Capitonis, quem proditorem Tarracinen-sium diximus, patibulo adfixus in isdem anulis, quos acceptos a Vitellio gestabat"; 4.11.3 reports: "Asiaticus (is enim libertus) malam potentiam servili supplicio expiavit." See also *Hist.* 2.57.2.

93. Paulus *Sent.* 5.25.1: "honestiores quidem in insulam deportantur, humiliores autem aut in metallum dantur aut in crucem tolluntur; servi autem post admissum manumissi capite puniuntur." My reading is pace Grodzynski (1984, 384 n. 72).

94. This purpose is adequately expressed by Cicero (2 *Verr.* 5.66.169–70).

Poisoning

To illustrate Galba's excessive violence during his governorship in Tarraconensis in the sixties A.D., Suetonius reports that he had a guardian crucified for poisoning his ward in order to enter into his inheritance. The condemned man protested against this mode of execution, reminding the governor of the privileges granted by law to Roman citizens. Galba then had him crucified on a higher cross painted in white. Suetonius remarks further on that Galba was "immodicus," an understatement that illustrates to what extent the expectations of a Roman citizen living in Italy in the second century A.D. were consistent with those of an expatriate living in Spain in the first century A.D.⁹⁵

Military Disobedience

The recently published *senatus consultum de Cn. Pisone patre* of A.D. 19 recalls among the many abuses at the hand of Cnaeus Calpurnius Piso some crimes perpetrated during his short-lived command in Syria following Germanicus's murder, whereby he exhibited to the utmost his "unica crudelitas." The official senatorial propaganda has it that, not content with condemning provincials to death without proper trial, and in the absence of his advisers' approval, Piso went as far as crucifying a centurion despite his Roman citizenship. Seneca, who describes Piso as a man who mistook sternness (*rigor*) for firmness (*constantia*), may be referring to the same event in his *De ira* as an unambiguous beheading.⁹⁶ In ancient historiography, villains were supposed to misbehave, and one way they did so was by transgressing taboos. The crucifixion of a free citizen was a recurrent motif illustrating blatant lack of moderation.⁹⁷

The *Historia Augusta*, a source from the late fourth century A.D. authored under various pen names by one writer, possibly a lawyer,⁹⁸ records

95. Suet. *Galb.* 9.2: "et tutorem, quod pupillum, cui substitutus heres erat, veneno necasset. cruce adficeri implorantique leges et civem Romanum se testificantem, quasi solacio et honore aliquo poenam levaturus, mutari multoque praeter ceteras altiore et dealbatam statui crucem iussit."

96. *Senatus consultum de Cn. Pisone patre* 49–52 (ed. Eck, Caballos, and Fernández [1996, with commentary at 169–71]): "perspecta etiam / crudelitate unica qui incognita causa sine consili sententia plurimos captis supplicio adfexisset neq(ue) externos tantum(m)odo sed etiam centurionem / (civem) Romanum crucifixisset." Cf. Sen. *Ira* 1.18.3–6: "Damnatus extra vallum productus est et iam cervicem porrigebat. . . . Tum centurio supplicio praepositus condere gladium speculatorem iubet. . . ." Admittedly, Seneca does not say how the *miles, consilio*, and centurion were eventually put to death. The *senatus consultum de Cn. Pisone patre* does not seem to provide, in my view, cogent evidence that *externi* were being massively crucified in the Roman East at the time of Jesus.

97. See Halm-Tisserant 1998, 61–67, discussing a Greek context. For "cruelty in criminal trials" as "part of the image of the 'bad governor' in Late Antiquity," see Harries 1999, 156.

98. Honoré (1987, 166–70) convincingly suggested that the writer was writing between 393 and 395, while attached to the urban prefect's office.

four earlier cases of crucifixion of soldiers for disobedience, such as plundering, violence against provincials, and fighting despite orders. Again, all passages, clearly marked by the literary influence of Cicero's *De suppliciis*, tend to denounce the unusual cruelty of those responsible for the executions: respectively, Avidius Cassius sometime before 175, Clodius Albinus in the 190s, and Opellius Macrinus in 217/218. One of the alleged authors, Vulcacius Gallicanus, admits that he cannot find parallel instances of crucifixion of soldiers in Roman history: he was obviously unfamiliar with the tradition recorded in the senatorial decree against Piso. Interestingly, another alleged writer, Julius Capitolinus, seems to imply that under certain circumstances ("ubi causae qualitas . . . postulavit"), crucifixion could have been legitimately used to execute soldiers.⁹⁹

Desertion and High Treason

In 201 B.C., after his victory against the Carthaginians, Scipio Africanus cracked down on deserters. Roman runaways were crucified; allies were beheaded for disloyalty.¹⁰⁰ Valerius Maximus expressed his doubts concerning the adequacy of the former group's punishment and decided to skip the details to spare Scipio's reputation and to avoid adding to the insult suffered by the Romans, however deservedly, on that occasion. The writer's uneasiness was misplaced, because Scipio seems, according to the view already presented in this essay, to have followed a proper course of action: as defectors, the soldiers had forfeited their citizenship and become enemies (*hostes*) of the Roman state. After being captured as prisoners of war, they were automatically considered as slaves. The author of one of the few surviving ancient texts on military law, the writer Tarruntenus Pater-

99. SHA *Avidius Cassius* 4.1–2 (Vulcacius Gallicanus): "multa extant crudelitatis potius quam severitatis eius indicia. Nam primum milites, qui aliquid provincialibus tulissent per vim, in illis ipsis locis, in quibus peccaverant, in crucem sustulit" (the following paragraphs demonstrate the creativity of Avidius Cassius in devising unusual punishments): *Avidius Cassius* 4.6: "rapi eos [= centuriones] iussit et in crucem tolli servilique supplicio adfici, quod exemplum non extabat"; *Clodius Albinus* 11.6 (Julius Capitolinus): "Uxori odiosissimus fuit, servis iniustus, atrox circa militem. Nam saepe etiam ordinarios centuriones, ubi causae qualitas non postulavit, in crucem sustulit. Verberavit certe virgis saepissime"; *Opellius Macrinus* 12.1–2 (Julius Capitolinus): "Fuit igitur superbus et sanguinarius et volens militariter imperare. . . . Nam et in crucem milites tulit et servilibus suppliciis semper adfecit." The discrepancy incidentally verifies the hypothesis of Honoré (1987: 171–72) that the author assumed different attitudes under various pen names, and it vindicates Honoré's statement that "Scriptor is not as careless of the historical truth as is supposed" (176). See also Chastagnol 1972.

100. Liv. 30.43.13 reports: "De perfugis gravius quam de fugitivis consultum; nominis Latini qui erant, securi percussit. Romani in crucem sublatis"; Val. Max. 2.7.12 reports: "Hos [= Romanos qui ex nostris exercitibus ad Poenos transierant] enim tamquam patriae fugitivos crucibus adfixit, illos [= Latinos] tamquam perfidos socios securi percussit." Note, however, that the word *fugitivus* is used to represent opposite groups in these sources.

nus of the late second century A.D., considered that traitors and defectors could be tortured and killed at will, because of their status as *hostes*.¹⁰¹

In the late seventies B.C., Verres, then governor of Sicily, had a Roman knight crucified on the grounds that he was spying on behalf of a gang of runaway slaves. P. Gavius was executed as *speculator fugitivorum* despite his protest and claim that, in his capacity as Roman citizen, he was entitled to a proper trial and should be given the right to appeal to the people in Rome (*ius provocationis*). Unimpressed, Verres mocked Gavius's claim by having him crucified in an unusual place, where the victim could see the Italian shore over the Straits of Messina. In his speech against Verres, Cicero emphasized that on this particular occasion, the victim was denied not only the privileges and rights attached to citizenship (*civitas*) but even those attached to free status (*libertas*).¹⁰² He also stressed that both the death sentence and the mode of execution reflected a blatant abuse of power. However, in view of Tarruntenus Paternus's opinion (just mentioned), admittedly expressed at a much later date, it is not so sure that Verres' measure was as outrageous as Cicero claimed—he called it a “*nefaria crudelitas*.” It is remarkable that in both capacities, as a prosecutor against Verres and as a defense advocate for Rabirius, Cicero could make consistent use of the principle that legal status should be instrumental in deciding penalties, in particular the mode of execution in capital cases, and that persons of free status (freeborn and freed persons), not only Roman citizens, should be regarded as entitled to exemption from the shame and horror of crucifixion, *crudelissimum taeterrimumque supplicium*.¹⁰³ This view is echoed in the early fourth century A.D., by another apologist, Lactantius.¹⁰⁴

Robbery and Piracy

Crucified robbers hang in the background of the famous tale of the Matron of Ephesus. Since the provincial governor feared that their relatives would try to bury the corpses, soldiers were ordered to stand guard

101. Tarruntenus Paternus (*de re militari*) *Dig.* 49.16.7: “Proditores transfugae plerumque captis puniuntur et exauctorati torquentur: nam pro hoste, non pro milite habentur.”

102. Cic. *2Ver.* 3.66.170: “Facinus est vincere civem Romanum, scelus verberare, prope patricidium necare; quid dicam in crucem tollere? (. . .) Non tu hoc loco Gavius, non unum hominem nescioquem, sed communem libertatis et civitatis causam in illum cruciatum et crucem egisti.”

103. For the story of P. Gavius's crucifixion, see Cic. *2Ver.* 3.61.158–67.171. On the same theme, see 1.3.7, 3.6.12; see also Cic. *Rab. perd.* 3.16 (cited in n. 88).

104. Lactant. *Div. inst.* 4.26.29: “. . . (infame genus) supplicii, quod etiam nomine libero quamvis nocente videatur indignum.”

around the clock.¹⁰⁵ The more interesting case of Lucius occurs in another fictional, novelistic context, Apuleius's *Metamorphoses*. Charged with robbery and murder while staying in a Thessalian city, Lucius was tried in the theater by municipal magistrates. The accuser—the alleged victims' mother—asked for the death penalty by crucifixion.¹⁰⁶ Pregnant with interesting narrative potential, such a situation must have been rather common across the empire. Josephus has numerous—perhaps a few too many—accounts of robbers' crucifixions in Palestine under the procuratorships of Cumanus (A.D. 48–52) and Felix (52–60).¹⁰⁷ Probably falling into this category is the stone-throwing, rowdy blockhead of a fable by Phaedrus, tricked into and punished for turning against a rich and powerful man in the hope of making a bigger profit than from Aesopus, his previous victim.¹⁰⁸ *Latrocinium* was a loosely defined crime in Roman law that could include almost any act of random violence perpetrated with the purpose of acquiring some material asset. Robbers were often runaway slaves, lived outside or on the margin of society, and were outlawed.¹⁰⁹ That Roman criminal law would regard them as slaves and treat them accordingly is only natural.

Insurrection and Rebellion

Under the reign of Tiberius, the prefect Aulus Avillius Flaccus, convinced that a large-scale uprising was in the making, officially withdrew all legal protection from the Jewish community at Alexandria. When a pogrom broke out, Flaccus had many Jews flogged in public, tortured, and eventually crucified.¹¹⁰ This was not an isolated case. During the first century A.D., the Romans crushed several Jewish revolts in Palestine, reportedly crucifying rebels who had fallen alive into their hands.¹¹¹ Josephus tells of two thousand cases in 4 B.C. and more than five hundred cases a day in 70,

105. Petron. *Sat.* 111.5 reads: "... cum interim imperator provinciae latrones iussit crucibus affligi ..."; 111.6 reads: "... cum miles, qui cruces asservabat ne quis ad sepulturam corpus detraheret. ..."

106. Apul. *Met.* 3.9: "Prius, inquit, optimi cives, quam latronem istum miserorum pignorum meorum peremptorem cruci affigatis. ..."

107. Joseph. *BJ* 2.241 (= *AJ* 20.129), 2.253.

108. Phaedrus *Fab.* 3.5 (Aesopus et petulans).

109. Flor. *Epit.* 2.7.8 (on the repression of the servile war by Perperna in Sicily) reports: "reliquias latronum compedibus, catenis crucibusque punivit." Cf. the case of Calocerus in Cyprus (A.D. 335) according to Aur. Vict. *Caes.* 41.11–12: "quo excruciato, ut fas erat, servili aut latronum more ..." Morton Smith pointed out to me that in Josephus, λησται were usually subversives. But for my purpose here, the nuance is trivial. See Jossa 1983. On *latrocinium*, see Shaw 1984; Habinek 1998, 190–91 n. 4; Grünwald 1999.

110. See Philo *In Flacc.* 54, 72, 83ff.

111. See Joseph. *BJ* 2.75 and *AJ* 17.295 (4 B.C.); *AJ* 20.102 (A.D. 46–48, Judas the Galilean's sons were crucified on the order of Tiberius Alexander, a Roman official of Jewish background); *BJ* 2.306

adding that the total number would have probably been much higher had not the Romans run out of space and wood to carry out crucifixions.¹¹² Although mass crucifixions are attested in the context of the repression of Spartacus's slave revolt in 71 B.C., a major scare in Rome's backyard,¹¹³ Josephus's story sounds rather impractical: without denying the probability of large-scale atrocities, one has to wonder why the victorious army would have made life so difficult for itself by resorting to such a labor-intensive mode of execution. Josephus's reports merely serve the purpose of illustrating how the Jewish historian, who claimed to have personally witnessed the crucifixion of some of his relatives, chose to depict the way the Romans tried to discourage, in the most spectacular and savage manner, any further action of that kind. Not only do the executions recorded by Philo and Josephus conform with known Roman practices against enemies of the state (*hostes*, as discussed earlier in this essay), but they also incidentally reflect the opinion of the Roman nobility regarding Jewish people—in the words of Cicero, Josephus (citing the future emperor Titus), and Tacitus, “a people born to be enslaved,” “used to slavery,” and “the most despicable group of all slaves.”¹¹⁴

The Jews were not the only ones to resist Romanization. One Tiberius, an otherwise unknown proconsul of Africa in the late second century, reportedly “displayed” the priests of Saturn alive on trees in the gardens of their temples for performing child sacrifices. There is no reason to think that the priests belonged to any lesser class than the local elite. Although the mode of execution may have nothing to do with crucifixion, which Tertullian only mentions for the sake of comparison (“arboribus . . . votivis crucibus”), it could be explained as an adequate penalty against those who tried to resurrect an otherwise abandoned custom to promote their resistance to Roman authority and the Roman way of life.¹¹⁵

and 308 (A.D. 66), 3,321 (A.D. 67), 5,289 and 446–51 (A.D. 70), 7,201–2 (A.D. 71); *Vit.* 420–21. See also Schürer 1973, 332, 357, 485, 504. The execution in 37 B.C. of Antigonus, king of the Jews, by Antony falls outside the definition of crucifixion; see Dio Cass. 49.22.6; Joseph. *AJ* 14.487–91, 15.5–10; Joseph. *BJ* 1.354–57; Plut. *Ant.* 36.2. See also Schürer 1973, 286.

112. Joseph. *BJ* 5.451.

113. See App. *B Cīv.* 1.200.

114. Cic. *Prov. cons.* 5.10: “Iudaeis et Suris, nationibus natis servituti”; Joseph. *BJ* 6.42: (Ἰουδαίοις) μαθούσι δουλεύειν; Tac. *Hist.* 5.8.2: “Dum Assyrios penes Medosque et Persas Oriens fuit, despectissima pars servientium (Iudaei).”

115. Tert. *Apol.* 9.2–3 (written in 197): “Infantes penes Africam Saturno immolabantur palam usque ad proconsulatum Tiberii, qui ipsos sacerdotes in eisdem arboribus templi sui obumbraticibus scelerum votivis crucibus vivos exposuit, teste militia patris nostri, quae id ipsum munus illi proconsuli functa est. Sed et nunc in occulto perseveratur hoc sacrum facinus.” See Rives 1994. The torture is reminiscent of suspension from the *arbor infelix*; see Cantarella 1991, 171–210.

Thus, crucifixion was a normal way to execute rebels. Those Britons who had crucified Roman colonists and residents in Londinium and Verulamium (A.D. 61) were thought to have used this mode of execution, among others, in anticipation, so says Tacitus, of what was in store for them in case of defeat.¹¹⁶ In fact, the crucified rebel was such a familiar image that it became a fabulistic motif: Pliny the Elder tells how old and weakened lions used to besiege towns in Africa to feed on their inhabitants, and he wants the reader to believe, on the authority of no less an eyewitness than the historian Polybius, that Scipio Aemilianus, back in the second century B.C., would have crucified one of the lions to deter the others from such threatening behavior.¹¹⁷

The death sentence against Jesus Christ was probably based on the charge of rebellion. Apart from the gospel tradition, the second-century pagan writer Celsus, extensively quoted by Origen, states that Jesus was known back then as "a chief robber and leader of sedition."¹¹⁸ The charge was apparently not groundless, since even the authors of the Gospels had difficulty explaining why some of Jesus' followers were carrying weapons, eventually used against the soldiers sent to arrest him. All four Gospels acknowledge, while playing down the event, that some violence occurred that night.¹¹⁹ John reports that the troops involved in the arrest included an entire (Roman?) cohort backed by Jewish police.¹²⁰ This detail, possibly invented, suggests that significant resistance was expected on the part of Jesus' followers. However, the story is more complicated: Luke devotes a

116. Tac. *Ann.* 14.33 (A.D. 61): "sed caedes paribula ignes cruces, tamquam reddiduri supplicium, at praerepta interim ultione, festinabant."

117. Plin. *HN* 8.18.47.

118. Origen *C. Cels.* 2.12: λῆστοραρχὸς πονηρὸς καὶ ἀπειροκλήτων ἄρχων; 8.14: τῆς στάσεως ἀρχηγέτης. Concerning the trial of Jesus, I generally agree with Sherwin-White 1963, chaps. 1–2. See also Fox 1991, 283–310; Millar 1990; both works discuss why John's account is to be preferred with regard to the timing of the events, although I cannot accept Millar's contention (376; cf. Fox 1991, 302) that in reconstructing Jesus' life and death, "amalgamating data from all four Gospels" is "illegitimate." See Egger 1997 for a survey of the evidence and an up-to-date bibliography, although Egger's conclusion (199), shared with many others before him, (see, e.g., Cohen and Paulus 1985), that the Romans had found Jesus guilty of "crimen maiestatis populi Romani imminutae" (i.e., "perduellio") is debatable: the reported criminal procedure and Jesus' punishment, legal status (noncitizen), and social standing (lower-class, despite Bauman 1996, 180 n. 13, citing Paulus *Sent.* 5.29.1) all speak against it; see Robinson 1995, 74–78. Ulpianus's definition of *maiestas* ([7 *de officio proconsulis*] *Dig.* 48.4.1) is somewhat anachronistic for the early first century A.D.; see Harries 1999, 128 and n. 63 with bibliography. In the words of Watson (1995, 75), "perverting the Jewish nation is no crime against Roman law"; the reference is to Lk 23:2. But it may be correct to say that Jesus' accusers tried to have him charged with "crimen maiestatis," though to no avail. On *status* as a crime committed by Jesus, Jews, and later Christians, see Dormeyer 2000.

119. Mk 14:47; Mt 26:51; Lk 22:50; Jn 18:10.

120. Jn 18:12.

short section to a dialogue that allegedly took place before Jesus went to the Mount of Olives, in which Jesus requests that his disciples carry swords: “‘And the one who has no sword must sell his cloak and buy one. For I tell you, this scripture must be fulfilled in me, *And he was counted among the lawless*; and indeed what is written about me is being fulfilled.’ They said ‘Lord, look, here are two swords.’ He replied, ‘It is enough.’”¹²¹ By Luke’s own admission, Jesus’ followers did not have to buy the requested weapons, because they already had more than one at hand.¹²²

A group of people carrying weapons in public places could be seen as a threat, as the next generation of Romans and Jews in Palestine would know all too well.¹²³ Such a threat was unlikely to be dismissed lightly. Perhaps this menace allowed Jesus’ Jewish opponents to play an instrumental part, if one follows the Gospels’ version, admittedly a very biased source: knowing that the charge of blasphemy retained by the Sanhedrin had little chance of success in a Roman court,¹²⁴ they would not have failed to capitalize on the Roman authorities’ paranoia concerning risks of rebellion. Accused, as the leader of the group, of inciting the Jewish people to revolt against Roman occupiers,¹²⁵ outlawed by the very nature of his crime of sedition, Jesus was likely to be condemned to death and crucified. As sole holder of the *ius gladii*,¹²⁶ Pontius Pilatus, the Roman prefect of Judaea, was required to take a stand on the issue. Failure to act against what was alleged to be a rebellion would have been tantamount to high treason and conspiracy. Succumbing to tergiversation, by taking the advice of his wife or relinquishing the whole case to the judgment of another court,¹²⁷ did not do in the end and could have only made things worse for him. Pilate was the only one who was entitled and obliged to make the final decision to crucify Jesus, despite his alleged personal feelings.

121. Lk 22:36–38 New Revised Standard Version, quoting Isaiah 53:12: καὶ μετὰ ἀνόμων [= ἐν τοῖς ἀνόμοις] ἐλογίσθη.

122. This is pace Watson (1995, 167), who anachronically alleges that traveling Essenes reportedly carried weapons to defend themselves against bandits (Joseph. *BJ* 2.125).

123. On the *sikarioi*, see Joseph. *AJ* 20.185–88; *BJ* 2.254–57, 4.389–409. Cf. the case of the Egyptian false prophet in *BJ* 2.261–65, illustrating that the threat was indeed serious.

124. See Robinson 1973 (non vidi).

125. Lk 23:2, 5. According to Jn 7:30 and 11:57, Jesus was first outlawed by the Jews. See Fox 1991, 300.

126. This is pace Watson (1995, 170, 204 n. 32). Stephen’s death by stoning (Ac 7:57–60) does not prove that the execution/murder was lawful. In A.D. 62, James, Jesus’ brother, was stoned at the instigation of the high priest Ananus precisely at a time when the procurator Festus had just died and his successor, Albinus, had not yet arrived. Josephus reports (*AJ* 20.197–203) that Ananus was threatened by Albinus and deposed by King Agrippa for this very action.

127. See Mt 27:19; Lk 23:7.

The Gospels describe a procedure leading to Jesus' crucifixion that is not without parallel in Hellenistic and Roman times. Consisting in a popular demonstration leading to the conviction and execution of a criminal, it is referred to in the sources by the name *succhmatio* (ἀνα-, ἐκ-, ἐπιβόησις).¹²⁸ The model of civil unrest leading to the execution of the alleged cause of the unrest is commonly attested in the narratives found in the Acts of the Christian martyrs, most noticeably in the story of the martyrs of Lyons.¹²⁹ It was then up to the governor to suppress those who were merely regarded as the cause of discord, despite his expressed conviction that intention was lacking on the part of those indicted. Consequently, even though Pilate had every reason and right to choose crucifixion over other forms of execution, popular participation may have put pressure on him to act in a certain way. This possibility opens the door to the question of who suggested the mode of execution and why.

Many modern scholars have regarded Jesus' crucifixion as a purely Roman act. This verdict may be a fallacious point of view that unnecessarily plays down the role of the people, whoever they were, gathered in front of Pilate's tribunal. The Gospels claim that popular pressure was instrumental precisely in choosing the mode of execution. This version is problematic for two main reasons. First, practically, from a Jewish point of view, crucifixion would have been a poor choice for Jesus' execution, due to the religious necessity to bury the corpse before the beginning of the Sabbath; Isidorus of Seville, in the seventh century, comments that while Jesus' death came quickly, the two bandits crucified at his side had their legs broken to hasten the procedure, so that the burial deadline could be met.¹³⁰ Second, the Jewish authorities were concerned with blasphemy, a charge carrying the death penalty by stoning in Jewish law.¹³¹ However,

128. See Colin 1965, 113–16, with reference to *OGIS* 8 (= *JGJF* 526; Eresos and Lesbos, 334 B.C.); Liv. 26.3 (Rome, 211 B.C.); Ac 25:24 (Caesarea, A.D. 59); Apul. *Met.* 10.6.3 (Thessaly, second century A.D.). See also Fox 1991, 290 and 456 n.

129. See *Letter on the Martyrs of Lyons* (A.D. 177), quoted in Euseb. *Hist. eccl.* 5.1.30–31, 38 (pp. 70–74 Musurillo); *Martyrdom of Polycarp* (ca. A.D. 155) 12.2 (pp. 10–12 Musurillo); Barnes 1968, 48–50.

130. Isid. *Etym.* 5.27.37 (Lindsay): "... unde et in Evangelio latronibus, ut morerentur et de ligno ante sabbatum deponerentur, crura contracta sunt, quia ligno suspensi cito mori non poterant." The two ζῆσται are mentioned in Mt 32:38 and Mk 15:27 and are often represented as bound, rather than nailed, to the cross, to explain the delay.

131. See Lv 24:13–16. The Mishnah (*Sanbedrin* 7.1) lists four legal modes of execution: stoning, burning, slaying, and strangling. The last one was sometimes replaced by hanging; cf. *Targum to Ruth* 1.17: "Naomi said 'we have four penalties of death for the guilty, stoning with stones, and burning with fire, and beheading (with) the sword, and hanging upon wood'" (trans. A. Saaristo, *Studia Orientalia* 2 [1928]: 93). But note Mishnah, *Sanbedrin* 6.4: "H. 'All those who are stoned are hung on a tree (afterward)' the words of Rabbi Eliezer. I. And sages say 'Only the blasphemer and the one who worships

from a theological point of view, it was very convenient for them to see Jesus crucified as a subversive and rebel, because the Torah prescribed that anyone who had lost contact with the ground after death—be it through hanging or crucifixion—was accursed before God: “When someone is convicted of a crime punishable by death and is executed, and you hang him on a tree, his corpse must not remain all night upon the tree; you shall bury him that same day, for anyone hung on a tree is under God’s curse. You must not defile the land that the LORD your God is giving you for possession.”¹³² Therefore, death by crucifixion would have made Jesus’ claim to be the Messiah totally unacceptable to observant Jews, who until then may have been unsure about Jesus’ status.

If, indeed, the Jewish crowd, incited by the high priest, played a role in Jesus’ condemnation, the dilemma presented by the need of a swift death and the appeal of a dispelling solution to Jesus’ claim is difficult to solve. It could be suggested that the crowd gathered in front of Pilate’s tribunal called not so much for Jesus’ crucifixion as for the (posthumous) hanging of his body. Hanging is described as follows in the Mishnah: “They drive a post into the ground, and a beam juts out from it, and they tie together his two hands, and thus they do hang him.”¹³³ Confusion between this method and crucifixion would be quite understandable. Such a hypothesis, ludicrous as it may sound, was actually suggested by later sources, Jewish and Christian,¹³⁴ and could be explained as a result of linguistic confusion: the Hebrew word for hanging (*tlh*) was apparently the same as the Aramaic word for crucifying (in Hebrew, *tlh*). Thus, a later tradition, dating from Mishnaic time (second/third century) but not included in the censured edition of the Talmud, records that “on the eve of Passover Yeshu was hanged.” The following passage of the text describes the lengthy procedure used to call defense witnesses. Then a commentator, Ulla, asks whether it was regular to go through the whole process in case of enticement. The response was “With Yeshu however it was different [from what

an idol are hung” (trans. J. Neusner, *The Talmud of Babylonia*, vol. 23B, *Tractate Sanhedrin* [Atlanta, GA, 1984], 87).

132. Dt 21:22–23 NRSV. The Greek version of the Septuagint translates the key words as follows: κρεμάσητε αὐτὸν ἐπὶ ξύλου and ὅτι κεκαταραμένος ὑπὸ θεοῦ πάς κρεμαζόμενος ἐπὶ ξύλου. Jerome’s Vulgate reads, “quia maledictus a Deo est qui pendet in ligno.” Parente (1977, 85–97) lists various interpretations (Jewish vs. Christian) based on the nature of a genitive (objective vs. subjective in “curse of God”) in the Hebrew text.

133. Mishnah, *Sanhedrin* 6.4 (trans. J. Neusner [New Haven, CT, and London, 1988], 595).

134. See Talmud, *Sanhedrin* 43a. Cf. Mishnah, *Sanhedrin* 6.1 and 41. 7.4; Ac 5:30: Ἰησοῦν ὃν ἡμεῖς διεχειρίσασθε κρεμάσαντες ἐπὶ ξύλου; Ga 3:13: ἐπικατάρατος πάς ὁ κρεμάμενος ἐπὶ ξύλου, a quote from Dt 21:26 and 21:23. See Cohn 1967, 365, 371; Parente 1977; Kulin 1982, 665–69.

should have been done in accordance with Dt 13:9–10] for he was connected with the government.”¹³⁵ Roman sympathy, although surprising, would account for Jesus’ public and triumphal entrance into Jerusalem on Palm Sunday and would have protected him at first from stoning. His eventual crucifixion, whether it was forced on Pilate or not, is revealing of a later falling out with his foreign protector.

The Old Testament records many cases of posthumous hangings.¹³⁶ So does a Latin tradition preserved by Servius. The fourth-century commentator of Virgil goes back to the republican historians Cassius Hemina and Varro. Servius reported the story of a group of nonslave workers forced by King Tarquinius Superbus to work in the sewer system, who hanged themselves out of protest. Offended by their suicide, the king had them crucified after death, to deny them proper burial.¹³⁷ In either context, posthumous defilement of the corpse carried a strong symbolic meaning. However, death by hanging, usually suicidal, also bears on the victim’s funerary rights. Artemidorus Daldianus refers in his *Onirocriticon* to the story of a man who had dreamed that he had lost his name. Subsequently, his son (who bore his name) died, and his property was confiscated as a result of an accusation of crimes against the state followed by a condemnation to ἀτιμία (= *capitis deminutio* or *infamia*) and exile. After all these losses, he hung himself and actually lost his name, since family members would never mention it during funerary meals, because of the manner of his death.¹³⁸ Loss of civic status and symbolic rejection in death are two sides of the same coin.

Hanging alive by non-Romans and in particular by Jewish people is occasionally attested in both biblical and Hellenistic/republican times.¹³⁹

135. Trans. Neusner (1984, 74), following Schacher.

136. See Josh 10:26; 1Sam 31:10 (= Joseph. *AJ* 6,374); 2Sam 4:12; Est 9:13–14 (= Joseph. *AJ* 11,289).

137. Serv. *ad Aen.* 12,603: “Cassius autem Hemina ait, Tarquinium Superbum, cum cloacas popululum facere coegisset, et ob hanc iniuriam multi se suspendio necarent, iussisse corpora eorum cruci affligi, tunc primum turpe habitum est mortem sibi consciscere, et Varro ait, suspendiosis, quibus iusta fieri ius non sit, suspensis oscillis, veluti per imitationem mortis parentari, docet ergo Vergilius secundum Varronem et Cassium, quia se laqueo induerat, leto perisse infirmi.”

138. Artem. 1.4; cf. 2,68, where flying dreams mean that one’s country is inaccessible and anticipate punishment, even by crucifixion. On Roman revulsion toward hanging as preventing the soul from leaving the body, see Cantarella 1991, 177–86.

139. See Gn 40:19, 22 (= Joseph. *AJ* 2,73); Josh 8:29; Ezra 6:11 (= *AJ* 11,17, 103); Est 2:23, 5:14, 7:9–10 (= *AJ* 11,208, 241, and 280, respectively); 1 am 5:12. See also Joseph. *AJ* 13,376–83 (= *BJ* 1,92–97) on hanging by Alexander Iannacus in Jerusalem in 88 B.C., with the evidence from the Dead Sea Scrolls (*Pesher Nahum*, col. 1, lines 1–11). Cf. Yadin 1971 and Baumgarten 1972 for a restoration supported by the Temple Scrolls (col. 64, lines 6–13); *Sifre* on Dt 21:22; and Baraita in the Babylonian Talmud, *Sabbodin* 46b. A similar instance was carried out in the second century B.C. by Shimon ben Shetah; see Mishnah, *Sabbodin* 6.4.

Even crucifixion was not a quintessentially Roman punishment but was reportedly used by Greeks (under the name ἀποτυμπανισμός), Carthaginians, and even Germanic and Briton tribes.¹⁴⁰ I conclude that whoever tries to assign liability for Jesus' crucifixion to either the Romans or the Jews should resort to a different line of argument. Short of making the Jews responsible for Jesus' death, as some Christian scholars have tried to demonstrate over two millennia, the evidence I have presented demonstrates the logic of what is implied in the Gospels' narrative (without assuming that the narrative itself has any historical value)—namely, that the crowd representing Jesus' opponents was less interested in maximizing Jesus' suffering than led to believe that execution in the Roman way would serve their interests in invalidating what was perceived as Jesus' political and theological program. In other words, from a legal point of view, Jesus' crucifixion makes sense no matter who called for it and fits perfectly in the pattern of applying a slave punishment to those who, as subversives, rebels, and outlaws, could not benefit from the protection of the law.

Christianity

Between the second half of the first century A.D. and the reign of Constantine, Christians were persecuted in a rather unsystematic way and with various degrees of intensity according to times and places. Both Christian and, to some extent, pagan writers kept detailed records of those who had suffered martyrdom for their faith. Remarkably, not too many of them appear to have been crucified. The most notorious instances are those of the apostles Peter and Andrew, according to later sources sometimes qualified as “forgeries of heretics.”¹⁴¹ Peter was martyred at Rome during the reign of Nero, having requested to be crucified upside down, in an implicit act of extreme humility in memory of Jesus' death.¹⁴² However,

140. See Cantarella 1991, 41–46, with qualifications. The story of Regulus's crucifixion by the Carthaginians is due to a later tradition: see Sen. *Ep.* 98.12; Cantarella 1991, 100–92. See also Strabo 1.4.18; Sil. *Poa.* 1.151–81 (Spain under Carthaginian rule in the third century B.C.). According to Flor. *Epit.* 2.30.24, Drusus attacked three German nations, the Cherusci, the Suebi, and the Sicambri, after they had started the war by crucifying twenty centurions as a way of binding themselves together by oath: “qui viginti centurionibus in cruce[m] actis hoc velut sacramento sumpserant bellum . . .” (one manuscript [C] has “in cruce[m] hactis”); see also Tac. *Ann.* 14.33.

141. So writes Eusebius (*Hist. eccl.* 3.25.6) about the Acts of Andrew, John, and the other apostles.

142. Euseb. *Hist. eccl.* 2.25.5 reads: καὶ Πέτρος ὡσαύτως ἀνασκολοπισθήναι; 3.1.2 reads: ὃς καὶ ἐπὶ τέλει ἐν Ῥώμῃ γεγόμενος ἀνεσκολοπισθῆ κατὰ κεφαλῆς, οὕτως ἀξιώσας παθεῖν. The *Acta Petri* (35–41), written in Greek in the late second century and translated into Latin in the mid-third century, contains a similar tradition with unambiguous reference to crucifixion (obviously based on Jesus' logion ἀνοθεν μέλλω σταυρούσθαι) and the theological justification of Peter's choice (38).

apart from the technical difficulty linked to the mechanics of an upside-down crucifixion and apart from the dubious historicity of Eusebius's sources (Gaius of Rome, Dionysius of Corinth, and Origen), the word used by him in both passages, ἀνεσκολοπίσθη/ἀνασκολοπισθῆναι, points to a different punishment, impalement or exposure at the stake. If Peter was indeed crucified, the circumstances of his death would show that some Christians may have wanted to die in the same manner as Jesus, to share in his fate and glory, and may have influenced the judge's sentencing in that respect. The tradition about the execution of Andrew, Peter's brother, is even more romantic. He was reportedly crucified at Patras, where he cooperated with the executioners and took the opportunity of a long-protracted death to preach to his followers, eventually turning down a last-minute reprieve offered by the governor.¹⁴³ The typical shape of the cross (X vs. T) is a later accretion.

Finally, the second-century church historian Hegesippus, cited by Eusebius, records the execution of Simeon, son of Clopas, a relative of Jesus Christ and the second bishop of Jerusalem, who had allegedly been crucified in the reign of Trajan (ca. 106/107). The account is of dubious historical value, the victim being made to die on the cross at the age of 120 after withstanding torture for many days.¹⁴⁴ One should not exclude the possibility that others have been crucified as a result of multiple charges or confusion of status or both. However, a plethora of crucified martyrs would have resulted in banalizing Jesus' death, and only a few members of the inner circle were allowed by Christian martyrologists to share in the Master's fate. Thus, the Acts and Passions of Christian martyrs consistently show that burning at the stake, mauling by wild beasts, and other rather exotic forms of execution were the choice penalties in such cases. This is congruent with the fact that the persecutions of Christians were sometimes conducted under the charge of *maiestas*, which does not normally carry the death penalty by crucifixion.¹⁴⁵

143. *Acta Andreae* 51–63 (for the claim that his crucifixion lasted three days and three nights, see 59); *Vita Andreae* 36. See also August. *Contra Faustum manichaeum* 14.1 for the likeness to Peter's death, although Andrew's death probably occurred earlier, around 60.

144. See Euseb. *Hist. eccl.* 3.32.

145. See *Dig.* 48.4; *Cod. Inst.* 9.8; Paulus *Senz.* 5.29, especially 1: "His antea in perpetuum aqua et igni interdicebatur: nunc vero humiliores bestiis obiciuntur vel vivi exuruntur, honestiores capite puniuntur."

Conclusion

What we know through nonlegal sources on the application of the death penalty by crucifixion is consistent with the basic hypothesis that in Roman law crimes and punishments were matched according to some logical principle. Crucifixion sanctioned a few categories of crimes, the nature of which excluded their authors from the civic and international community, thus disqualifying them altogether from whatever form of legal protection was attached to citizenship and freedom. Outcasts convicted for serious crimes were put to death in the most horrendous way to remind the rest of the community of the importance of belonging to it. By contrast, *parricidium* (a private crime) and *perduellio* (a public crime) were punished by specific penalties aimed at removing vertically (by drowning or suspension) and excluding the culprit from the society to which he or she lawfully belonged.¹⁴⁶

From the point of view of criminal law, slaves were never considered members of the community. Though legal fiction in the sphere of Roman private law (e.g., the introduction of the *actiones adiecticiae qualitatis* in the second century B.C. or the grant of testamentary rights within the household by a generous master like Pliny the Younger) and humanitarian attitudes promoted by individuals and various groups raised slaves above the status of mere objects, they were nevertheless regarded as *hostes* throughout Greco-Roman antiquity, undoubtedly because slaves had long been acquired through war and were perceived as former and forever enemies.¹⁴⁷ Consequently, it would be surprising if freeborn *humiliores* had seen their condition in criminal law deteriorate to servile levels.

In fact, the legal sources explicitly suggest that the distinction between free *humiliores* and slaves persisted during the whole Principate and beyond. The *Sententiae Pauli*, which reflect the state of Roman criminal law in the late third century, at a time when status distinctions among the lower classes were supposed to be blurred, provide a list of crimes punished by crucifixion. This penalty was applied against slaves who had consulted a seer about their masters' life expectancy; against deserters and traitors; against rebels; against people who had caused a death with a weapon, poison, or perjury; against people who had taken part in magical ceremonies; against counterfeiters; and against kidnappers.¹⁴⁸ Three generations earlier,

146. See Briquel 1980.

147. See Bauman 1996, 83 and 184 n. 20, citing Sen. *Clem.* 1.24.1 and *Ep.* 47.5.

148. See Paulus *Sen.* 5.21.4; 5.21.2 (= *Dig.* 48.19.38.1); 5.22.1; 5.23.1. 15; 5.25.1; 5.30b.1.

Callistratus had suggested that notorious robbers be crucified in the very place where they had committed their crimes, to deter would-be criminals and console the victims' relatives.¹⁴⁹ Finally, to illustrate his proposition that the author of a sacrilege be punished more or less severely according to the rank, status, time, age, and gender of the offender, Ulpianus recalls many cases that had resulted in a condemnation to death by animals, while others were reportedly burned alive or crucified; lesser crimes were punished with a condemnation to the mines or with deportation to an island.¹⁵⁰ Not surprisingly, the legal sources account for more categories of crimes to be punished with crucifixion than do the literary sources.

What is more remarkable is that in every single case, without exception, when the jurists—Pseudo-Paulus or his predecessors—mention crucifixion as an appropriate penalty for *humiliores*, they consistently propose an alternative penalty for the same category (the beasts, burning at the stake, or the mines), in addition to a milder one for *honestiores*. The inescapable conclusion is that the jurists never felt comfortable applying a servile punishment to freeborn people and maintained until the very end of the history of crucifixion as a legal penalty a three-tiered (not a two-tiered) system,¹⁵¹ taking into account both social standing and legal status. There is, then, no reason to surmise that the distinction between freeborn people and slaves was reintroduced in the fourth century (as reflected in the *Theodosian Code*), since it was in fact never abandoned.¹⁵²

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149. Callistratus (6 *de cognitionibus*) *Dig.* 48.19.28.15. In this text and the text cited in n. 150, *crux* was of course replaced with *furca*.

150. Ulpianus (7 *de officio proconsulis*) *Dig.* 48.13.7(6).

151. See Rilinger 1988; Balzarini 1988.

152. Callistratus (6 *de cognitionibus*) *Dig.* 48.19.28.16 (quoted in n. 43). Grodzynski (1984, 382) and, before her, De Robertis (1939) surmised the reintroduction of such a distinction after a three-century-long eclipse. Bauman (1996, 133–36, 200 n. 58) had it right. Some "residual distinction between the rights in court of slave and free" survived into the fifth century (at least), according to Harries (1999, 129).

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