Crime and Punishment in Ancient Rome

Richard A. Bauman

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PREFACE

Roman Criminal Law has attracted steady attention ever since Mommsen gave it form and definition nearly a hundred years ago. Of the many scholars who have clarified and amplified Mommsen's ideas, a special place is occupied by Kunkel. Other important contributors include, in chronological order, Greenidge, Strachan-Davidson, Girard, Rogers, Siber, Vittinghoff, Brasiello, Brecht, Avonzo, Bleicken, Waldstein, Genin, Eder, Cloud, Ungern-Sternberg, Gioffredi, Wieacker, A.H.M. Jones, Pugliese, H. Jones. The writer's contributions appear in the Bibliography.

The above works can all be classified, to a greater or lesser extent, as general surveys. The present study does not aim to produce another such survey. Our focus is a more specialized one. We are concerned primarily with punishment, over the period of the Republic and the Principate; substantive law and procedure fill a subsidiary, though still important, role. Mommsen made some valuable observations on punishment, as did Kunkel, but no special lens was trained on the topic until Levy's seminal study of capital punishment which appeared in 1931 and was included in the collected edition of his works in 1963. Dupont's investigation of Constantine's criminal law is marginal to our period but instructive, and so is Biondi's work on the law of the Christian emperors as a whole. Within our period Levy was followed by the several studies of De Robertis and Cardascia, and Garnsey's full-length study in 1970 which is the only major work in English. (Drapkin focuses only in part – and inadequately – on classical antiquity.) Since 1970 there has been something of a minor proliferation. The works of Fanizza, Ducos, Rilinger and Cantarella call for special mention, as do the symposia edited by Thomas and by Diliberto. There are also the shorter studies by André, Archi, Brunt, Cornell, Crifó, Eisenhut, Ferrary, Flach, Fraschetti, Garofalo, Grelle, Grodzynski, Lassen, Liebs,

Marino, Monaco, Mouchova, Richardson, Robinson, Spruit, Thome, Volterra and Wolf.

A number of studies have an important bearing on our theme although covering private law as much as, and in some cases more than, criminal law. *Humanitas* and *utilitas publica*, which are central to our interpretation, have been discussed by Buchner, Gaudemet, Heinemann, Honig, Jossa, Lapicki, Longo, Maschi, Mignot, Riccobono, Schadewalt and Schulz; and criticism of the law by the lawyers has been (uniquely) investigated by Nörr.

While drawing massive support from the extant literature, the present study uncovers a substantial amount of unexplored terrain, both in its overall approach and in a number of specific matters. Details will be found in the last two paragraphs of our first chapter. It is hoped that some of the proposals will win acceptance, but even on those that do not, the writer welcomes debate, when documented and reasoned.

My sincere thanks are due to Richard Stoneman, Senior Editor at Routledge, in correspondence with whom the topic was clarified at the outset. I also wish to thank Nigel Eyre, Editorial Manager at Routledge; Kate Chenevix Trench, Desk Editor; and Seth Denbo, Copy Editor. I greatly appreciate the unfailing assistance and courtesy that I have received from the librarians and staffs of the Law Library, University of New South Wales; Fisher Library, University of Sydney; and Macquarie University Library.

R.A.B.
Sydney
April 1996

LIST OF ABBREVIATIONS

Except where otherwise indicated, abbreviations of the names of periodicals, classical authors and their works are as listed in *L'Année Philologique* and/or the *Oxford Latin Dictionary* and/or Liddell and Scott, *A Greek–English Lexicon.*

ANRW	H. Temporini and W. Haase (eds), *Aufstieg und Niedergang der römischen Welt*, Berlin/New York 1972–
Ascon./St.	T. Stangl (ed.), *Ciceronis Orationum Scholasticae* 1912, repr. 1964
CD	Cassius Dio
CJ	*Codex Justiniani*
Coll.	*Mosaicarum et Romanarum Legum Collatio*
CTh	*Codex Theodosianus*
D.	*Digesta Justiniani*
EJ	V. Ehrenberg and A. H. M. Jones (eds), *Documents illustrating the Reigns of Augustus and Tiberius*, 2nd edn, Oxford 1955
FIRA	S. Riccobono et al. (eds), *Fontes Iuris Romani Anteiustiniani*, 3 vols, 2nd edn, Florence 1942–3
Gai.	*Gai Institutionum Commentarii Quattuor*
ILS	H. Dessau, *Inscriptiones Latinae Selectae*
J. Inst.	*Institutiones Justiniani*
Kl.P.	K. Ziegler and W. Sontheimer (eds), *Der Kleine Pauly*, 5 vols, Stuttgart 1964–75
L.	Livy
Lenel	O. Lenel, *Palingenesia Iuris Civilis*, 2 vols, Leipzig 1899
Lex. Tac.	A. Gerber and A. Greef, *Lexicon Taciteum*, Leipzig 1903
OLD	*Oxford Latin Dictionary*
PS	*Pauli Sententiae* (= 'Sententiarum Receptarum Libri Quinque Qui Vulgo Iulio Paulo Tribuuntur')
RE	A. Pauly et al. (eds), *Real-Encyclopädie der classischen Altertumswissenschaft*, Stuttgart, 1894–1978
SA	Suetonius *Augustus*
SC	—— *Claudius*
SD	—— *Domitian*

SG	—— *Gaius* (*Caligula*)
SJ	—— *Julius* (*Caesar*)
SN	—— *Nero*
ST	—— *Tiberius*
TA	Tacitus *Annales*
TH	—— *Historiae*
TLL	*Thesaurus Linguae Latinae*
VIR	*Vocabularium Iurisprudentiae Romanae*
VM	Valerius Maximus
Warmington	*Remains of Old Latin*, Loeb edn., vol. 4, 1961

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INTRODUCTION

> Scourging, the executioner's hook, the dread of the cross – these things have long been obsolete. The credit belongs to our ancestors who expelled the kings and left no trace of their cruel ways among a free people. Many brave men followed them and protected our liberty by humane laws rather than by savage punishments.
>
> (Cicero in 63 BC)

> Those who commit capital crimes are, if from the upper classes, decapitated or exiled; those from the lower orders are crucified, burnt alive or thrown to the beasts.
>
> (Legal manual, c. 300 AD)

CRIME AND PUNISHMENT

The expression 'Crime and Punishment' covers a number of different things. It can be used conjunctively, taking in both philosophical ideas about the suppression of crime and the practicalities of the criminal law. Or it can be used disjunctively, covering 'Crimes and Punishments' and thus simply describing positive law, enumerating the acts that are treated as criminal and the procedures and penalties by which offenders are brought to book. But the distinction between the two meanings is little more than a notional one. They are interdependent and both will be covered, though with different degrees of emphasis. Our primary focus is on punishment, with substantive law and procedure in a supporting role. But as we are also interested in what Roman thinkers felt about crime and punishment, some attention will be given to philosophical ideas.

Another question of definition arises. What do we mean by 'a crime', and what do we mean by 'punishment'? In general terms a crime is a wrongful act giving rise to a remedy, but it was only relatively late in

the piece that the investigation of the act and the imposition of the remedy were regulated and controlled by the state. In primitive society a wrong was a private matter to be avenged by direct retaliation by the victim or, if he had not survived, by his family. As the community became more cohesive it began to involve itself in the repression of wrongful acts, at first by restricting the private vendetta and later on by abolishing it and placing the machinery of repression and punishment under public control.

The assumption of public control sparked off a new differentiation. Wrongful acts were divided according to the nature of the remedy to which they gave rise. A crime generated a *poena*, or penalty, which inured for the benefit of the community rather than that of the victim. The penalty might be capital, which meant that it affected the status of the wrongdoer; primarily this meant death, but over time an alternative emerged in the shape of exile. Or it might be sub-capital; the most common form was the fine (*multa*), but the money went to the state treasury, not to the victim. The acts penalized under this head included both crimes against the state (treason and sedition) and common law crimes that primarily affected only the injured party, such as murder, forgery, corruption, kidnapping and adultery. But a number of wrongful acts affecting individuals retained a remedy which inured for the benefit of the individual. These included damage to property, affronts to personality, and – with less logic – theft. In these cases the *poena* (the same word was used) took the form of monetary compensation payable to the injured party. The state provided the judicial machinery for the settlement of these delicts (roughly the torts of Anglo-American law), but it had no interest in what was recovered.

This study is concerned with the first category, crimes whose punishment was pursued in the interests of the community. Those interests were designated as *utilitas rei publicae, utilitas publica.*[1] The furtherance of that concept was the fundamental *raison d'être* of Roman criminal law. The civil wrongs known as delicts will be touched on only in passing.

PUNISHMENT: THE GREEK EXPERIENCE

The first explorations of Crime and Punishment in its philosophical mode were conducted by Greek thinkers. They took their inspiration from Plato. As it is not our intention to embark on a comparative study, we content ourselves with an outline of Plato's theories in a few broad strokes. In works like *Gorgias*, *Protagoras* and *Nomoi* ('Laws') he explores

punitive theory in depth, focusing on the purpose of punishment, its ability to achieve its perceived purpose, and the extent to which that purpose is in harmony with the *mores* of society. Why is the wrongdoer being punished? Is it in order to make him suffer? Or to make him mend his ways? Or to protect society? Or to deter others from following his example? Should there be different punishments for different classes of person? Or for different degrees of fault?

Plato's most famous contribution to penal theory is the curative purpose of punishment. The wrongdoer, plagued by his criminal propensities, derives a positive benefit from punishment. He is reformed by it. Even death is a boon to the tortured criminal soul. But if he fails to respond to curative treatment (in the non-lethal forms of whipping, imprisonment and fines) he should be exiled or put to death. Thus the idea of an increased penalty for a second conviction takes shape. The other important purpose is deterrence. The wrongdoer should be deterred from repeating his crime, and the penalties should be severe enough to discourage others. But Plato rejects retribution as a legitimate purpose; it merely inflicts suffering without reforming or deterring.

In his last work, the *Laws*, Plato comes closer to reality by anchoring his theories in the positive criminal law of the imaginary state of Magnesia on Crete. Magnesia is exposed to the stresses and strains of the real world, and its penal code includes laws currently in force in Plato's Athens. The approach is still philosophical, but it is pragmatic, almost usable, philosophy. The union between theory and practice would be taken further by Aristotle and Theophrastus.[2]

ROMAN PUNISHMENT IN THEORY AND PRACTICE

The criminal law is the poor relation on the Roman legal scene. The jurists, though not ignoring criminal interpretation nearly as much as is generally believed,[3] certainly devoted more attention to the private law. It was not until the second century AD, under the inspiration of the enlightened despotism that we know as the Antonine period, that legal literature began giving serious attention to crime. Prior to that we have to depend mainly on literary works. This is not altogether a bad thing. The accounts of actual trials in Cicero and Tacitus present contemporary thinking in real-life situations, thus supplying a window on public opinion that is not often accessible in the smooth, storyless facade of the private law. But there are disadvantages. The literary sources tend to concentrate on the upper classes. The test was whether a trial made a good story, and the best stories were provided by those

who stood in the corridors of power. This leaves us in the dark as to how the ordinary citizen fared, especially when brought up for common law (non-political) crimes. Nevertheless, even with this qualification the cases give valuable insight into how the Romans thought about crime and punishment.

The philosophical approach to punishment is exemplified by Cicero and Seneca. But Cicero is an equivocal guide. His most informative work should have been *De legibus* ('On the laws'), which promised to naturalize Plato's *Nomoi* in a Roman setting. But the work is only partly successful in that regard, and has to be supplemented by, especially, *De officiis*. But even then Cicero does not provide much more than the bare bricks for a cohesive theory of punishment.[4] The truth of the matter is that in this particular area Cicero was not altogether comfortable with philosophy. His work as a barrister got in the way. His views depended on whether he was defending or prosecuting, and this might have created an imbalance that had not troubled the non-practising Greek philosophers. Cicero was also a politician, in which capacity he might have seen law reform through a different lens. Nevertheless, despite the diversity of his repertoire Cicero was able, at the end of the day, to preserve a surprising degree of consistency between what he practised and what he preached. His legal philosophy can best be described as pragmatic conceptualization.

Seneca, writing a hundred years after Cicero, was able to present his ideas more cohesively. One does not need scissors and paste to assemble a collage of Seneca's ideas; they are already there in *De clementia* and *De ira*. Also, the special relationship between Seneca and Nero gave a unique practical twist to the philosopher's work, for the pupil made strenuous efforts to put his teacher's precepts into practice. His failure was not entirely his fault; conflicting Stoic doctrines also had something to do with it.

CRIMINAL COURTS AND PUNISHMENTS

The study covers the Republic and Principate, with occasional forays into the Later Empire. Chapters 2 to 9 are built around the changes in the court systems over the period, with special reference to the changes in penalties. At any given point of time punishment depended on what courts were in operation. An outline of the systems will make this clear.

Three different systems occur in succession. None is completely isolated from its neighbour; there are overlaps right down the period.

But each of the three phases has a dominant system which determines what criminal acts can be charged, the procedure by which charges are tried and, most important of all, the punishments that can be imposed.

The first phase is that of the *iudicium populi*, trial by magistrate and people. A magistrate, in most cases a tribune of the plebs, conducts a preliminary examination, at the end of which he brings the accused before the popular assembly. The magistrate proposes a penalty, which may be either capital or sub-capital, in his discretion; if it is a fine he stipulates the amount. After hearing speeches the people vote on the proposal. The salient fact is that there is no fixed penalty; it depends on the magistrate's discretion and the endorsement by the people.

The first phase was at its peak until the mid-second century BC, after which it started tailing off; by about the mid-first century it was obsolete. It was supplanted by the *iudicium publicum*, trial by jury. Starting in the mid-second century, a series of permanent courts, each consisting of a magistrate sitting with a jury of about fifty, was put in place. This system dominated the trials of the first century BC and continued into the Principate, though with gradually decreasing importance; it ceased to exist in the first quarter of the third century AD. One of its most important features was its reversal of the punitive system of its predecessor. Instead of discretionary penalties, a *poena legis*, a fixed penalty, was laid down by the statute that created the court in question.

The third phase is that of the *cognitio extraordinaria*, or *cognitio extra ordinem*. Its introduction coincided with the foundation of the Principate by Augustus. At first concurrently with the jury-courts, and eventually without them, criminal justice was dispensed by a number of new jurisdictions. The senate conducted trials, thus exercising a function that it had not possessed in the Republic. The emperor did the same, and in two ways. He tried cases in his own court, and he delegated trials to his subordinates, the most important of whom were the urban and praetorian prefects and provincial governors.[5] All these 'extra-ordinary jurisdictions' had one feature in common: they were 'liberated' from the constrictions of the public criminal laws, that is, the laws that had created the system of jury-courts. This meant that they could exercise a free discretion, but on a much broader basis than had been possible under the old *iudicium populi*. The new courts took as their benchmark the public criminal laws pertaining to the jury-courts, but were free to depart from those laws in two ways. They could add to the categories of wrongful acts that could be charged under a given public criminal law. And they exercised a discretion on punishment; the *poena*

legis for a crime could be applied as laid down by the statute or it could be mitigated or intensified in the discretion of the sentencing authority. The principal agent in the exercise of these discretionary powers was the emperor himself. He performed that function through what are generically known as 'constitutions'. The emperor could define additional categories of crimes, and new penalties, in four ways. He could issue an edict; he could reply to both official and private petitioners by rescript; he could hand down verdicts in trials over which he presided; and he could give mandates to officials, especially governors.

If anything sums up the punitive situation over the three phases, it is the position of the fixed penalty as the meat in the sandwich. It is flanked on both sides by discretionary punishments. The discretion which emerged in the Principate is, of course, vastly different in both quality and quantity from that of the *iudicium populi*, but the broad principle is the same.

HUMANITAS, SAEVITIA AND PUNISHMENT

The death sentence is a lurid beacon right across our period – and beyond. But although capital punishment was never abolished, it presents differently in different epochs. In the Late Republic there was, both in public opinion and in the minds of legislators, a desire to reduce the incidence of death sentences. That desire was inspired by *humanitas*, the civilizing instinct that is one of the hallmarks of the Roman ethos, both in the Later Republic and, at times, in the Principate. In the Republic the impulse was given practical expression in two ways. First, sentence of death continued to be pronounced, but there was a convention under which the condemned person had access to voluntary exile. By managing, with the connivance of the government, to leave Rome and Roman Italy he was safe. If he ever returned he would be put to death, but in practice the facility made all the difference to his future prospects. Then, in the first century BC, the convention was given formal expression by being written into some of the criminal laws. The unexpected architect of the reform was Sulla. The convention is discussed in chapters 2 and 3.

Even in the Republic, however, the humane impulse was hedged around with reservations drawn from the overriding doctrine of *utilitas publica*, the public interest. This is discussed in chapter 4. Then, in the Principate, ambivalence is almost institutionalized. On the one hand rulers like Augustus and the Antonines used their free discretion under *cognitio extra ordinem* to import notions of equity into punishment.