

Plebeians and Repression of Crime in the Roman Empire: From Torture of Convicts to Torture of Suspects*

Janne PÖLÖNEN

(Ecole des Hautes Etudes en Sciences Sociales, Paris)

I. Introduction

Modern scholarly tradition has established that two fundamental rules regulated the use of torture in ancient Rome: torture must not be applied to Roman citizens or to slaves against their owners¹. It is

* I am grateful to Prof. J. ANDREAU, Doc. A. ARJAVA, Prof. J.-J. AUBERT, Prof. D. MANTOVANI, Dr. Y. RIVIÈRE and Prof. Y. THOMAS for their helpful comments on the manuscript. English translations often follow, or are adopted from, A. WATSON (ed.), *The Digest of Justinian* (1984), and the editions of Latin and Greek literature in the *Loeb Classical Library*. The responsibility for views and interpretations presented in this paper remains entirely mine.

¹ P. GARNSEY, *Social Status and Legal Privilege in the Roman Empire* (1970); P. A. BRUNT, "Evidence given under Torture in the Principate", *SZ* 97 (1980), 256–65; E. PETERS, *Torture* (1985), 18–36; Y. THOMAS, *Confessus pro iudicato: L'aveu civil et l'aveu pénal à Rome*, in *L'aveu: Antiquité et Moyen Age* (1986), 89–117; R. RILINGER, *Humiliores-Honestiores: Zu einer sozialen Dichotomie im Strafrecht der römischen Kaiserzeit* (1988), 114–36; J.-P. LEVY, "La torture dans le droit romain de la preuve", in *Mélanges H. Ankum I* (1995), 241–55; Y. THOMAS, "Arracher la vérité, la Majesté et l'inquisition", in R. JACOB (ed.), *Le juge et le jugement dans les traditions juridiques européennes* (1996); R. FASANO, *La torture judiciaire en droit romain* (1997); Y. THOMAS, "Les procédures de la majesté. La torture et l'enquête depuis les Julio-Claudiens", in *Mélanges A. Magdelain* (1998), 477–99; J. ERMANN, "Die Folterung Freien im römischen Strafprozess der Kaiserzeit bis Antoninus Pius", *SZ* 117 (2002), 424–31; R. VIGNERON, "La question judiciaire vue par les

commonly thought that during the Republic these principles were breached but exceptionally, whereas under the Empire their violation became ever more frequent as the extraordinary *cognitiones* invaded the criminal procedure. Expansion of torture has been associated with the political interests of imperial regime inaugurated by Augustus that took increasingly inquisitive and harsh measures against those convicted, or even suspected, of threatening the well-being of the Emperors and the Empire. The torture spread slowly but gradually to investigation of wider range of crimes, until the generalization of its use at the latest under the Severan emperors.

The progress of torture during the first two centuries of the Empire is not, however, without contradiction, as scholars note the legal doctrine prohibiting the torture of freemen was duly maintained². Yet it is often taken for granted that at least the underprivileged inhabitants of the Roman Empire, the so-called *humiliores* in the legal jargon, in practice, if not in theory, lost protection against torture³.

jurisconsultes romains”, in B. DURAND (ed.), *La torture judiciaire: approches historiques et juridiques* I (2002), 277–94; C. RUSSO RUGGERI, *Quaestiones ex libero homine. La tortura degli uomini liberi nella repressione criminale romana dell'età repubblicana e del I secolo dell'impero* (2002).

² E.g. GARNSEY (*cit. n.1*), 145, 213–16; BRUNT (*cit. n.1*), 265; THOMAS 1986 (*cit. n.1*), 97 n. 29; LÉVY (*cit. n.1*), 242 n. 7; ERMANN (*cit. n.1*), 430; VIGNERON (*cit. n.1*), 283–4.

³ Th. MOMMSEN, *Le droit penal romain* II (1907), 82–3, III (1907), 394–6; BRUNT (*cit. n.1*), 265; O. F. ROBINSON, “Slaves and the Criminal Law”, *SZ* 98 (1981), 223; PETERS (*cit. n.1*), 26–7; FASANO (*cit. n.1*), 143; THOMAS (*cit. n.1*), 492; R. A. BAUMAN, *Human Rights in Ancient Rome* (2000), 118–9; J.-J. AUBERT, “A Double Standard in Roman Criminal Law? The Death Penalty and Social Structure in Late Republican and Early Imperial Rome”, in J.-J. AUBERT and B. SIRKS (eds), *Speculum Iuris: Roman Law as a Reflection of Social and Economic Life in Antiquity* (2002), 103; VIGNERON (*cit. n.1*), 286–7. On division between *honestiores* and *humiliores* see G. CARSDASCIA, “L’apparition dans le droit des classes d’honestiores et d’humiliores”, *RHD* 28 (1950), 305–37, 461–85; GARNSEY (*cit. n.1*); D. GRODZYNSKI, “Tortures mortelles et catégories sociales. Les summa supplicia dans le droit romain aux IIIe et IVe siècles”, in *Du châtement dans la cité. Supplices corporels et peine de morte dans le monde antique* (1984), 361–403; RILINGER (*cit. n.1*); AUBERT (*cit. n.3*). I think that RILINGER has successfully demonstrated that the *humiliores-honestiores* dichotomy was fixed only by the post-classical editor of *Pauli sententiae*. Yet it seems to me that the principle of status differentiation in punishment is pre-Severan in origin, although it was not systematically expressed in terms of *humiliores-honestiores* dichotomy. There is much justified criticism of

While the ruling classes, so-called *honestiores* (mainly including the members of senatorial, equestrian and decurional orders), were as a rule protected against degrading servile torture, it has not been clearly established what remained of the ordinary Roman citizen's rights during this period, and how was it that the lower classes actually came to lose the protection against torture, if they did. Although I agree with scholars who prefer a cautious view as to the progress of judicial torture of freemen in Roman law, and who point out the importance of Severan Emperors in its generalization, I think that some important aspects of this development have not been sufficiently emphasized.

The purpose of this article is to trace the development of judicial torture in Rome from the time of Augustus to the Severan age particularly from the point of view of the lower classes, the ordinary plebeian citizens. This development becomes much more intelligible once it is fully realized that in case of Roman citizens the torture of convicted criminals to make them reveal accomplices was traditionally the only legal form of torture known to the Romans⁴. Torture was considered no different from corporal punishment⁵, so in the Roman mind to put a citizen to torture before condemnation would have been equivalent of condemning a formally innocent person to potentially lethal penalty.

Nevertheless, the rule forbidding the torture of a Roman citizen was no longer valid if he was condemned as a result of a fair trial to corporal capital punishment, consequence of which was a slave-like exclusion from the civic community, technically known as a *servitus poenae*.⁶ Because the guilt of the convict was already established in

RILINGER's thesis e.g. in M. BRETONNE, "Fra storia sociale e storia giuridica", *RJ* 8 (1989), 35–51.

⁴ The scholarship (*cit. n.1*) has of course not failed to indicate the torture of convicts to reveal accomplices, as it appears in D. 48.19.29, as one of torture's uses in Rome, but it is fair to say that the distinction between torture before and after condemnation has not been regarded as central to the Roman doctrine. My attention to this distinction was drawn by THOMAS (*cit. n.1*, 1986), 97–9 n. 29.

⁵ The punitive function of torture has been emphasised by P. CERAMI, "Tormenta pro poena adhibita", *Annali del seminario giuridico di Palermo* 41 (1991), 31–51.

⁶ See AUBERT (*cit. n.3*) on assimilation with slaves and exclusion from civic community as common aspects of crucifixion. AUBERT emphasizes with RILINGER that a distinction in punishing slaves and freemen was never completely lost to the Romans.

the trial, the torture after condemnation could have as its sole formal and logical purpose the exposure of accomplices, although this is not to deny that in practice posthumous confessions helped to release the judges from any lingering doubt and responsibility. The main purpose of the *lex Iulia de vi (publica)* was to halt torture (and any other acts leading to execution of punishment) as long as an appeal to the Emperor was pending, not to absolutely ban it.

When the Romans considered it necessary to overcome these strictures governing the use of torture, they did not proceed arbitrarily but introduced legal categories of offenders not protected by the *lex Iulia*. Introduction of these categories was prompted by the imperial criminal policy that required provincial governors to repress *ex officio* activities, including violent upheavals and organized crime, considered most harmful to public order. The wide range of discrimination allowed to the governors in deciding the nature of crime and criminal ensured that the have-nots rather than the haves were assigned to the disadvantageous categories of offenders. Indeed, the torture after condemnation was effectively restricted to plebeian convicts, as the decurions were protected against torture and corporal punishments by the imperial pronouncements.

In order to effectively implement the imperial criminal policies, the governors were more and more inclined to bend the rule of law prohibiting torture of freemen before condemnation by readily condemning suspects in order to have them formally tortured to reveal accomplices but so also to make them confess their own crimes. As the governors had all the power to decide when a person was sufficiently hard-pressed to merit a condemnation, also the distinction between a suspect and a convict, and between torture before and after condemnation, slowly eroded but was not lost to the Romans until the Severan period. The principle that a strong suspect can be tortured about his own crime is based on a decision of Caracalla in 216, but it seems to be known already to Callistratus who wrote before 211 when Severus was still alive.

In conclusion, I argue that the formal and logical distinction in the eyes of the law between innocent and condemned persons is necessary to explain the historical development of use of torture in the Roman law and practice. Before the Severan age, a Roman citizen could not in legal principle be tortured but to reveal accomplices after his

condemnation to capital punishment and reduction to the *servitus poenae*. The uses and abuses of this principle studied in this paper document the great extent to which the Roman legal administration was rule oriented even in regard to plebeian offenders. Even if due allowance is made to error and maladministration, this should be a warning against a too generous presumption that the Roman Empire deprived in the normal run of events its plebeian subjects of legal protection afforded by their citizenship.

II. Torturous Punishments and The *lex Iulia de vi publica*

Judicial torture was regularized in Rome relatively early, and was certainly in use already under the Republic, out of public interest in case of the most heinous criminals like *perduelliones*, in order to make them reveal their accomplices after condemnation⁷. According to Quintilian, indeed a *lex* ordered that a traitor is to be tortured until he reveals accomplices⁸. Scourging and other tortures regularly

⁷ A violation of a Roman citizen's liberty by servile torture, if detested in any case, could be admitted more easily against him as a criminal after condemnation than as an innocent man, that is, before his condemnation. The principle that a free man ought not to be tortured was evidently one of the 'tabous juridiques immémoriaux': THOMAS (*cit. n.1*, 1998), 478, however I would stress that only as long as he was formally innocent. This principle is referred to law in Quint. *decl. mai. 7: Liberum hominem torqueri ne liceat... offert se pauper in tormenta... dives contradicit ex lege*. C. RUSSO-RUGGERI (*cit. n.1*) has sought to demonstrate that it would have been legal under the Republic to torture freemen, but she pays no attention to distinction between torture before and after condemnation. As far as torture before condemnation is concerned, her thesis does not seem to me convincing, see A. D'ANTONIO's review of RUSSO-RUGGERI's book in *Index* (forthcoming) – I am grateful to Ms. D'ANTONIO for having allowed me to read the manuscript before its publication.

⁸ Quint. *decl. min. 307.3: lex quae [proditorem] torqueri iubet donec conscios indicet*. Admittedly Quintilian is not our best guide to the legal norms of his past or present, nevertheless he cites the law saying that 'it is not written in the law that 'a traitor is tortured', but 'is tortured until he reveals accomplices': 307.3: *Itaque non sic scriptum est: 'proditor torqueatur', sed: 'torqueatur donec conscios indicet'*. Quintilian refers the presumption of accomplices to 'our ancestors' (*maioribus nostris*). Could this law be the *lex Varia de maiestatis* that urged an inquiry into accomplices: Ascon. *pro Scaur.* 19.19-25? The assassins of Tarquinius Priscus, 'after being put to the torture and forced to name the authors of the conspiracy, met at length with the punishment they deserved': Dion. Hal. 3.73.4: μετὰ τοῦτο βασάνοις καταικισθέντες καὶ τοὺς ἀρχηγοὺς τῆς ἐπιβολῆς ἀναγκασθέντες εἰπεῖν τῆς προσηκούσης τιμωρίας ἔτυχον σὺν χρόνῳ and Appian BC. 4.4.28: καὶ ληφθεὶς ἔλεγεν

preceded the execution of death penalties already under the Republic, and at least the hypothesis is advanced here that their purpose was a forced interrogation of convicts, and not only to make their punishments more torturous⁹. This tradition continued also in the

εἶναι ληστής καὶ ἐπὶ τῷδε θανάτῳ καταδικαζόμενος ἠνείχετο. ὡς δὲ αὐτὸν ἔμελλον καὶ βασανιεῖν ἐς τοὺς συνεγνωκότας, οὐκ ἐνεγκὼν ἤδη τοῦτο ὡς ἀπρεπέστερον; compare with Dion. Hal. 5.28.4, 29.2; Dio 2.6; 68.11.3. Publius Horatius was condemned for *perduellio* to *arbor infelix* and risked being ‘flogged and tortured as tied under the stake’: Liv. 1.27.10-11: *sub furca vinctum inter verbera et cruciatus*; Dion. Hal. 7.69.1-2. Torture of the condemned is most accurately described by Appianus when he tells about the end of proscribed Varus as a bandit in Minturnae under the second triumvirate: ‘He was captured and said that he was a robber. He was condemned to death on this ground and resigned himself, but as they were preparing to subject him to torture to compel him to reveal accomplices, he could not bear such an indignity’: Appian. *BC*. 4.4.28: καὶ ληφθεὶς ἔλεγεν εἶναι ληστής καὶ ἐπὶ τῷδε θανάτῳ καταδικαζόμενος ἠνείχετο. ὡς δὲ αὐτὸν ἔμελλον καὶ βασανιεῖν ἐς τοὺς συνεγνωκότας, οὐκ ἐνεγκὼν ἤδη τοῦτο ὡς ἀπρεπέστερον. Under Tiberius a rustic of the Terrestine tribe in the Hither Spain killed the governor Lucius Piso. After the killer’s identity was ascertained ‘torture was applied in order to force him to disclose his accomplices’: Tac. *ann.* 4.45: *cum tormentis edere conscios adigeretur*.

⁹ On capital punishments in general see E. CANTARELLA, *I supplizi capitali in Grecia e a Roma: Origini e funzioni della pena di morte nell’antichità classica* (1991), 205, especially 171–222. Flogging (*verberatio*) was a common element of both capital punishment: C. LOVISI, *Contribution à l’étude de la peine de mort sous la République romaine (509-149 av. J.-C.)* (1999), 158; and torture: GARNSEY (*cit.* n.1), 138; FASANO (*cit.* n.1), 159–60, 162. It seems to me that the flogging/torture of criminals after condemnation to reveal accomplices was often, if not always, the flogging/torture commonly attested leading to execution of death penalties. Often it is not clear what the function of flogging and torture was; I suggest that it had to do also with interrogation. Dionysius refers to early laws that prescribed malefactors to be bound to stakes, scourged with whips and put to death by axe: Dion. Hal. 20.5.5; 20.16.2; see also 9.40.4. According to Aurelius Victor, *perduelliones* were traditionally (*more maiorum*) ‘put to death by flogging their neck being tied to a stake’: *De vita et moribus imperatorum* 5.7: *collo in furcam coniecto, virgis ad necem caederetur*. In 204 B.C. a legate had ‘military tribunes tied to stakes, then put them to death having had them flogged and tortured by all kinds of servile torments’: Liv. 29.18.14: *tribunos militum in vincla coniectos, dein verberatos servilibusque omnibus suppliciis cruciatus occidit*. Verres abusively condemned Gavius as a spy, and consequently had him tied up in the forum, beaten with rods, tortured with fire and hot metal plates, and crucified: Cic. *Verr.* 2.5.160-164; Gell. *NA* 10.3.6-13. While Gavius was beaten and tortured, Cicero claims that ‘no words came from his lips in his agony except ‘I am a Roman citizen’: *Verr.* 2.5.162: *nulla vox alia illius miseri inter dolorem... audiebatur nisi haec, ‘Civis Romanus sum’*. Apparently this was the moment when Gavius was, as it was customary, questioned about the crime, but as an

repression of *crimen maiestatis*¹⁰, however in this context torture expanded more arbitrarily. Roman historians suggest that dictators and Emperors since Sulla indulged in torturing citizens as suspects

innocent man only appealed to his citizen rights; on the moment of interrogation compare with Tac. *ann.* 15.57. Jonathan, a gang-leader brought before Vespasian, was 'first tortured and then burnt alive': Jos. *bell. iud.* 7.450: ζῶν γὰρ κατεκαύθη πρότερον αἰκισθεὶς. In a Quintilian's *declamatio* 'a convict for murder is tortured and confessed to have committed also a sacrilege': Quint. *decl. min.* 324.pr: *Damnatus caedis cum torqueretur, dixit et sacrilegium a se commissum*. The *lex locationis de munere publico libitinario* from Puteoli dating to the Late Republic or the Early Empire also suggests a close connection between torture and capital punishment: *AE* (1971), no. 88. l. 8-14; J. BODEL, "Graveyards and Groves: A study of the *Lex Lucerina*", *American Journal of Ancient History* 11 (1986), 1-133, 72-80; J.-J. AUBERT, "En guise d'introduction: contrats publics et cahiers des charges", in J.-J. AUBERT (ed.), *Tâches publiques et enterprise privée dans le monde romain* (2003), 15-25; F. HINARD/J.C. DUMONT (eds.), *Libitina: pompes funèbres et supplices en Campanie à l'époque d'Auguste* (2003). In case the owner wanted to have his slave crucified at private expense (lines 8-10) the owner contacted an undertaker (*redemptor*) who provided floggers (*verberatores*) and accessories (*asserēs vincula restes*) against a compensation of HS IIII. The second part of the law concerns capital punishments executed by a magistrate at public expense. Although a slave status of the convicts is not specified, F. DE MARTINO has well-foundedly argued that in both cases *supplicia* of slaves are in question: "I 'supplicia' dell'iscrizione di Pozzuoli", *Labeo* 21 (1975), 211-4, however also foreigners can perhaps be admitted: C. LOVISI, "Les supplices", in HINARD/DUMONT (*cit.* n.9) 94. This time the undertaker was to produce 'stakes, nails, pitch, wax and candles' (*cruces clavos pecem ceram candelas*) which could mean a crucifixion accompanied by torture or stake: AUBERT (*cit.* n.3), 114. LOVISI (*cit.* n.9), 93 rules out the stake suggesting torments to make the crucifixion more painful. In my view a torture to make the condemned to reveal accomplices is in question. Yet this does not have to exclude the possibility of stake: e.g. Tac. *ann.* 15.44. Compare with punishments preserved for public authorities: C.9.14.1.1.

¹⁰ In Quintilian 'a person having aspired the throne is tortured to reveal accomplices': *inst. or.* 9.2.81.6-7: *Tyrannidis adfectatae damnatus torqueatur ut conscios indicet*. See also Liv. 24.5.9-14; Sen. *dial.* 4.23.1; Val. Max. 3.3.3.1-4; 3.3.5.1-5. Tiberius also tortured Clemes, a libertus of Agrippa, 'in order to learn something about his fellow conspirators': Dio 57.16.4: μετὰ τοῦτο βασιανίσας ἵνα τι περι τῶν σθνεγνόκωτων αὐτῷ μάθη. Accomplices may have been the official motive of torture also in Tac. *ann.* 11.22.2-5. Pius is credited for having 'prohibited inquiry to the accomplices' in case of Atilius condemned for having aspired the throne: SHA, *Pius* 7.3-4: *conscios requiri vetuit*. Domitian, in what may have been an illegal torture of mere suspects, applied new torturous techniques against the members of opposition in investigation about accomplices: Suet. *Dom.* 10.5.1-4.

before their condemnation¹¹, but this was strictly illegal and concealed from the public eye¹². Precisely because the principles of law could be

¹¹ According to Dionysius, Sulla was the first to turn dictatorship into tyranny, having ‘put no fewer than forty thousand [citizens] to death after they had surrendered to him, and some of these after he had first tortured them’: Dion. Hal. 5.77.5: : τοὺς παραδόντας αὐτῷ σφῶς αὐτοὺς οὐκ ἐλάττους τετρακισμυρίων ἀπέωκτεινεν, ὧν τινὰς καὶ βασάνοις πρῶτον αἰκισάμενος and Dio 58.21.3: ἐσέπεμπε δὲ ἐς αὐτὴν οὐ μόνον τὰ βιβλία τὰ διδόμενά οἱ παρὰ τῶν μηνυόντων τι, ἀλλὰ καὶ τὰς βασάνους ἃς ὁ Μάκρων ἐποιεῖτο, ὥστε μηδὲν ἐπ’ αὐτοῖς πλὴν τῆς κατανηφίσεως γίνεσθαι. In 44 B.C. Portia the wife of Brutus could be afraid that she might reveal something about her husband’s conspiracy against Caesar if tortured, like Quintus Cicero’s son a year later: Dio 44.13.2-4; 47.10.6-7. Augustus suspected Quintus Gallius for having hidden a sword under his cloak, and ‘tortured him like a slave and when he confessed nothing ordered him to be killed’: Suet. *Aug.* 27.4.1-7: *seruilem in modum torsit ac fatentem nihil iussit occidi. Seruilem in modum torsit ac fatentem* refers to torture of a suspect to procure a confession of his own crime, see discussion below. Tiberius for instance sent to the Senate ‘not only the documents given him by the informers, but also the confessions which Macro had obtained from people under torture, so that nothing was left to them except the vote of condemnation’: Dio 58.21.3: ἐσέπεμπε δὲ ἐς αὐτὴν οὐ μόνον τὰ βιβλία τὰ διδόμενά οἱ παρὰ τῶν μηνυόντων τι, ἀλλὰ καὶ τὰς βασάνους ἃς ὁ Μάκρων ἐποιεῖτο, ὥστε μηδὲν ἐπ’ αὐτοῖς πλὴν τῆς κατανηφίσεως γίνεσθαι. On torture of suspects see e.g. Plut. *Mor.* 505 D; Dio 50.13.7; 58.3.7; 58.27.2-3; 59.25.5b; 60.15.6; 60.31.5; 62.27.3; Herod. 3.5.8; 4.5.4.

¹² Dio 55.5.4 recounts that Augustus allowed the torture of slaves against their masters but not that he legalized torture of citizens in any unprecedented manner. Caligula was praised for having handled the case of Pomponius accordingly, only his *eJtaivra* was tortured: Dio 59.26.4. Dio 55.19.2-3 also had Livia to denounce as wrongdoing the condemnation of men on basis of their statements made under torture. Early Emperors tried indeed to conceal their illegal investigations, e.g. Suet. *Aug.* 27.4; *Tib.* 62.2. See also Dio 58.24.2 on the disgrace faced by Tiberius when suspects were condemned in the Senate on basis of confessions procured beforehand by means of torture. Still the sources of Severan age considered only torture of slaves in context of *crimen maiestatis*, and it is likely that the *Lex Iulia* provided nothing further: C.9.8.6.1; C.9.41.1pr. The earliest general statements that everyone is susceptible to torture in case of *maiestas* date to the late third or early fourth centuries: Paul. *Sent.* 5.29.2; D.48.18.10.1. Hence it can be doubted if these principles ante-date the Severan age. Indeed a passage of Dio might suggested that it was Caracalla who made particularly paranoid use of torture: ‘He realized so well how he stood with all the senators that the slaves and freedmen and most intimate friends of many of them who were not even under any charge at all were arrested by him and were asked under torture whether So-and-so loved him or So-and-so hated him’: Dio 78.2.2: : οὕτω γὰρ που πρὸς πάντας τοὺς βουλευτὰς διακειμένῳ συνήδει ἑαυτῷ ὥστε μηδ’ ἔγκαλουμένων τι πολλῶν τοὺς τε δούλους καὶ τοὺς ἐξελευθέρους τοὺς τε φίλους αὐτῶν τοὺς πάνυ συλλαμβάνεσθαι τε ὑπ’ αὐτοῦ καὶ διὰ βασάνων ἐρωτᾶσθαι ‘εἰ ἄρα ὁ

more easily transgressed in the secret and paranoid treason trials, they are not a reliable guide to the legal administration's use of torture outside such investigations.

The works of Cicero demonstrate that the principle against the torture of citizens, or that of slaves against their owners, was strongly felt during the last century of the Republic. Cicero may have denounced all kinds of torture but it was true in his time that a voluntary exile saved the accused from potential death, and so also from the torture to reveal accomplices¹³. Although escape to avoid condemnation (and so torture and punishment) was theoretically open to all suspects, it was more feasible option for the rich Romans who had estates outside Italy¹⁴. There is no reason to doubt that a torture of an innocent Roman citizen, regardless of his status, was against the Roman custom and strongly disapproved.

For the imperial period, which is the main concern of this paper, Roman historians, not surprisingly, have a lot to say about politically charged *maiestas* trials but little about the position of ordinary plebeian offenders¹⁵. The rhetoricians are little more generous. In the jurists' writings the regulation of judicial torture can be followed in any detail from the early second century onwards, while for the first century the only normative evidence comes in form of the appeal laws. Following a republican tradition¹⁶ the Julian law on violence (of

δεῖνά με φιλεῖ' ὁ δεῖνά με μισεῖ'. Still St. Augustin deplored the torture of innocent witnesses, see LÉVY (*cit. n.1*) 246. Also Dio, a Caracalla's contemporary, wrote with antipathy about this kind of abusive torture of freemen and citizens, but never condemned the torture of convicts: e.g. Dio 57.19.1c-2; 60.15.6. To adopt a sentence, all the evidence indicates that the Emperors were more concerned about threats to their lives than potential challenges to their constitutional position: P. GARNSEY, "The Lex Iulia and appeal under the Empire", *JRS* 56 (1966), 167–89, 187.

¹³ Cic. *Verr.* 2.61.158-66, 170; *part. or.* 34.118; *pro Mil.* 59; CERAMI (*cit. n.5*), 46–7; LÉVY (*cit. n.1*), 24–2; THOMAS (*cit. n.1*, 1998), 479–81. On exile: G. CRIFÒ, *Ricerca sull'exilium nel periodo repubblicano* (1961); GARNSEY (*cit. n.1*); E. L. GRASMÜCK, *Exilium. Untersuchungen zur Verbannung in der Antike* (1978).

¹⁴ Suet. *Jul.* 42.3: *Poenas facinororum auxit; et cum locupletes eo facilius scelere se obligarent, quod integris patrimoniis exulabant, parricidas, ut Cicero scribit, bonis omnibus, reliquos dimidia parte multavit.*

¹⁵ For a full discussion of expansion of torture in context of *crimen maiestatis* see THOMAS (*cit. n.1*, 1996 and 1998).

¹⁶ Cic. *rep.* 2.53; Liv. 10.9.6; Val. Max. 4.1.1; W. KUNKEL, *Entwicklung des römischen Kriminalverfahrens in vorsullanischer Zeit* (1962); GARNSEY (*cit. n.12*),

Caesarian or Augustan origin) forbade magistrates from torturing citizens who appealed to the Emperor. The crucial content is reported in a Digest fragment from Ulpian's *De officio proconsulis*, as well as post-classical *Sententiae* attributed to Paul¹⁷:

D.48.6.7:

Lege Iulia de vi publica tenetur, qui, cum imperium potestatemve haberet, civem Romanum adversus provocationem necaverit verberaverit iusseritve quid fieri aut quid in collum iniecerit, ut torqueatur.

Liabie under the Julian law on public violence is anyone who, while holding *imperium* or office, puts to death or flogs a Roman citizen contrary to his appeal or orders any of the aforementioned things to be done, or ties his neck for the purpose of torture.

Paul. *sent.* 5.26.1:

Lege Iulia de vi publica damnatur, qui aliqua potestate praeditus civem Romanum antea ad populum, nunc imperatorem appellentem necaverit necarive iusserit, torserit verberaverit condemnaverit in publica vincula duci iusserit.

Under the Julian law on public violence is condemned anyone who, when invested with any office, puts or orders to be put to death, tortures, flogs, condemns, or orders to be led to prison a Roman citizen who appeals, earlier to the people, but now to the Emperor.

In imperial times an appeal to the Emperor was as a rule made against a prior conviction¹⁸. The law seems to have had little to do

167–8; J. D. CLOUD, “*Provocatio*: Two Cases of Possible Fabrication in the Annalistic Sources, in *Scritti Quarino*”, *Sodalitas* III (1984), 1365–76; M. HUMBERT, “Le tribunal de la plèbe et le tribunal du peuple: remarques sur l’histoire de la *provocatio ad populum*”, in *MEFRA* 100 (1988), 431–503; J. D. CLOUD, “*Lex Iulia de vi* – I”, *Athenaeum* 76 (1988), 579–95; J. D. CLOUD, “*Lex Iulia de vi* – II”, *Athenaeum* 77 (1989), 427–65; J. D. CLOUD, “Constitution and Public Criminal Law”, in *Cambridge Ancient History*² IX (1994), 491–530.

¹⁷ See also the Visigothic *Paul. sent. int.* 5.28.1: *Lege Iulia decretum est, ut pro violentia publica damnentur, quicumque iudex appellentem, ut ad principis praesentiam ducatur, ingenuum hominem vel civem Romanum factum torserit occiderit vel occidi iusserit vel in vinculis publicis adstrinxerit vel flagellis ceciderit aut damnare praesumpserit.*

¹⁸ GARNSEY (*cit.* n.12), 167 convincingly refutes the theory of JONES, according to which two distinct procedures of appeal, *provocatio* and *appellatio*, the former before and the latter after sentence, existed during the first two centuries of the Empire: A.

with magisterial *coercitio* such as pertained to “police” functions¹⁹, although it would certainly have been against its spirit to torture or put to death a citizen before his or her condemnation. Indeed, if torture was applied in criminal case against the laws, Cervidius Scaevola states that an appeal could exceptionally be made before condemnation²⁰. Therefore it seems to me that the *lex Iulia de vi*, as it appears in Ulpian and the *sententiae*, sought primarily to stop acts of public violence committed by the magistrates in the event of appeal to the Emperor against Roman citizens after their condemnation to capital punishment²¹. This interpretation explains also *condemnaverit*

H. M. JONES, “I appeal unto Caesar”, and “Imperial and senatorial jurisdiction in the Early Principate”, in *Studies in Roman Law and Government* (1960), 53–68, 69–98. There was a possibility during the Early Empire to have a trial transferred to Rome before any sentence was passed, but the governor was not under obligation to admit such a request: H. COTTON, “Cicero, *Ad Familiares* XIII, 26 and 28: Evidence for *Revocatio* or *Reiectio Romae/Romam?*”, *JRS* 69 (1979) 39–55. St. Paul’s appeal appears to fall into this category, Festus was not under obligation to send him to Rome and did this only after consulting his advisers: GARNSEY (*cit. n.*12), 184–5.

¹⁹ It was not the aim of the *lex Iulia de vi* to prohibit preventive incarceration: Y. RIVIERE, “*Carcer et vincula* : la détention publique à Rome (sous la République et le Haut-Empire)”, *MEFRA* 106 (1994), 640 n. 201. A passage of Suetonius shows that Augustus, in an effort to conceal wrongful treatment of Quintus Gallius, considered it perfectly lawful to claim that he was imprisoned before condemnation to exile: *Aug.* 27.4.7-10: *coniectumque a se in custodiam, deinde urbe interdicta dimissum*. Despite the *lex Iulia de vi* Ulpian and Gellius clearly thought that magistrates could ‘use coercion and send people to prison’: D. 2.4.2: *qui et coercere aliquem possunt et iubere in carcerem duci*; Gell. *NA* 13.12.8: *Nam qui iure prendi potest, etiam in vincula duci potest*.

²⁰ D.49.5.2: *Ante sententiam appellari potest, si quaestionem in civili negotio habendam iudex interlocutus sit, uel in criminali si contra leges hoc faciat*. But it is not certain if Scaevola had in mind other than torture of slaves.

²¹ Also the republican laws prohibiting Roman citizens to be put to death or flogged against an appeal might have similar aim, notably in regard to those condemned to death by flogging *collo in furca coniecto*: Aur. Vict. 5.7. This is at least how Livy depicted the case of Publius Horatius. He was condemned for *perduellio* (*P. Horatius, tibi perduellionem iudico*) after which he appealed (*provoco*). It was only after the condemnation that he would have been tortured and flogged to death (*sub furca inter verbera et cruciatus*) had his appeal not been successful: 1.26.7-14. A similar sense of *in publica vincula duci iusserit* as a preparation for execution is preserved by Velleius Paterculus in case of Gaius Marius: ‘he was tied about his neck [to a stake?] and led to the prison of Minturnae on the orders of its duumvir. A public slave...was sent with a sword to put him to death’: *hist. rom.* 2.19.2: *iniecto in collum loro in carcerem Minturnensium iussu duumviri perductus est. Ad quem interficiendum*

in the *sententiae* text²², for insofar as the condition of the appellant had to remain entirely intact while the appeal was pending (see D.49.1.16 below), it was necessary to prevent also their condemnation for other offences (which could, moreover, have released the torture and punishment).

It is necessary, however, to emphasize that the appeal law did not absolutely ban torture of citizen offenders, for the punishment including the forced interrogation about accomplices could take place if the original sentence was confirmed by the Emperor. Capital punishment reduced convicts symbolically and legally to a slave-like condition, and they effectively lost their citizen status (see discussion below²³). While it was legal to torture a citizen after condemnation if his crime was serious enough to merit a servile penalty, the underlying presumption of the Julian law is that none of the prohibited acts of public violence could take place until his guilt was established as a result of a fair trial. Whereas only slaves could be tortured as suspects about their own crimes, the basic rule remained constant at least from Augustus to Hadrian, albeit abused in *maiestas* inquisitions, that no free Roman citizen should be tortured before condemnation²⁴:

D.48.18.12:

Si quis, ne quaestio de eo agatur, liberum se dicat, diuus Hadrianus <res>cripsit non esse eum ante torquendum quam liberale iudicium experiatur.

missus cum gladio servus publicus. A prison was a place of execution and Ulpian leaves no room for doubt that the time for making an appeal was proper when the convict was being led to execution: D.49.1.6: *Non tantum ei, qui ad supplicium ducitur, prouocare permittitur, uerum alii quoque nomine eius.*

²² *Condemnaverit* could be an interpolation, as suggested by MOMMSEN I (*cit.* n.3), 283 n. 2, II (*cit.* n.3), 384 n. 1; or it could be understood as sharing with *duci iusserit* the *in vincula publica* as a common predicate: GARNSEY (*cit.* n.12), 170–1. GARNSEY suggests that *in publica vincula condemnare* pertained to incarceration as punishment, and *in publica vincula duci iubere* to preventive incarceration as a measure of *coercitio* to ensure the appearance of the accused at the trial.

²³ See CANTARELLA (*cit.* n.9) and AUBERT (*cit.* n.3).

²⁴ Pliny, for example, making inquiry about Christ's cult, told to Trajan specifically to have tortured two slave girls: *ep.* 10.96.8: *Quo magis necessarium credidi ex duabus ancillis... et per tormenta quaerere.*

If someone, to avoid interrogation under torture, alleges to be free, the Divine Hadrian replied that he is not to be tortured before an action to determine his free status has been heard.

III. *Incentives to Expand Tortures: Repression of Crime Ex Officio*

The fact that certain convicts had to be tortured about their accomplices points to a relatively early interest of the Roman state in repression of crime. The Principate from Augustus to the Severan age witnessed a gradual shift from accusatorial to inquisitorial criminal process²⁵. Meanwhile, the Emperors adopted a policy of strong public discipline that called for the use of extraordinary procedures and aggravated capital punishments (D.1.11.1pr.; D.39.49.5), and the governors were charged by imperial *mandata* to maintain order in the provinces²⁶:

D.1.18.13:

Congruit bono et graui praesidi curare, ut pacata atque quieta prouincia sit quam regit. quod non difficile obtinebit, si sollicite agat, ut malis hominibus prouincia careat eosque conquirat: nam et sacrilegos latrones plagiaris fures conquirere debet et prout quisque deliquerit, in

²⁵ E.g. I. BUTI, "La 'cognitio extra ordinem': da Augusto a Diocleziano", in *Aufstieg und Niedergang der Römischen Welt* II 14 (1982), 29–59; B. SANTALUCIA, *Diritto e processo penale nell'antica Roma* (1989); G. ZANON, *Le strutture accusatorie della cognitio extra ordinem nel Principato* (1998). The development of repression of crime *ex officio* has been recently analysed by Y. RIVIÈRE, *Les délateurs sous l'empire romain* (2002), 273–305, see also V. MAROTTA, *Mandata Principum* (1991), 161–76. The importance of this development for the expansion of torture has been emphasized by THOMAS (*cit.* n.1, 1996 and 1998). Whereas the replacement of formulary by extraordinary procedure happened relatively slowly, it appears to be well-established in provinces under Hadrian. *Cognitio* invaded most rapidly and exhaustively the province of Egypt governed from the beginning by the Emperor's personal procurator: D. 1.18.9; M. HUMBERT, "La juridiction du préfet d'Égypte d'Auguste a Dioclétien", in *Aspects de l'empire romain* (1964) 98–9.

²⁶ The same duty is pronounced also in D.48.13.4.2: *Mandatis autem cauetur de sacrilegiis, ut praesides sacrilegos latrones plagiaris conquirant et ut, prout quisque deliquerit, in eum animaduertant. et sic constitutionibus cauetur, ut sacrilegi extra ordinem digna poena puniantur*; D.1.18.3: *Nam et in mandatis principum est, ut curet is, qui prouinciae praeest, malis hominibus prouinciam purgare, nec distinguatur unde sint*; MAROTTA (*cit.* n.25), 161–2. See also Fronto *ad am.* 1.20.1: *offenderis malos, defenderis bonos*.

eum animaduvertere, receptoresque eorum coercere, sine quibus latro diutius latere non potest.

It befits a good and responsible governor to make sure that the province he governs is peaceful and orderly. This he will achieve without difficulty if he works conscientiously in ridding the province of wicked men and at seeking them out to that end. For he is duty-bound to search out robbers of sacred places, bandits, kidnappers and thieves and to punish them each according to the evil they have done and to jail those who harbor them without whose help a bandit cannot lie hidden for too long.

Although the earliest history of repression of crime *ex officio* is difficult to track, the procedure followed in such an inquest is attested in Trajan's rescript concerning *contumaces* (D.48.19.5pr.), in Hadrian's edict concerning looters of shipwrecks (D.47.9.4.1; D.47.9.7)²⁷, and in rescripts by Hadrian and Pius dealing with captured bandits (D.48.3.6). After having arrested the bandits the local authorities in charge of *disciplina publica* (so-called *irenarchae* in the province of Asia (D.50.4.18.7)) conducted a preliminary interrogation and delivered the suspects together with a report to the governor for trial. Hadrian ruled that the governors were not to treat as already condemned (*quasi damnatos*) the suspects sent to them with such reports (*qui cum elogio mittuntur*), and Pius confirmed the same rule in case of persons named on the lists of wanted persons (*qui requirendi adnotati sunt*). Instead the Emperors commanded the governors to investigate the cases of suspects on the presumption of innocence (*ex integro audiendi sunt*). This was all consonant with Trajan's policy statement that 'it was preferable that the crime of a guilty man should go unpunished than an innocent man be condemned'²⁸.

A rescript of Hadrian, according to which 'no one is to be condemned for the purpose of torture'²⁹, proves that the condemned criminals could be, and were expected to be, tortured in the beginning of the second century. It also proves, in conjunction with the other

²⁷ On torture of pirates by Pompeius: Arrian. *bell. civ.* 5.9.77.

²⁸ D.48.19.5pr: *Satius enim esse inpunitum relinqui facinus nocentis quam innocentem damnari*.

²⁹ D.48.18.21: *Quaestionis habendae causa neminem esse damnandum diuus Hadrianus rescripsit.*

rescript of Hadrian cited above (D.48.18.12), that this was still the only lawful form of torture in Rome. Condemnation for the purpose of torture was meaningful only because torture before condemnation was out of question, illegal. The title of Paul's work from which the rescript was excerpted to the Digest, *de poenis paganorum*, suggested to B. d'Orgeval that the rescript was aimed against governors who condemned low status persons to mines in order to reduce them to 'slavery of the penalty' (*servitus poenae*) and so make them susceptible to torture³⁰. Whether or not d'Orgeval's hypothesis is acceptable³¹, it must be admitted that still in the beginning of the second century even plebeians were protected, at least in the legal principle, against judicial torture as mere suspects before their condemnation. If the administration really felt it necessary to take the trouble of procuring a formal condemnation of suspects whom they wished to interrogate under torture (as the very rescript implies they really did), it seems extremely unlikely also in practice that formally innocent plebeians would have been put to torture illegally before condemnation. The torture after condemnation, however, would have been restricted in effect to plebeian convicts as the escape through exile was transformed through *relegatio* and *deportatio* mainly into privilege of the nobility³².

The aggravated death penalties (*summa supplicia*) and condemnation to mines (*metallum*) certainly deprived lower-class convicts of citizenship and freedom, and reduced them to the condition of *servus poenae*³³. The regular torture of *servi poenae* is most explicitly attested in a Gaius fragment preserved in the Digest,

³⁰ B. D'ORGEVAL, *L'empereur Hadrien. Oeuvre législative et administrative* (1950), 338–9. The view is reported with approval by CERAMI (*cit. n.5*), 35 n. 4.

³¹ Hadrian obviously intended to check what he considered a malpractice in legal administration, but the recall alone of this rescript in *de poenis paganorum* does not prove more than that Paul thought the rule laid down by Hadrian was valid in contemporary criminal proceedings against offenders of civilian status, as differentiated from soldiers whose punishment was discussed in *de poenis militarium*. The rule itself (*quaestionis habendae causa neminem esse damnandum*) had a general validity and would have held good also in case of decurions and their superiors.

³² On deportation and relegation: GARNSEY (*cit. n.1*), 111–22, esp. 121; GRASMÜCK (*cit. n.13*), 81.

³³ D.49.14.12; D.29.2.25.3; D.48.19.29; D.49.16.3.1; D.49.16.3.10. In general, see J. BURDON, "Slavery as a punishment in Roman Criminal law", in L. J. ARCHER (ed.), *Slavery and Other Forms of Unfree Labour* (1988), 68–85.

according to which ‘it is often the custom for them to be kept alive after their condemnation, so that they may be interrogated under torture against others³⁴’. Ugo Brasiello regarded Pius as the innovator in officially recognizing (if not creating) the condition of *servus poenae*³⁵, but *saepe solent* in the Gaius passage refers to a well-established practice. The association of plebeian convicts with the slave condition was linked to corporal punishment (*cum etiam uerberibus seruilibus coercentur*³⁶) traditionally detested by all free men. All those, especially but not exclusively *decuriones* and their superiors, who according to privilege afforded by the imperial pronouncements could normally at most be exiled, should not have been reduced to *servitus poenae* by their condemnation³⁷. And even if they should have been reduced to *servitus poenae* and so made susceptible to torture when an execution was ratified by the Emperor (D.28.3.6.7), Pius ruled that ‘a condemned decurion must not be interrogated under torture³⁸’.

So under Pius the rule was clear: no citizen could be tortured before his condemnation, and only plebeian convicts could be tortured after it. But there is a close connection between Hadrian’s prohibition to condemn suspects readily on bases of reports produced by their captors, and his prohibition to condemn anyone for the purpose of torture. While governors hoped to increase the truth finding potential of their inquiries in order to find out criminals *ex officio praesidis*, they inclined to bend the rules by condemning suspects readily but formally on basis of the reports delivered by their captors, or on basis of confessions made by tortured convicts and slaves, in order to

³⁴ D.48.19.29: *Saepe etiam ideo seruari solent post damnationem, ut ex his in alios quaestio habeatur.*

³⁵ U. BRASIELLO, *La repressione penale nel diritto romano* (1937), 378.

³⁶ D.49.14.12. Therefore the servile condition of plebeian convicts was a result of their factual treatment, which at some point came to be recognized in the legal jargon as *servitus poenae*. The idea itself is probably as old as application of servile corporal punishments to convicted citizens.

³⁷ B.60.54.15 = D.48.22.15; D.29.1.13.2. An exile is contrasted with *servitus poenae* also in D.36.1.18.6; Paul. *Sent.* 3.6.29; 4.8.22; GARNSEY (*cit. n.1*), 122–36.

³⁸ D.50.2.14: *De decurione damnato non debere quaestionem haberi diuus Pius rescripsit.* Pius pronounced the same principle in case of a person deported to an island: D.48.18.9.2: *De eo, qui in insulam deportatus est, quaestio habenda non est, ut diuus Pius rescripsit.*

justify a recourse to torture. Pius prevented this type of abuse in case of decurions effectively by prohibiting their torture after condemnation altogether. But as torture to reveal accomplices was still available in case of plebeian offenders, the wide range of discrimination permitted to governors to decide whether a suspect was sufficiently hard-pressed or not ensured that the line between torture of convicts and suspects was about to become obscured.

The curious case of Primitivus, a slave who had voluntarily confessed an homicide against himself and named partners demonstrates how suspects' torture about their own crimes developed through their torture as convicts, and that the torture of freemen before condemnation was still prohibited under Marcus Aurelius. In a rescript reproduced *verbatim* the *divi fratres* praised the governor Voconius Saxa in these words:

D.48.18.27:

'Prudenter et egregia ratione humanitatis, Saxa carissime, Primitivum seruum, qui homicidium in se confingere metu ad dominum reuertendi suspectus esset, perseuerantem falsa demonstratione damnasti quaesiturus de consciis, quos aequae habere se commentitus fuerat, ut ad certiore ipsius de se confessionem peruenires. nec frustra fuit tam prudens consilium tuum, cum in tormentis constiterit neque illos ei conscios fuisse et ipsum de se temere commentum.'

'My dear Saxa, you have acted prudently and with the excellent motive of humanity in condemning the slave Primitivus, who had been suspected of fabricating a confession of homicide against himself for fear of going back to his master and was persisting in his false evidence, with aim of interrogating him about the accomplices whom he had equally mendaciously declared himself to have, so that you could have a more reliable confession than his about himself. Nor was your prudent scheme in vain, since under torture it was established that they had not been his accomplices and that he had rashly told lies about himself'.

Commenting the letter, Ulpian describes Primitivus as a 'seemingly condemned slave' (*quasi servus damnatus*). The exposure of accomplices is clearly given as the official motive of torture, as Saxa did not put Primitivus to torture until he was condemned *quaesiturus de consciis*, used as an excuse for his true aim to procure *certiore ipsius de se confessionem*.

In doing so Saxa ignored two rules, one of Hadrian according to which ‘no one is to be condemned for the purpose of torture’. This may have been possible because Primitivus was a slave. But while it is perhaps striking that any formalities governed the torture of a suspected slave who had confessed a homicide, those prudently observed by Saxa should no doubt have applied to freemen. Accordingly, it appears to have been illegal still under Marcus to torture free suspects before condemnation, even if they confessed, and strictly legal only to torture them traditionally as convicts about accomplices after condemnation³⁹. While it would have been absurd for someone to be able to confess the crimes of his accomplices without confessing his own, the torture against accomplices gave a judge the formal excuse for torturing convicts also about their own crimes. This may have been, in addition to revealing accomplices, an important motive for the above noted abuses already under Hadrian. It is also possible, but hardly demonstrable, that Marcus tacitly permitted the condemnation of suspected plebeians for the sake of torture in the interests of repression of crime *ex officio*, if this was not allowed already by Pius who protected only decurions (and their superiors) against the torture after condemnation.

Be that as it may, the torture of Primitivus also contradicted another rule, pronounced concerning freemen by Pius, according to which ‘one who confessed against himself is not to be tortured against others⁴⁰’. If my thesis that there was under Pius no other form of legitimate torture than the one applied to convicts concerning accomplices is correct, the question Pius settled here was whether a *confessus*, who had admitted a crime before condemnation, could be

³⁹ Apuleius has a magistrate to pronounce after a bandit was convicted that ‘there is only one duty left for us, that we find out the other partners of such a crime... Therefore the truth is to be elicited by torture’: *Met.* 3.8.11-24: *sed una tantum subsiciua sollicitudo nobis relicta est, ut ceteros socios tanti facinoris requiramus... Prohinc tormentis ueritas eruenda*. This piece of fiction may not be a valid description of the powers of the local magistrates in dealing with bandits, yet it offers an interesting glimpse into a definition of a murderer as a bandit with reference to bloodthirsty laws and public discipline, that is the repression of crime *ex officio*. Interestingly, Apuleius seems to suggest that a slave-boy, should he not have escaped during the night, would have been tortured in the first place.

⁴⁰ D.48.18.16.1: *Is, qui de se confessus est, in caput aliorum non torquebitur; CTh.9.1.19.1.*

tortured as if already convicted to expose accomplices. In criminal procedure the rule was, as Y. Thomas has demonstrated, clear: a *confessus* was not automatically a *condemnatus*⁴¹ before his case was investigated and he was officially pronounced guilty on basis of evidence other than his own confession or torture. Also the Pauline *sententiae* forbade the torture of *in se confessi* against others, so ‘that the well-being of another would not be put in jeopardy by someone who is desperate about his own’⁴². Like Pius’ pronouncement, this *sententiae* rule concerned only the torture of *confessi* before their condemnation, but it does not follow that *in se confessi* could not be tortured against others after their condemnation because then their own *salus* was already settled for good. Severus still maintained that a mere confession did not merit automatic condemnation⁴³:

D.48.18.1.17:

Diuus Seuerus rescripsit confessiones reorum pro exploratis facinoribus haberi non oportere, si nulla probatio religionem cognoscentis instruat.

The deified Severus wrote in a rescript that the confessions of accused persons should not be taken as equivalent to crimes established by investigation, if there were no proof to guide the conscience of the judicial examiner.

This text does not mention torture. But given that Ulpian reports the rescript in the middle of discussion concerning torture it seems possible to infer that Severus still held the Pius’ view that *confessi* cannot be treated like *condemnati*, and cannot therefore be put to torture against accomplices, and so to confirm their own crimes, before their formal conviction. Consequently it seems that also the

⁴¹ THOMAS (*cit. n.1*, 1986) 99–103. The rule pronounced by Pius, as observed by LÉVY (*cit. n.1*), 246, does not make sense, and can in my view be reasonably explained only if it concerns *confessi* before their condemnation. *Confessi* were commonly thought to be almost equivalent to *condemnati* so it is not surprising that their position was in doubt. Pius, nevertheless, confirmed the rule that a *confessus* was not a *condemnatus*, and could not be tortured against accomplices as if already condemned.

⁴² *Paul. sent. 1.12.6: Qui de se confessus est, in alium torqueri non potest, ne alienam salutem in dubium deducat, qui de sua desperavit.*

⁴³ Severus appears to hold that a *confessus* could be taken as a convict if there were other proofs, probably such as *aliorum quaestiones*: D.48.18.1.17. This is also consonant with D.48.18.3 and D.48.18.19 discussed above.

rule against the torture before condemnation was still in force under Severus.

Against this background I doubt if two ambiguous pronouncements attributed to Marcus concern, let alone prove, the torture of freemen as suspects before their condemnation:

D.48.22.6.2:

Decuriones ciuitatum propter capitalia crimina deportandos uel relegandos diui fratres rescripserunt. denique Priscum in homicidio et incendio nominatim ante quaestionem confessum in insulam deportari iusserunt.

The deified brothers wrote in a rescript that for capital crimes decurions of *civitates* should be deported or relegated. Finally, they ordered that Priscus, who had been informed on for homicide and arson and had confessed before *quaestio*, should be deported to an island.

C.9.41.11.pr.-1 (a. 290):

Divo Marco placuit eminentissimorum quidem nec non etiam perfectissimorum virorum usque ad pronepotes liberos plebeiorum poenis vel quaestionibus non subici, si tamen propioris gradus liberos, per quos id privilegium ad ulteriorem gradum transgreditur, nulla violati pudoris macula adspersit. in decurionibus autem et filiis eorum hoc observari vir prudentissimus Domitius Ulpianus in publicarum disputationum libris ad perennem scientiae memoriam refert.

Divine Marcus ruled that children of *eminentissimi viri* and *perfectissimi viri*, to their great-grandchildren, should not be subjected to plebeian penalties and tortures, if no stigma from the violation of propriety stains the children of the more nearly related grade through whom that privilege passes to the more remote grade. This is to be observed also in case of decurions and their sons the *vir prudentissimus* Domitius Ulpianus mentioned in *Public disputationes*, set down for perpetuity in the records of jurisprudence.

First of all it must be noted that neither of the texts may reproduce the original wording. In the first case Ulpian summarizes the content of the rescript. In this text *ante quaestionem confessum* could be understood so that had Priscus not confessed he would have eventually been put to torture, but this is not the only possible reading. Although the usual meaning of *quaestio* in legal sources is investigation under torture, Ulpian notes also that ‘we understand *questio* to mean not only torture but all investigation and inquiry into

the death⁴⁴. Therefore it seems to me unlikely that Priscus, who apparently was a decurion, would have been questioned under torture in contravention of his privileges which his very deportation suggests were respected. Instead of his own torture, *ante quaestionem* could mean generally 'before investigation into the crime', or more specifically 'before torture of slaves'⁴⁵.

In the second case Marcus' ruling is given in a rescript of Diocletian and Maximian. This text speaks of torture without distinction and therefore it might seem that without Marcus' pronouncement the descendants of *eminentissimi* and *perfectissimi viri* could be subjected to plebeian penalties and tortures. But as it is well known, decurions were protected against corporal punishment and torture much earlier. If Marcus introduced a novelty, it can only be that now this protection extended to 'children of *eminentissimi viri* and *perfectissimi viri*, to their great-grandchildren', even if they were of plebeian status⁴⁶. The logic of *plebeiorum poenis vel quaestionibus* is not in doubt⁴⁷, because someone excluded from plebeian capital punishments would be excluded also from torture, and vice versa⁴⁸. Although the text concerns but penalties and torture after condemnation, at the time these could be called 'plebeian' instead of 'servile'.

The assimilation of poorest plebeians with slaves in torture might seem to be explicitly asserted by Ulpian in case materials relating to jurisdiction were *dolo malo* obliterated: 'torture is to be applied to

⁴⁴ D.29.5.1.25: *Quaestionem autem sic accipimus non tormenta tantum, sed omnem inquisitionem et defensionem mortis.*

⁴⁵ BRUNT (*cit. n.1*), 263, favours torture of 'slave witnesses', GARNSEY (*cit. n.1*), 141 n. 5, 'the whole investigation'.

⁴⁶ Nothing in the evidence suggests that already Marcus allowed torture before condemnation, and indeed Primitivus' case clearly suggests that at the time citizens could be tortured only after condemnation to expose accomplices. If Marcus had allowed torture of citizens before their condemnation, it is surprising that the Severan jurists failed to take notice.

⁴⁷ The authenticity of *vel quaestionibus* has been questioned on grounds that torture of citizens was not permitted before the Severan age: BRUNT (*cit. n.1*), 262 and RILINGER (*cit. n.1*), 130, but the remarks of THOMAS (*cit. n.1*, 1998), 492 n. 66.

⁴⁸ I agree with CERAMI (*cit. n.5*), 42 that *plebeiorum poenae vel quaestiones* can mean but torture in its double function of punishment and *probatio*, however I would stress that torture was essentially a punishment not to be applied to a citizen but after his condemnation. See also C.9.41.16 pr.

slaves not defended by their masters and to those who labour in *inopia*⁴⁹. But this assimilation was only due to inability of the poor as responsables for this offence to pay the prescribed fine of 500 *aurei* (D.2.1.9). Torture took here the form of corrective beating which in extraordinary jurisdiction became a common substitute for a fine in case of people who otherwise would have escaped all punishment because of their poverty (D.48.19.1.3⁵⁰). Decurions and their superiors were categorically exempted from beating (D.48.19.28.2, 5), and this could be avoided by the plebeians who could afford and preferred a fine. The victim of beating was, like in case of torture, a convict, so this practice provides another example of compromising the Roman citizen's traditional liberty rights after condemnation, but this time to a non-capital punishment.

IV. *Restrictions of Appeals and Discrimination of Plebeian Offenders*

In general, an appeal protected by the *lex Iulia de vi* should have suspended all proceedings after condemnation, including torture. If appeals to the Emperor could at first be taken for granted⁵¹, the situation may soon have been quite different out of pressure caused by growing number of citizens⁵². A requirement of money deposit from appellants can be presumed to have had a practical effect of preventing access to the appeal procedure to those who could not afford, or could not muster, such a payment⁵³. Moreover, an edict of

⁴⁹ D.2.1.7.3: *In servos autem, si non defenduntur a dominis, et eos qui inopia laborant corpus torquendum est.*

⁵⁰ GARNSEY (*cit. n.1*), 139; AUBERT (*cit. n.3*), 108 with evidence discussed on 106-109. See also R. S. BAGNALL, "Official and Private Violence in Roman Egypt", *BASP* 26 (1989), 201-16. The most telling text on flogging of free men is D.50.2.12.

⁵¹ F. MILLAR, *The Emperor in the Roman World*² (1992), 513.

⁵² The treatment of Christians under Trajan and Marcus demonstrate the change in appeal procedure as Plinius noted Roman citizens to be sent to Rome, whereas the governor in Lyon only consulted the Emperor and kept the citizens in the province while waiting for the rescript: *Plin. Ep.* 10.96; *Eus. hist. eccl.* 5.1.44 and 47. Tightening of policy in accepting appeals has been plausibly explained by their increasing volume caused by the extension of Roman citizenship in the provinces: JONES (*cit. n.21*), 55-9.

⁵³ Ulpian contemplates explicitly that some people can be prevented from appealing because of lack of funds: D.17.1.8.8: *si scierunt, incumbibat eis necessitas prouocandi, ceterum dolo uersati sunt, si non prouocauerunt. quid tamen, si*

praefectus Aegypti from Hadrian's reign may imply that appeals to the Emperor in cases of homicide, brigandage, poisoning, kidnapping, rustling, armed violence, forgery, despoiling of inheritance, and aggravated injury were categorically forbidden⁵⁴. In any case this would not have been a universal practice at the time. A rescript of Hadrian to the Spartans refers to a capital case as a criterion for admission of appeals⁵⁵, but testifies also to a tendency towards restricting private law appeals, for also a minimum monetary value was set for the acceptable cases⁵⁶. This principle is attested also by

paupertas eis non permisit? On requirement of deposit: Paul. *sent.* 5.33: *De cautionibus et poenis appellationum*; *AE* (1978), no. 629 with J. H. OLIVER, "Greek Applications for Roman Trials", *AJPh* 100 (1979), 553–8 and B. LEVICK, *The Government of the Roman Empire: a Sourcebook*² (2000), 12; *P.Yale* II 162 col. 3; *AE* (1962), no. 288. See also R. ORESTANO, *Appello civile in diritto romano*² (1953), 376 and JONES (*cit.* n.18), 63. The purpose of these deposits was to restrict appeals. According to Tacitus a change was introduced under Nero that 'litigants appealing from civil tribunals to the Senate must risk the same deposit as those who invoked the Emperor; for previously, appeals had been unrestricted and immune from penalty': Tac. *ann.* 14.28: *qui a privatis iudicibus ad senatum provocavissent, eiusdem pecuniae periculum facerent, cuius si qui imperatorem appellarent; nam antea vacuum id solutumque poena fuerat.* The text also proves that deposits were required from appellants to the Emperor already before Nero's time. For an argument that a money deposit payable in advance of procedure can be particularly troublesome for poor litigants (whether or not this is the actual purpose of the requirement) see R. VON JHERING, "Le riche et le pauvre", in *Etudes complémentaires de l'esprit du droit romain* IV (1902), 223–8, 243. Similar idea is pronounced by Cicero in context of access to worship of gods: Cic. *leg.* 2.25.

⁵⁴ *P.Yale* II 162 col. 2–3: ὁ ἡγεμὼν διαγνώσεται. περὶ φόνου περὶ ληστειῶν περὶ φαρμακείας περὶ πλαγαρίας περὶ ἀπελατῶν περὶ βίας σὺν ὄπλοις γεγενημένης περὶ πλαστογραφίας καὶ ραδιουργίας [περὶ ἀ]νηρημένων [δι]αθηκῶν περὶ ὕβρεως ἀνηκέστου. Different opinions have been expressed as to what happened to the rest of cases not specified. Lewis thought that the prefect would not hear the other cases but on appeal to himself, while in Oliver's view the prefect heard the other cases unless they were appealed to the Emperor who implicitly refused to accept appeals concerning the crimes listed in the edict: N. LEWIS, "Un nouveau texte sur la jurisdiction du préfet d'Egypte", *RHDFE* 50 (1972), 10; OLIVER (*cit.* n.53), 550. Oliver's interpretation is favoured also by B. ANAGNOSTOU-CAÑAS, *Juge et le sentence* (1991), 224, however Lewis' by MAROTTA (*cit.* n.25), 118.

⁵⁵ *IG* 5.1.21; J. H. OLIVER, *Greek Constitutions of Early Roman Emperors from Inscriptions and Papyri* (1989), no. 91.

⁵⁶ In the first study of this inscription Oliver interpreted a figure engraved before *denarii* as 'an abnormal sampi' denoting 900, but later took a second opinion to prefer 'a deliberately omitted figure to be left to the local discretion': OLIVER (*cit.*

Ulpian in a passage suggesting that only cases of some financial importance were reviewed on appeal by the Emperors⁵⁷. The fact that the Pauline tradition of *lex Iulia de vi* provides a list of exceptions to the appeal law, and according to imperial pronouncements certain criminals were not afforded a full protection in case of refusal of their appeals by the governors, clearly suggests that criminal law appeals were also being restricted. The relevant passages of *Sententiae* and Ulpian read:

Paul. *sent.* 5.26.2:

Hac lege excipiuntur, qui artem ludicram faciunt, iudicati etiam et confessi et qui ideo in carcerem duci iubentur, quod ius dicenti non obtemperaverint quidve contra disciplinam publicam fecerint: tribuni etiam militum et praefecti classium alarumve, ut sine aliquo impedimento legis Iuliae per eos militare delictum coerceri possit.

Those are exempted from this law who perform on stage, also the condemned and the confessed, and those who are ordered to be led to prison because they did not obey judges or had committed something against the public order; also military tribunes and *praefecti classium alarum*, so that they may coerce military delicts without any impediment of the *Lex Iulia*.

D.49.1.16:

Constitutiones, quae de recipiendis nec non appellationibus locuntur, ut nihil noui fiat, locum non habent in eorum persona, quos

n.53), 548 n. 12. H. GALSTERER, “Local and Provincial Institutions and Government”, in *Cambridge Ancient History XI²* (2000), 351 holds on to the 900 *denarii*. Even if one would not accept 900 *denarii*, it seems to me hardly credible that the figure would have been left for local magistrates to decide. Rather it was a decision the governors had to make in overall understanding of the imperial policy in admitting appeals. Already under Claudius it was ruled in the imperial *mandata* that all matters thought to be worthy of the Emperor’s decision had to be sent first to the provincial authorities: *AE* (1974), no. 629; OLIVER (*cit.* n.53), 551–4; LEVICK (*cit.* n.53), 12–3. See also *SEG* 17.759.

⁵⁷ D.49.1.10.1: *Si quis, cum una actione ageretur, quae plures species in se habeat, pluribus summis sit condemnatus, quarum singulae notionem principis non faciunt, omnes autem coniunctae faciunt: poterit ad principem appellare.* This view is expressed hesitantly in ORESTANO (*cit.* n.53), 376, and without reservations in JONES (*cit.* n.18), 63. The rule is reflected also in a later rescript C.7.62.20 (333) but the criteria of minimum value appears now to have been abolished.

damnatos statim puniri publice interest: ut sunt insignes latrones uel seditionum concitatores uel duces factionum.

Imperial pronouncements that concern the admission and refusal of appeals, so that nothing will change [in the condition of the convict], have no place in case of persons, whose immediate punishment after condemnation is in public interest: such as notorious bandits, instigators of seditions, and leaders of criminal gangs.

To start with the exceptions to the *lex Iulia de vi publica* in Pauline tradition, the purport of the exceptions is clear. The offenders falling into the exempted categories could be, if governor so wanted, imprisoned, flogged, tortured – even condemned if necessary – and put to death even after an appeal was made to the Emperor⁵⁸. *Qui artem ludicram faciunt* were stage performers whose discrimination in law went back to the Republican period and is pronounced in the Praetor's edict as well as the Augustan laws on marriage, municipal constitution, and public violence itself. Apparently the refusal of appeal had to do with the potential public disorder commonly associated with public spectacles⁵⁹. Next come the *iudicati*, who in the context of criminal procedure are not synonymous with *confessi*, as it has been seen⁶⁰. *Iudicati* are probably those once condemned of public crime, whose repetition of crime suggested to Roman officials a

⁵⁸ Thus also *Paul. sent. Int.* 5.28.1 (fin).

⁵⁹ The Praetor's edict: D.3.2.1; the *lex Iulia de maritandis ordinibus*: D.23.2.44; the *lex Iulia municipalis (Tabula Heracleensis)*: S. RICCOBONO, *Fontes Iuris Romani Antejustiniani* I (1941), 140–52, ll. 127–8; the *lex Iulia de vi publica*: D.22.5.3.5. An early law gave magistrates wide powers of *coercitio* against stage performers: Suet. *Aug.* 45; and under Tiberius the Senate allowed particularly harsh measures against them: Tac. *ann.* 1.77. 'Keeping peace among the citizens and maintaining order at public spectacles' were among the duties of the Urban Prefect: D.1.12.12: *Quies quoque popularium et disciplina spectaculorum*. On theatre and circus as starting-places of riots: O. F. ROBINSON, *Ancient Rome: City Planning and Administration* (1992), 196–8.

⁶⁰ GARNSEY (*cit.* n.12), 173, cites *lex Rubria*, 21; *leges duodecim tabularum* 3.1-2; D.42.2.1; D.42.2.3; D.42.2.6.3 and 7; D.42.1.56; D.48.22.6.2 as demonstrating the intrinsic connection between *iudicatus* and *confessus* but only the last example pertains to criminal procedure. All the other texts concern confession in civil procedure, and it was only in this context that *confessus* was considered *iudicatus*: THOMAS (*cit.* n.1, 1986), 89–9.

criminal intention and way of life⁶¹. The disadvantage of both stage performers and *iudicati* stems from the Republican tradition of *infamia*, but their disadvantage in appeal law was rather due to interests of public discipline and repression of crime *ex officio*.

That was probably also the case of *confessi*, offenders who admitted their crimes to the magistrates before condemnation, more or less voluntarily or during a preliminary interrogation that did not yet involve torture. A confession did not, *de iure*, automatically warrant torture or execution of punishment⁶², although a strong suspicion certainly attached to the suspect. *Qui ideo in carcerem duci iubentur* introduces two further groups of offenders: those who disobeyed judges and those who committed against the public order. *Quod ius dicenti non obtemperaverint* refers to offenders who failed to appear, despite summons, before the magistrates through contumacy⁶³. According to Trajan's rescript the *contumaces* could be even condemned in their absence (however not to mines or to execution) because contumacious behavior confirmed suspicions about criminal liability⁶⁴. The *contumaces*, I suggest, would often have been those

⁶¹ Therefore the *iudicati* are the *iudicio publico condemnati*, who traditionally incurred infamy and procedural disabilities: *Tab. Heracl.* 119–21; D.48.2.4; D.3.1.1.6; D.22.5.3.5; D.3.2.1. A prior condemnation for a heavier punishment prevented an appeal in case of another crime meriting a lighter penalty: D.49.7.1.5. Therefore those condemned to capital punishment by a governor e.g. for one of the crimes against the public order could not delay its execution by appealing against another sentence for some lesser charge.

⁶² THOMAS (*cit.* n.1, 1986), 99–103. See also the cases of two *confessi*, Priscus and Privatus, discussed above.

⁶³ D.42.1.53; D.2.3.1pr-4; GARNSEY (*cit.* n.12), 173; L. FANIZZA, *L'assenza dell'accusato nei processi di età imperiale* (1992), 35–7. FANIZZA omits discussion of Paul. *sent.* 5.26.2. On exclusion of appeal see also Paul. *sent.* 5.5A.6.

⁶⁴ D.48.19.5pr. Trajan maintained that no one was to be condemned merely because of suspicions, declaring, as it was reported above, that 'it was preferable that the crime of a guilty man should go unpunished than an innocent man be condemned'. Yet he allowed the condemnation of those absent through contumacy because obviously resisting summons was considered a sign of a guilty consciousness. Such an offender would no more be condemned out of mere suspicions but out of suspicions confirmed by the suspects' defiance. Even though not condemned in their absence, the eventual condemnation of contumacious offenders after their arrest must have been almost a foregone conclusion. Trajan is doubtlessly concerned with repression of crime *ex officio*, as the *contumaces* were actually criminals in hiding, whom it was the governor's duty to expose.

named as accomplices during torture of convicts (or indicated by torture of slaves), but who did not show up before the magistrates to clear their record when summoned.

Those who *quidve contra disciplinam publicam fecerint* were offenders whom it was the governors' duty to hunt down and punish *ex officio* in order to maintain the public discipline in provinces⁶⁵. Unlike *contumaces* who remained at large, they were arrested and brought before the governor as fresh suspects. Taking the *sacrilegos latrones plagiarios* as a starting-point⁶⁶, the governor's duty apparently covered a relatively wide range of violent crime that in the Digest is embraced by both the *lex Iulia de vi privata* and *publica*⁶⁷. A complete list might resemble the one produced in the edict of *praefectus Aegypti* indicated above. The ubiquitous presumption of accomplices suggests that the main target of the governors' efforts were those who made their living with permanent criminal intention, perhaps best described as the 'criminal element' or even 'organized crime'. "Accidental" criminal offences of private rather than public interest hardly inspired official pursuits⁶⁸. In all, the appearance of categories of offenders excluded from the protection of appeal law is

⁶⁵ D.1.18.13; D.48.13.4.2 cited above.

⁶⁶ *Fures* do not appear in Marcian's list of crimes the governors were duty bound to repress (D.48.13.4.2) hence that of Ulpian could reflect recent development under Caracalla (D.1.18.13) to aggravate the treatment of thieves. D.47.2.57.1 shows that already under Hadrian thieves could either be dealt with by ordinary or extraordinary jurisdiction, whichever tribunal the victim wished to choose. But according to Hadrian's rescript 'a person can be liable to a charge of theft for stealing others' slaves without immediately being reckoned a kidnapper on that account': D.47.15 pr: *posse aliquem furti crimine ob seruos alienos interceptos teneri nec idcirco tamen statim plagiarium esse existimari*. This suggests that under Hadrian *fures* did not belong to the disadvantaged category of criminals, such as *plagarii* that are found on both lists – a view approved by Callistratus who cites the rescript. Exactly on what grounds a person stealing another's slaves was treated as a thief or a kidnapper is not evident. Hadrian states that it was a question of fact, and hence to be decided by the investigating governor.

⁶⁷ For a summary see O. F. ROBINSON, *The Criminal Law of Ancient Rome* (1995) 23–40, 78–81.

⁶⁸ C. BRÉLAZ, "Lutter contre la violence à Rome: attributions étatiques et tâches privées", in C. WOLFF (ed.), *Les exclus dans l'Antiquité. Actes du colloque, Université Jean-Moulin Lyon 3, 23-24 septembre 2004* (forthcoming). I wish to thank Dr. BRÉLAZ for many inspiring discussions, and for having shown me the manuscript of this article before its publication.

no doubt due to development of the official repression of crime under the Empire. The case of *contumaces* might suggest that the list was completed under Trajan, whose rescript aggravated notably the position of *contumaces* in criminal proceedings, or not much after his reign.

To turn to the second tradition of exceptions, a list produced by Ulpian must be given in addition to the one cited from Modestine:

D.28.3.6.9:

Quid tamen si appellationem eius praeses non recepit, sed imperatori scribendo poenam remoratus est? puto hunc quoque suum statum interim retinere nec testamentum irritum fieri: nam, ut est oratione diui Marci expressum, tametsi prouocantis uel eius pro quo prouocatur appellatio non fuerit recepta, poena tamen sustinenda est, quoad princeps rescripserit ad litteras praesidis et libellum rei cum litteris missum, nisi forte latro manifestus uel seditio praerupta factioque cruenta uel alia iusta causa, quam mox praeses litteris excusabit, moram non recipiant, non poenae festinatione, sed praeueniendi periculi causa: tunc enim punire permittitur, deinde scribere.

What if the governor did not accept his [the defendant's] appeal, but has delayed the punishment by writing to the Emperor? In my view he nevertheless retains his status meanwhile and the will is not invalidated; for, as it has been provided in the Divine Marcus' speech, although the appellant's appeal, or of one on whose behalf an appeal is made, is not accepted, the punishment is postponed until the Emperor responds to the letter of the governor, and that of the offender sent with it, unless a manifest bandit, erupted sedition, or violent gang, or some other lawful cause is concerned, in case of which the governor immediately restrains letters, accepts no delay, in order not to hurry a punishment, but to prevent a disaster: then it is permissible to punish (first) and write afterwards.

A straightforward reading of Ulpian's account of Marcus' speech suggests three possible scenarios after an appeal has been made: a) the appeal may have been accepted, in which case the consequences of condemnation were delayed at least until the case was decided by the Emperor in his *cognitio*; b) the appeal may have been refused, in which case the consequences were delayed at least until the Emperor

responded to the letter of the governor⁶⁹; c) the consequences could have been carried out by the governor at once, the Emperor being informed on the cause in writing afterwards. The bandits, seditions and violent gangs fell again within the governors' duty to battle organized crime in provinces⁷⁰. Modestine refers also to other lawful causes, and specifies that certain crimes merited prompt punishment out of 'public interest'. While there cannot be certainty about the other lawful causes, at least the stage performers, *iudicati*, *confessi* and *contumaces* as suggested by the Pauline tradition of the *lex Iulia* can be contemplated⁷¹.

Nevertheless, it is not necessary that the appeal and postponement by writing was categorically denied by governors, although permitted by law, to all convicts in disadvantaged groups. Although the *confessi* were no more protected by the appeal laws, as it has been seen the Emperors maintained that they must not be automatically tortured as if already condemned. Yet the denial of appeals to *confessi* proved convenient to administration in case of Christians, who against all Roman logic insisted on confession⁷². In case of public disorder Ulpian suggests cautiously that postponement of punishment by *relatio* was to be refused *non poenae festinatione, sed praeueniendi periculi causa*, and in providing exceptions Modestine, more punctually than Ulpian, specified *insignes latrones uel seditionum concitatores uel duces factionum*. Yet, as the purpose of penal system was predominantly to revenge evils done and to intimidate potential wrongdoers⁷³ (especially those of low social condition on whose

⁶⁹ On *relatio* procedure see J.-P. CORIAT, *Le Prince Législateur. La technique législative des Sévères et les méthodes de création du droit impérial à la fin du principat* (1997), 308–14.

⁷⁰ All this was punished under the very same *lex Iulia de vi publica*: e.g. D.48.18.6; Paul. *sent.* 5.3, and might easily come under the *lex Iulia de maiestatis*: D.48.18.5.1.

⁷¹ If it was legitimate to incarcerate, flog, torture, condemn and put them to death after their condemnation against an appeal, why not also to refuse postponement of their punishment by writing?

⁷² The Acts of Martyrs of Lyon as well as Plinius' letter to Trajan show clearly that all tortures of Christians were preceded by confessions: Eus. *hist. eccl.* 5.1.8; Plin. *ep.* 10.97. In Roman thought to confess the crimes on which one stood accused was the last thing to do: THOMAS (*cit. n.1*, 1986), 99; C. A. BARTON, *Roman Honor, The Fire in the Bones* (2001), 133–42, 140.

⁷³ On Roman ideology of punishment: M. HUMBERT, "La peine en droit romain", in *La peine, Première partie* (1991) 133–83; and particularly the motive of revenge: Y.

reformation the administration apparently entertained no hopes), an opportunity to teach a lesson may not have often been lost to the governors (D.48.19.16.10; D.48.19.28.15). Torture was not inflicted with surgical diligence, and it also played an intimidating function as the regular and painful accessory of plebeian capital punishments.

In addition to difficulties faced by poorer appellants to muster the required deposits, the restriction of appeals probably aggravated the position particularly of plebeian offenders and made them more vulnerable to legitimate derogation of their citizen rights. Firstly, there is reason to believe that the time afforded by the Emperors to hearing appeals and disputes at first instance was largely consumed by cases of *honestiores*⁷⁴. The imperial *mandata* insisted even the refused appeals to be referred to the Emperor by *relatio* only in case of penalties suitable for the upper classes, so also this could be interpreted as a legal privilege (D.48.19.27.1-2; D.48.22.6.1; D.48.8.16). Secondly, as K. Hopwood has pointed out, an aristocratic governor's appraisal of the suspect – often guided by social prejudice unfavourable to those considered inferior in status, wealth, education, outlook, manner, way of life, etc. – exercised a crucial role in definition of his crime and his treatment⁷⁵. Simply put, a plebeian of

THOMAS, “Se venger au Forum. Solidarité familiale et proces criminel a Rome (Premier siècle av. – deuxième siècle ap. J.C.)”, in R. VERDIER – J.-P. POLY (eds.), *La vengeance: Etudes d'ethnologie, d'histoire et de philosophie. Volume 3: Vengeance, pouvoirs et ideologies dans quelques civilisations de l'Antiquité* (1984), 65–100. For the argument that ‘the *metus poenae* weighted mainly on *humiliores*’: R. Bauman, *Crime and Punishment in Ancient Rome* (1996), 156–9.

⁷⁴ Thus also GARNSEY (*cit.* n.1), 72. CORIAT has shown that the litigants attested in *decreta* of the Severan Emperors are invariably of high status, often senators and equestrians: CORIAT (*cit.* n.69), 299–303. Even if these cases were all introduced before the Emperors at first instance, which is certainly not true, the social profile of this group of litigants certainly betrays social discrimination. Dio has Maecenas to advice Augustus to hear himself as the ultimate authority especially cases ‘which involve knights and centurions recruited from the levies and the foremost private citizens, when they are defendants on a charge punishable by death or disfranchisement’: Dio, 52.33.2: ταῦτά τε οὖν κρίνε, καὶ περὶ τῶν ἱππέων τῶν τε ἑκατοντάρχων τῶν ἐκ τοῦ καταλόγου καὶ τῶν ἰδιωτῶν τῶν πρώτων, ὅταν περὶ θανατώσεως καὶ ἀτιμίας τινὸς ἀγωνίζονται. It is of course still possible that the Emperors delegated plebeian appeals to other judges. On the delegation see already Suet. *Aug.* 33.4.

⁷⁵ K. HOPWOOD, “Bandits, Elites and Rural Order”, in A. WALLACE-HADRILL (ed.), *Patronage in the Ancient Society* (1989), 179, illustrating the potential ambiguity by

poor condition scorned by the governor might be more easily suspected of deviant behaviour and be taken as a criminal whom it was in the public interest to arrest and punish, e.g. as a bandit, which scholars note may have been a stock denomination for a whole range of lower-class violent crime and traditionally called for a harsh and servile treatment⁷⁶.

V. *From Torture of Convicts to Torture of Suspects*

Offenders not protected by the *lex Iulia de vi* were as a rule tortured after their condemnation, hence there was no immediate contradiction with the principle that a citizen was to be tortured only if his guilt was proven by other means and sanctioned by condemnation. The situation of suspects would of course have been different from criminals caught *in flagrante delicto* whose condemnation was a foregone conclusion. As far as suspects are concerned, Hadrian's and Pius' statements that they are to be assumed innocent until proven guilty have already been reported (D.48.3.6.pr-1). But as legal anthropologists and sociologists have remarked, a judicial inquiry conducted by the judge himself, as the case was in Roman extraordinary criminal jurisdiction, can make it 'appear that the defendant is assumed guilty unless he can prove his innocence,

the *lex Iulia de vi* which condemned carrying arms with criminal intent but allowed it for self-protection. On the social attitudes of upper class Romans see e.g. Cic. *leg.* 1.40-1 with *part. or.* 90.3-9. For a sociological theory of law explaining the effects of social hierarchies on law's application see D. BLACK, *The Behaviour of Law* (1976), 28-31, with A. HUNT, "Behavioral Sociology of law: A Critique of Donald Black", *Journal of Law and Society* (1983), 19-46. For an illuminating case study inspired by Black's theory: M. P. BAUMGARTNER, "Law and Social Status in Colonial New Haven, 1635-1665", in M. P. BAUMGARTNER (ed.), *The Social Organization of Law* (1999), 111-29. To the same effect also K. T. ERIKSON, *Wayward Puritans: A Study in the Sociology of Deviance* (1966), 189.

⁷⁶ J.-J. AUBERT (*cit.* n.3), 119-120. See also B. SHAW, "Bandits in the Roman Empire", *P&P* 105 (1984), 3-52; B. SHAW, "Il bandito", in A. Giardina (ed.), *L'uomo romano* (1993), 361; K. HOPWOOD (*cit.* n.75). Pomponius seems to imply that all violence not committed by enemies of war could be covered by banditry: D. 50.16.118; K. HOPWOOD, "Aspects of Violent Crime in the Roman Empire", in P. MCKECHNIE (ed.), *Thinking Like a Lawyer: Essays on Legal History & General History for John Crook on his Eightieth Birthday* (2002), 73 n. 60. Dr. B. Pottier's recently defended doctoral thesis (Paris X - Nanterre) provides a complete re-examination of banditism in the Roman world.

instead of the contrary⁷⁷. This kind of assumption seems indeed to govern the treatment of offenders not protected by the *lex Iulia*.

As it has been pointed out above, the legal sources make it abundantly clear that the governors exercised the whole range of discretion in judging the evidence and in deciding whether a suspect was sufficiently hard-pressed to be condemned or not. And as it was the governor who pronounced the sentence of guilt, this could of course be a mere formality, as it apparently sometimes was. But still, a citizen could not be legally tortured before his condemnation to capital punishment, and even after it only to reveal accomplices. The pauline *sententiae* show an important departure from this state of affairs in alluding to a logic of exacting a confession of crime under torture from an accused (*reus*, not *condemnatus*) overwhelmed with evidence, however one not hard-pressed by proofs was not to be readily tortured – instead the charges were to be made good (Paul. *sent.* 5.14.3-4). What Augustus had laid down concerning torture of slaves provided the guidelines for torture of freemen at the time of compilation of the *sententiae* (the late third or early fourth century⁷⁸):

Paul. *sent.* 5.14.1:

In criminibus eruendis quaestio quidem adhibetur: sed non statim a tormentis incipiendum est, ideoque prius argumentis quaerendum, et si suspicione aliqua reus urgeatur, adhibitis tormentis de sociis et sceleribus suis confiteri compellitur.

Torture is to be applied in criminal investigations. Yet one should not begin at once by torments but the evidence must be considered first, and if some suspicion attaches to the accused, he must be made to confess by torments about his partners and his crimes.

The logic of legitimate torture had developed from the inquiry about convicted criminal's accomplices to confirmation of the

⁷⁷ S. VAN DER SPENKEL, *Legal Institutions in Manchu China: A Sociological Analysis* (1977), 68.

⁷⁸ To the same effect: C.9.41.8.1-2 (Diocl./Maxim). To be compared with pronouncements of Augustus: D.48.18.1; D.48.18.8. These provisions may have both concerned torture of slaves and could indeed emanate from the same edict: THOMAS (*cit.* n.1, 1998), 477 n. 2. Hadrian's rescript to Claudius Quartinus unlikely alludes to torture of others than slaves: D.48.18.1-3.

suspect's own culpability earlier permitted only in case of slaves⁷⁹, and in this sense one can also speak of an assimilation of the free and slave population in the eyes of the law. But this development demonstrates, perhaps more accurately, the gradual promotion of Rome's activist state ideology in repression of crime over considerations of individual liberty rights⁸⁰. The earliest lawful inquisition of a free suspect according to this new logic is in the record from Caracalla's reign. In 216 the Emperor authorised the torture of a woman charged of poisoning, after suspicions against her were substantiated by the prior torture of slaves not her own⁸¹:

C. 9.41.3 (a. 216):

Ant. A. cum cognitionaliter audisset, dixit: primum servi alieni interrogabuntur. si praestita fuerint ex tanto scelere argumenta, ut videantur accedere ad verisimilia causae crimina, ipsa quoque mulier torquebitur: neque enim aegre feret, si torqueatur, quae venenis viscera hominis extinxit.

Emperor Antoninus said when holding a *cognitio*: first the slaves of others are to be tortured. If sufficient evidence is furnished for such a horrible crime that it seems in fact to have been committed, also the woman herself is put to torture: for she who took a man's life by her poisons will not without justice undergo the hardship if tortured.

⁷⁹ It seems to me that the *sententiae* text accurately reflects the historical development of official policy in torture, for the suspect's torture in order to procure confession about accomplices is mentioned before torture about his own crimes (*de sociis et sceleribus suis*). The motives of torture appear in the same order in Primitivus' case discussed above. This order is not natural, for at the time of *Sententiae*'s compilation one expects a priority to be given to torture about suspect's own crimes, and only after that to torture about his accomplices (see *SC Silanianum* below). For similar examples see A. WATSON, "Some Cases of Distortion by the Past in Classical Roman Law", *TR* 31 (1966), 69–91.

⁸⁰ On the procedural implications of the laissez-faire and activist state ideologies see M. R. DAMASKA, *The Faces of Justice and State Authority: A Comparative Approach to the Legal Process* (1986).

⁸¹ A school-book case of a stepmother who poisoned her husband's son from earlier marriage and indicated her daughter as a partner in crime under torture appears in *declamationes* of both Quintilian and Seneca, as well as of Calpurnius Flaccus of unknown date: Quint. *decl. min.* 381pr; Sen. *contr.* 9.6; Calp. Flacc. *decl.* 12.1-6. But keeping to the earlier standards, Seneca and Calpurnius Flaccus state explicitly that the *venefica* was tortured as *damnata*, in Quintilian she was at least *confessa* before torture.

For Caracalla it was apparently no more necessary to take the formal step of condemnation but a strong suspicion was enough to warrant torture, in the first place now to procure the suspect's confession concerning her own crime, and probably only later to reveal accomplices if she confessed. At least this was the traditional order in case of slaves tortured under the *senatusconsultum Silanianum*. According to Modestine 'first, the household slaves are to be tortured in regard to their own acts, and if they confess, then they are interrogated on the question by whose instruction the crime was committed'⁸².

Hence the passage from suspicion to punishment became more straightforward, as in applying torture against the offender the judge had already to be convinced (according to his own subjective standards) about the suspect's culpability. Whether or not the suspect confessed was quite immaterial. So, as K. Hopwood remarks, 'torture validates the authorities' preconceived views about the nature of crime and the criminal'⁸³. This change in the use of torture may have been forthcoming for a long time, if not indeed tacitly admitted earlier in form of condemnation for the purpose of torture, in case of criminals to whom also an appeal under the *lex Iulia* was denied. But the imperial licence to torture a suspect hard-pressed by slaves' confessions about his own crime appears indeed to be the novelty of the Caracalla's pronouncement and the very reason for its selection to the Code.

This of course does not have to mean that the new principle was not introduced earlier than 216. In any case it is perhaps suspicious that this principle was recorded in a courtroom decision, extremely rare in the Code, and not in a rescript. But the fact that Caracalla felt it necessary to comment the justice in submitting the *venefica* herself to torture (*neque enim aegre feret, si torqueatur, quae venenis viscera*

⁸² D.29.5.17: *Prius de se familia torquenda est et, si confiteatur, tunc interrogetur, quo mandante flagitium admissum sit.*

⁸³ K. HOPWOOD (*cit. n.75, 1989*), 180. On torture of a bandit who denied his crime and was nevertheless put to death see A. DIONISOTTI, "From Ausonius' schooldays? A schoolbook and its relatives", *JRS* 72 (1982), 105. Perhaps he was suspected of only hardening his body and spirit against the pains: Paul. *sent.* 5.14.3: *reus evidentioribus argumentis oppressus repeti in quaestionem potest, maxime si in tormenta animum corpusque duraverit.* Compare the bandits' case with Suet. *Aug.* 27.4.1-7.

hominis extinxit) indeed suggests that this was not yet a well-established practice. Two statements concerning the torture of suspects as witnesses do not take us much earlier, as one comes from the *pauli sententiae* and the other from Callistratus who wrote under Severus and Caracalla:

Paul. Sent. 5.14.5 = D.48.18.3:

Testes torquendi non sunt conuincendi mendacii aut ueritatis gratia, nisi cum facto interuenisse dicuntur.

Witnesses are not to be tortured for the sake of demonstrating falsehood or discovering the truth unless they are alleged to have had a hand in the act.

D.48.18.15pr:

Ex libero homine pro testimonio non uacillante quaestionem haberi non oportet.

Interrogation under torture ought not to be applied to a freeman whose evidence is not inconsistent.

According to the *sententiae* text the precondition for torture of witnesses is their own suspected culpability, as witnesses who have had a hand in the act can be none other than accomplices. As a strong suspect could now be tortured like a convict, the torture of witnesses was but an analogous extension of torture to reveal accomplices. The second text from Callistratus could be taken as evidence for torture of free witnesses during this epoch, as the author suggests that a freeman whose testimony was inconsistent (*vacillans*) could be tortured. But a witness who vacillated gave in fact contradicting testimonies (D.48.10.27pr-1; D.22.5.2). Such a comportment in witnesses naturally raised doubts about their trustworthiness but also suspicions about their own criminal responsibility, making a strong suspect out of an innocent witness⁸⁴. The rule is therefore clear that a free witness should not be tortured unless there were good grounds to suspect his own culpability. The famous but late opinion of Arcadius Charisius, according to which untrustworthy, but nevertheless innocent,

⁸⁴ U. VINCENTI, 'Duo genera sunt testimonium', *Contributo allo studio della prova testimoniale nel processo romano* (1989), 129. The situation of inconsistent witnesses was in a way comparable to that of *contumaces* who betrayed their guilt by resisting summons, as suggested above.

witnesses must be tortured simply because of their low social condition sounds a bit far fetched even in the Severan context, and would have been entirely out of place when torture of citizens before condemnation was formally forbidden⁸⁵.

It is only a third text coming from Tryphoninus, once a member of Septimius Severus' *consilium*, which concerns torture of suspects against themselves: 'A person to whom freedom is due under a *fideicommissum* may not be subjected to interrogation as a slave unless and only unless his position is aggravated by interrogations under torture of others⁸⁶'. Tryphoninus' text comes as close to Caracalla's pronouncement of 216 as not to allow torture of a suspect *nisi aliorum quaestionibus oneretur*⁸⁷. The confessions procured by torture from convicts and suspects warranted the torture of suspected accomplices against themselves. 'As a slave' appears to refer specifically to free man's torture as a suspect about his own crime⁸⁸. This comes out of a passage of Ulpian written in *De adulteriis*:

⁸⁵ 'If the matter is such that an arena-fighter or similar person has to be called as a witness, his evidence should not be believed without torture': D.22.5.21.2: *Si ea rei condicio sit, ubi harenarium testem uel similem personam admittere cogimur, sine tormentis testimonio eius credendum non est*. D.48.18.15.1, where Callistratus seems to be contemplating the possibility that persons under the age of fourteen must be tortured if they had to be used as witnesses, deals with convicts, see discussion below. In principle, even the poor plebeians, although in the eyes of the Romans more suspect than the rich and noble, could also be deemed trustworthy: D.47.2.52.21; D.26.10.8; D.1.7.17.4; Cic. *orat.* 2.117: *non esse ex fortuna fidem ponderandam*.

⁸⁶ D.48.18.19: *Is, cui fideicommissa libertas debetur, non aliter ut seruus quaestioni applicetur, nisi aliorum quaestionibus oneretur*. Presumption of accomplicity was not a requirement in adultery trials in which also slaves could be tortured against their masters: D.48.5.28.10.

⁸⁷ It does not seem impossible that Tryphoninus indeed wrote after Caracalla's pronouncement: O. LENEL, *Palingenesia Iuris Civilis* II (1889, repr. 1960), 351 n. 1.

⁸⁸ This meaning is evident also in Caes. *BG.* 6.19.3: *cum pater familiae inlustriore loco natus decessit, eius propinqui conveniunt et de morte, si res in suspicionem venit, de uxoribus in servilem modum quaestionem habent*.

D.48.5.28.5:

Si liber homo, dum seruus existimatur, tortus sit, quia et ipse condicionem suam ignorat: magis admittit Caecilius actionem utilem ipsi dandam aduersus eum, qui per calumniam appetit, ne impunita sit calumnia eius ob hoc, quod liberum hominem quasi seruuum deduxit in quaestionem.

If a freeman, while he is thought a slave, has been tortured because he also himself did not know his status, Caecilius [Africanus] prefers to grant him an *actio utilis* against the man who assailed him by calumny, so that his calumny in bringing a freeman to torture as if he were a slave should not go unpunished.

The free man in Ulpian's passage was supposed to be a suspect, not a mere witness as shown by the beginning of the fragment (D.48.5.28pr.-1). The text clearly points out the fact that freemen could sometimes be tortured in error, especially if they ignored their own freedom and rights⁸⁹, but implies that no one should be tortured if his free status was known. This was certainly true for Africanus from whom Ulpian borrowed the fiction⁹⁰. Even if the principle against freeman's torture (that is, before his condemnation) would not have been any more universally held, it was not necessary for Ulpian to alter the scene, for it was still valid in case of those whose situation was not aggravated e.g. by *aliorum quaestiones*. The jurists are not discussing whether or not torture should be applied against a freeman or not, but to whom the calumnious accuser had to pay recompenses for wrongful damages inflicted during torture on an innocent slave or a 'freeman who served as a slave in good faith' (*liber homo bona fide serviens*). The text demonstrates only that an accuser through whose calumny an innocent man was tortured as a slave was liable under the

⁸⁹ P. VEYNE, "Droit romain et société : les hommes libres qui passent pour esclaves et l'esclavage volontaire", in P. VEYNE, *Société romaine* (2001), 248–51. D.18.1.5 : *Difficile dinosci potest liber homo a seruo*; D.41.3.44pr. See also Y. RIVIERE, "Recherche et identification des esclaves fugitifs dans l'empire romain", in J. ANDREAU – C. VIRLOUVET (eds.), *L'information et la mer dans le monde antique* (2002), 115–96.

⁹⁰ The reference to Sex. Caecilius Africanus probably takes the issue back at least to the mid- or late second century: W. KUNKEL, *Herkunft und soziale Stellung der römischen Juristen* (1952), 172–3. According to T. HONORÉ, *Ulpian* (1982), 185–6, Ulpian wrote *Ad legem Iuliam de adulteriis* in 217, hence one year later than Caracalla permitted the torture of *venefica*.

lex Aquilia to pay the victim for wrongful damages⁹¹. But it is doubtful if, at any rate under Caracalla, the damages would have been considered wrongful if the truth was elicited and the suspect found guilty.

Finally, a rescript of Pius might command more serious doubts as to the date the torture of suspects was formally introduced. Right after giving the rule that a free witness whose evidence is consistent should not be tortured (D.48.18.15pr) Callistratus continues that ‘neither a person under fourteen should be tortured against others the deified Pius wrote in a rescript to Maecilius⁹²’. The text suggests that minors could be tortured at once when they attained full age, but ‘*in caput alterius*’ betrays torture after condemnation⁹³. It must indeed be carefully considered what is said by Pius and what by Callistratus⁹⁴. Callistratus interprets Pius’ rescript concerning a convicted young person as valid also in case of a *liber homo* hard-pressed by *testimonium vacillans* who in his time could be tortured as a suspect⁹⁵. In effect Callistratus says that a free witness whose testimony was *vacillans* could be tortured *in caput alterius* because in the current

⁹¹ By this action the victim probably received from the accuser a monetary compensation for wrongful damage done to his body, such as costs of recovery including medical attendance and value of employment lost during the recovery or in the future because of disability: D.9.2.7pr; D.9.3.7; D.9.1.3; D.9.3.1pr and 5.

⁹² D.48.18.15.1: *De minore quoque quattuordecim annis in caput alterius quaestionem habendam non esse diuus Pius Maecilio rescripsit*; D.48.18.10pr. To the same effect: D.48.18.10pr-1: *De minore quattuordecim annis quaestio habenda non est, ut et diuus Pius Caecilio Iuuentiano rescripsit. Sed omnes omnino in maiestatis crimine, quod ad personas principum attinet, si ad testimonium prouocentur, cum res exigit, torquentur*. The principle that all witnesses were torturable in treason trials was not pronounced by Pius but Arcadius Charisius, the source of the latter text.

⁹³ *In caput alterius* in case of minors recalls the Pius’ prohibition to torture *in se confessi in caput aliorum*.

⁹⁴ That is because the ideas of Pius and Callistratus about the use of torture were different. A rescript of Pius e.g. implies that slaves could generally be expected to escape torture by manumission: D.48.18.1.13.

⁹⁵ VINCENTI insists that the adverb *quoque* assimilates the position of *minor* and *liber homo* (*cit. n.84*), 125–7. What originally concerned only torture of convicts was later interpreted as valid also in case of torturable suspect. For evidence given by enemies: D.48.18.1.24; pregnant women until they gave birth: D.48.19.3; and those who cannot be compelled to give evidence against their will: D.48.18.1.9-10.

practice he was considered a strong suspect, but, like earlier a convict, not if he was a *minor*.

As it was pointed out above, Callistrate does not seem to have written anymore under Caracalla⁹⁶, and so this text would again reflect a development more than four years earlier to Caracalla's pronouncement of 216 and thus also antedating the *constitution Antoniniana* of 212. But while the tradition of torturing citizens as convicts to reveal accomplices goes back to the Republican period, their torture as suspects to force them confess their own crimes was admitted relatively late, probably under Severus and Caracalla in the beginning of the third century. The categories of offenders not protected by the appeal laws apparently paved the way for this change, of which it is difficult not to think as a way of adapting the criminal justice system to meet the gradual expansion of number and social range of Roman citizen offenders. It is interesting to note that the large majority of Roman citizens had in practice lost some of their most precious liberty rights, being reduced to equality with slaves and foreigners concerning torture, only a moment before the general grant of citizenship to Empire's inhabitants. Yet this seems to emerge as an official policy based on imperial pronouncement only four years after the grant.

VII. *Conclusions*

Torture was used in the Roman legal system regularly already in the Republican period. Nevertheless, as far as Roman citizens are concerned, interrogation under pain was used in principle only in case of citizens condemned to capital punishments, as torture commonly preceded the execution of death penalties to make criminals reveal their accomplices. Gravity of offence rather than social status called for torture and capital punishment. In the Late Republic a citizen could escape condemnation, and hence also torture, by means of a voluntary exile. Under the Empire, the extraordinary criminal jurisdiction that made a generous use of aggravated capital punishments permitted this escape mainly to the members of the governing classes. Consequently the death penalties and accompanying tortures considered simply 'servile' in the Late Republic could already in the second century be labeled as 'plebeian'.

⁹⁶ D.1.19.3; D.50.2.11; O. Lenel I (*cit.* n.87), 81 n. 1.

A servile condition of the convicts that now concerned only the underprivileged plebeian offenders was known in the legal jargon as *servitus poenae*. Outside the infamous *maiestas* trials, torture could be used in case of plebeian offenders but only after their condemnation to servile capital punishments.

In principle, a Roman citizen had a right to halt torture and capital punishment after his condemnation by means of an appeal to the Emperor under the *lex Iulia de vi*. This recourse to the Emperor was, however, soon restricted as the number of citizens in the provinces increased and the official repression of crime called for concessions. The right of appeal was altogether denied to stage performers, persons with earlier criminal record, those who confessed, those who resisted summons, and those who committed something against the public order. The denial of appeals authorized the derogation of plebeians' citizen rights as they, rather than the members of the governing elite, were assigned, for example as bandits, to the disadvantageous categories of offenders. Indeed, the governors started to facilitate the repression of crime *ex officio* by condemning plebeian suspects in order to have them tortured formally as convicts to reveal accomplices but also with aim of procuring confessions of their own crimes. This practice was firmly prohibited by Hadrian but it may have been tacitly admitted by the later emperors, as Pius forbade the use of torture after condemnation only in case of decurions (and their superiors).

Traditionally only slaves could be questioned under torture as suspects, or witnesses, before condemnation. In general, the principle was patiently maintained until the early third century that lest an innocent citizen be punished, he must not be interrogated under torture until he is pronounced guilty as a result of a fair trial and sentenced to a servile capital punishment. In the growing extraordinary regime of jurisdiction the investigating judge estimated if the evidence was sufficient enough to merit condemnation, which in case of a suspect hard-pressed by evidence was of course a mere formality before the interrogation under torture could begin. The distinction between a strong suspect and a convict, as well as between torture before and after condemnation, blurred. This change was for a long time forthcoming in case of offenders to whom also an appeal was denied, and whom the governors suspected of crimes against the

public order. Eventually, torture was no more used in the first place, even formally, to make convicts to reveal accomplices but to make suspects confess their own crimes. This use of torture seems not to be in evidence before the reign of Severus and Caracalla, and in the Justinian's Code it is authorized by Caracalla's pronouncement of 216.

One of course reasonably doubts to what extent a reconstruction of the legal doctrines and principles concerning the use of torture may reflect the reality of plebeians' treatment in the administrative practice that remains so poorly documented. It would perhaps be surprising if the aristocratic governors of the Roman Empire would have treated, contrary to their most deeply rooted social sentiments, even the lowest plebeians with equal dignity. Legal discrimination in Rome, as it is well-known, is most clearly attested in the field of criminal justice. Nevertheless, it seems that when the Roman officials wanted to torture plebeian offenders they preferred to do it with the law's authority rather than without it. Underprivileged categories of offenders were created and the judicial forms, although the rules were bended, seem to have been highly respected. Even if allowance must be made to maladministration and error, it seems to me that as long as plebeian citizens were not suspected of serious crime on reasonably good grounds, and this must have been the vast majority of population, they were as a rule not put to torture. This may serve as one indication towards an argument that in general the Roman legal administration did not arbitrarily jeopardize the well-being of its less well off but yet blameless subjects.